COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Beaudoin v. British Columbia (Attorney General),* 2022 BCCA 427

Date: 20221216
Docket: CA47363

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

The Attorney General of British Columbia and Dr. Bonnie Henry in her capacity as Provincial Health Officer for the Province of British Columbia

Respondents
(Respondents)

And

The Association for Reformed Political Action (ARPA) Canada

Intervener

Before: The Honourable Justice Fitch
The Honourable Justice Butler
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated March 18, 2021 (*Beaudoin v. British Columbia*, 2021 BCSC 512, Vancouver Docket S210209).

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Place and Date of Hearing:	Vancouver, British Columbia March 29 and 30, 2022
Place and Date of Judgment:	Vancouver, British Columbia December 16, 2022

Written Reasons by:
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Mr. Justice Butler
The Honourable Justice Marchand

Summary:

This appeal arises from a judicial review and constitutional challenge to certain COVID-19 public health orders made by the Provincial Health Officer ("PHO") between November 2020 and February 2021. The orders in issue gave rise to time-limited prohibitions on certain gatherings and events ("G&E orders"), including gatherings for public protest and for in-person religious worship. The chambers judge declared the impugned orders to be of no force or effect to the extent they infringed the right to organize and participate in outdoor protests. The appellant, Mr. Beaudoin, says the declaration in relation to this issue did not go far enough. The chambers judge dismissed the application of the churches and their leaders who sought declarations that the G&E orders amounted to an unconstitutional infringement of their freedom of religion, expression, assembly, association and equality rights because they were unable to gather for in-person religious worship. Applying Doré v. Barreau du Québec, he held that even though the orders limited certain of the petitioners' constitutional freedoms, they were justified as reflecting a reasonable and proportionate balancing of the Charter protections in play with the public health objectives underlying them. On appeal, the appellants submit that the chambers judge erred by: concluding they were not entitled to challenge the G&E orders that preceded the order made by the PHO on reconsideration; failing to decide their s. 15(1) Charter claim; and applying the analytical framework in Doré instead of Oakes. The appellants also submit that the ban on in-person gatherings for religious worship services was an unreasonable restriction of their Charter rights and freedoms, whether under Doré or Oakes.

Held: Appeal dismissed. Mr. Beaudoin's appeal is dismissed as moot as the prohibition on outdoor protests is no longer in effect and the violation tickets issued to him have been stayed. The fresh evidence application brought on behalf of the churches and their leaders is dismissed. The chambers judge did not err in concluding that the appellants ought to have sought judicial review of the

reconsideration decision. Despite coming to this conclusion, the chambers judge engaged in a judicial review of the pre-reconsideration G&E orders. The appellants were not prejudiced by the ruling of the chambers judge that they were required to seek judicial review of the reconsideration decision. The chambers judge was not obliged to consider the s. 15 claim in the circumstances, and doing so would have made no difference to the result. Doré is the appropriate analytical framework in this case. The ban on in-person gatherings for religious worship fell within a range of reasonable outcomes and proportionately balanced the appellants' freedoms with the attainment of critically important public health objectives. The result would, in any event, be the same under an Oakes analysis.

Table of Contents

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Nature of the Appeal

[1] When the second wave of the COVID-19 pandemic swept over British Columbia in November 2020, the Provincial Health Officer ("PHO") adjudged the virus to be an immediate and significant risk to public health throughout the province. Over the next four months, she made a number of orders prohibiting or regulating certain types of gatherings and events based on the risk of transmission known to be associated with particular settings and activities. The purpose of the orders was to preserve life, protect the well-being of British Columbians, and safeguard the future capacity of our healthcare system to provide essential services to people suffering from COVID-19 and other illnesses or conditions requiring acute care.

[2] The imposition of restrictions on gatherings inevitably imposed limitations on the ability of British Columbians to exercise certain constitutional freedoms, including the freedom to gather and manifest deeply-held religious beliefs. At its heart, this appeal is about whether the orders made by the PHO reflect a proportionate balancing of constitutional rights with the public health and safety objectives that animated them.

[3] More specifically, this is an appeal from orders made on judicial review that:

(a) dismissed a declaration sought by three churches and their spiritual leaders that time-limited orders imposed by the PHO during the second wave of the COVID-19 pandemic that prohibited in-person gatherings for religious worship violated their freedom of religion,

expression, assembly, association, liberty, and equality rights under ss. 2(a)–(d), 7, and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["*Charter*"]; and

(b) declared certain restrictions imposed by the PHO on outdoor gatherings for public protests during the second wave of the COVID-19 pandemic to be unconstitutional as unjustifiably infringing the freedom to peacefully assemble and associate, guaranteed by ss. 2(c) and (d) of the *Charter*. As I will explain, the appellants submit that the declaration issued by the chambers judge in relation to this issue did not go far enough.

II. Overview

[4] One of the appellants, Alain Beaudoin, organized public gatherings in Dawson Creek in December 2020 and January 2021 for protesters opposed to COVID-related restrictions. He did so allegedly in violation of orders made by the PHO that effectively prohibited outdoor gatherings for public protests. He was given two Violation Tickets.

[5] On February 10, 2021, the PHO made an order clarifying that she was not prohibiting outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy, subject to her expectation that persons organizing or attending such an assembly would take steps recommended in guidelines posted on the PHO's website to limit the transmission of COVID-19.

[6] On the hearing of the petition, the Attorney General of British Columbia ("AGBC") conceded that the pre-February 10, 2021 orders that purported to prohibit outdoor gatherings for public protest infringed Mr. Beaudoin's constitutional rights and were, therefore, of no force and effect. Chief Justice Hinkson, who heard the petition (the "chambers judge") declared the impugned orders to be of no force or effect to the extent that they infringed the right to organize and participate in outdoor protests. Subsequently, Crown counsel directed a stay of proceedings in relation to both Violation Tickets issued to Mr. Beaudoin.

[7] On appeal, Mr. Beaudoin submits that the February 10, 2021 order continued to restrict outdoor protests by permitting only those protests that complied with the guidelines issued by the PHO. He submits that the chambers judge should also have declared the February 10, 2021 order to be an unconstitutional violation of his s. 2(c) and (d) *Charter* rights. The AGBC applies to have Mr. Beaudoin's appeal dismissed as moot.

[8] The churches and their leaders (collectively referred to by the parties as the "religious petitioners" or the "religious appellants") defied orders made by the PHO between November 19, 2020 and February 10, 2021, not to gather in-person for religious worship. Violation Tickets were issued to the spiritual leaders of the churches. The petition was filed on January 7, 2021. The hearing was set to commence March 1, 2021.

[9] On January 29, 2021, the religious petitioners sought reconsideration of the orders banning in-person gatherings for religious worship. On February 25, 2021, in response to the reconsideration request, the PHO varied her previous orders and permitted the religious petitioners to gather for weekly, outdoor, in-person religious services subject to enumerated conditions.

[10] The religious petitioners declined to amend the petition to challenge the order made in response to their reconsideration application. Relying on established authority, including *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 [*Yellow Cab*], the chambers judge held that, as a general rule, where a party has taken advantage of a reconsideration process, only the reconsideration decision may be judicially reviewed. He concluded that the petitioning churches were not entitled to challenge orders made by the PHO that preceded the order made on reconsideration.

[11] Despite this conclusion, the chambers judge proceeded to judicially review the pre-reconsideration orders made by the PHO. He noted, however, that the failure of the religious petitioners to challenge the reconsideration decision would have an impact on the scope of the record properly before him. Specifically, he held that as the petitioners did not seek judicial review of the reconsideration decision, the record of the proceeding could not include materials put before the PHO in support of the reconsideration application that were not before her when she made the earlier orders.

[12] It was common ground that the impugned orders violated the religious petitioners' rights under ss. 2(a), 2(b), 2(c) and 2(d) of the *Charter*. Implicit in the concession of the AGBC that the order violated s. 2(a) of the *Charter* is an acknowledgement that the religious claimants had established two things: (1) that they sincerely believe in a practice that has a nexus with religion—the need for in-person congregation for religious worship; and (2) that the orders interfered, in a non-trivial way, with their ability to act in accordance with that belief: see *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 63 [*TWU*].

[13] Applying the framework developed in *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*], and having regard to the nature and extent of the community threat posed by COVID-19, the chambers judge concluded that the orders made by the PHO that temporarily prohibited gatherings for in-person religious worship reflected a reasonable and proportionate balancing of the *Charter* protections at play with the objectives underlying the orders. He rejected the contention of the religious petitioners that the orders were arbitrary, irrational, or disproportionate because in-person gatherings for religious worship were prohibited when other types of gatherings, including transactional gatherings in the retail industry, were permitted.

[14] He noted that decisions made by the PHO, including those that temporarily banned in-person gatherings for religious worship, were made in emergent circumstances amid substantial uncertainty about: (1) how the pandemic would unfold and the impact it would have on community members, particularly the most vulnerable; and (2) the capacity of our healthcare system to continue providing essential, potentially life-saving service for those afflicted by the virus or other serious illnesses or conditions for which acute care would be needed. He concluded that the decisions made by the PHO required highly specialized medical and scientific expertise and called for considerable deference in the application of the *Doré* framework. Finally, he found there was a rational basis upon which the PHO could draw a distinction between the transmission risks associated with in-person religious worship and other types of gatherings. He declined to issue a declaration that the orders unreasonably or otherwise unjustifiably infringed the religious petitioners' *Charter* rights.

[15] The religious petitioners focused their submissions below on the alleged infringement of their s. 2 *Charter* rights. They addressed the s. 15 infringement in a cursory way. Given this, and the chambers judge's findings with respect to the alleged s. 2 infringements, he declined to address the s. 15 claim in any detail.

[16] The religious petitioners advance numerous grounds of appeal, including that the chambers judge erred in the following ways:

(1) by concluding they were not entitled to challenge the orders that preceded the order made by the PHO on reconsideration;

(2) by failing to decide the s. 15(1) *Charter* claim; and

(3) by applying the analytical framework in *Doré* instead of *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

[17] In addition, the religious petitioners argue that the temporary prohibition on in-person gatherings for religious worship services was an unreasonable restriction of their *Charter* rights and freedoms, whether under *Doré* or *Oakes*.

[18] The intervener, Association for Reformed Political Action ("ARPA") Canada, submits that institutional pluralism—which I understand to refer to the mutual respect and "constitutional space" the state and other social institutions must accord one another—is an organizing principle under the *Charter* which should find meaningful expression in the proportionality inquiry required under both *Oakes* and *Doré*. In addition, ARPA submits that where, as here, the imposition of a measure limits several constitutional rights and freedoms, the cumulative effect of the limitations must be considered in both the *Oakes* and *Doré* proportionality analysis.

[19] In support of the appeal, the religious petitioners seek to adduce fresh evidence that challenges the efficacy of the reconsideration process and the rationale behind the PHO's decision to make restrictive orders premised on a distinction between transmission risks associated with in-person religious worship and those associated with other transactional events and gatherings that were regulated, but not prohibited.

[20] The role of this Court on an appeal from a judicial review is to "step into the shoes" of the chambers judge and determine whether he identified the correct standard of review and applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36 at paras. 45–47 [*Agraira*]. The appellate court's focus is, in effect, on the administrative decision: *Agraira* at para. 46.

[21] For the reasons that follow, I would dismiss the appeal of Mr. Beaudoin as moot. I would dismiss the fresh evidence application brought on behalf of the religious petitioners. I would also dismiss their appeal.

III. Background

1. The Parties

[22] Mr. Beaudoin is an activist opposed to the imposition of COVID-related public health restrictions that purported to curtail his freedom to peacefully assemble and associate with like-minded protesters.

[23] John Van Muyen is Chair of the Council of Immanuel Covenant Reformed Church in Abbotsford. Pastor John Koopman leads the congregation of the Free Reformed Church of Chilliwack. Pastor Brent Smith is the spiritual leader of the Riverside Calvary Chapel in Langley.

[24] It is a fundamental tenet of the religious petitioners' beliefs that in-person assembly for religious worship is commanded by scripture and forms an essential component of the observance of their faith. As explained by Pastor Smith, the liturgy involves a communal celebration of faith. Church members must congregate in person to pray and sing God's praises.

[25] Dr. Bonnie Henry is the PHO. She is the senior public health officer in the Province of British Columbia. Dr. Henry is a medical doctor who also holds a master's degree in public health (epidemiology). She was formerly Provincial Executive Medical Director for the BC Centre for Disease Control ("BCCDC"), the scientific and operational arm of the Public Health Office. She has held, or currently holds, positions as an Assistant or Associate Professor on the Faculties of Medicine at the University of British Columbia and University of Toronto. In one of her previous roles as Associate Medical Officer of Health for the City of Toronto,

she was the operational lead for the SARS outbreak in 2003. In 2000, Dr. Henry was the senior Canadian assigned to a World Health Organization ("WHO") mission to assist with the large-scale outbreak of Ebola in Uganda.

[26] As PHO, Dr. Henry has the formidable responsibility of making public health decisions necessary to promote the common good that, at the same time, reasonably balance the individual rights of British Columbians and visitors to this province.

[27] Dr. Brian Emerson is the Acting Deputy Provincial Health Officer ("Deputy PHO"). He is also a medical doctor who holds a master's degree in public health. Dr. Emerson led a multi-year project to develop and implement the current *Public Health Act*, S.B.C. 2008, c. 28 ["*PHA*"] and Regulations. He is the primary public health advisor to the PHO, Ministry of Health, and medical health officers ("MHOs") on the use of the *PHA* to address public health issues. Dr. Emerson was the lead public health official to provide drafting instructions for orders made by Dr. Henry under the *PHA*. Dr. Emerson was also the primary recipient of requests for reconsideration of PHO orders. He was responsible for analysing those requests, seeking MHO input in evaluating the requests, and making recommendations to the PHO about whether variances should be granted to previously issued public health orders.

[28] Public health is an important component of British Columbia's health system. Its goal is primarily preventative. Where transmissible viruses like COVID-19 are introduced into the population, public health initiatives seek to manage outbreaks and reduce the risk of infections, serious illnesses, and premature deaths. These initiatives are also aimed at protecting the ability of the healthcare system to service the diverse medical needs of the population as a whole, whether related to the virus or some other disease or cause.

2. The Legislative Framework

[29] It is common ground on appeal that the legislative framework authorizes the making of orders by the PHO in the face of a public health crisis. In these circumstances, I will only briefly review the legislative framework under which the orders at issue on this appeal were made.

[30] Section 30(1)(a) of the *PHA* provides that a health officer may issue an order if they reasonably believe that a health hazard exists. “Health hazard” is defined under s. 1 to mean “(a) a condition [or] a thing … that (i) endangers, or is likely to endanger public health” or “(b) a prescribed condition [or] thing … that (i) is associated with injury or illness…”.

[31] Section 31(1)(b) of the *PHA* provides that a health officer (or the PHO in an emergency) “may order a person to do anything that the health officer reasonably believes is necessary for any of the following purposes: … (b) to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard.”

[32] Section 32(2) of the *PHA* provides that without limiting s. 31, a health officer (or the PHO in an emergency) may make one or more of the broad-ranging orders enumerated therein.

[33] Section 39(1) of the *PHA* provides that orders made under Part 4 – Division 4 of the *PHA* (including ss. 30–32) must be made in writing and describe, among other things, who must comply with the order, what must be done or not done pursuant to the terms of the order, the date on which, or the circumstances under which, the order is to expire (if the date or circumstances are known) and how a person affected by the order may have the order reconsidered. Pursuant to s. 39(3), an order may be made in respect of a class of persons. Section 42(1) provides that a person named or described in an order must comply with the order.

[34] The circumstances in which a person affected by an order may request reconsideration of the order are set out in s. 43 of the *PHA*. As the reconsideration power features prominently on this appeal, the relevant provisions of s. 43 are set out below:

> 43 (1) A person affected by an order, or the variance of an order, may request the health officer who issued the order or made the variance to reconsider the order or variance if the person
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> (a) has additional relevant information that was not reasonably available to the health officer when the order was issued or varied,
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> (b) has a proposal that was not presented to the health officer when the order was issued or varied but, if implemented, would
>
> (i) meet the objective of the order, and
>
> (ii) be suitable as the basis of a written agreement under section 38 [*may make written agreements*], or

> (c) requires more time to comply with the order.
>
> (2) A request for reconsideration must be made in the form required by the health officer.
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> (3) After considering a request for reconsideration, a health officer may do one or more of the following:
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> (a) reject the request on the basis that the information submitted in support of the request
>
> (i) is not relevant, or
>
> (ii) was reasonably available at the time the order was issued;
>
> (b) delay the date the order is to take effect or suspend the order, if satisfied that doing so would not be detrimental to public health;
>
> (c) confirm, rescind or vary the order.
>
> (4) A health officer must provide written reasons for a decision to reject the request under subsection (3)(a) or to confirm or vary the order under subsection (3)(c).
>
> (5) Following a decision made under subsection (3)(a) or (c), no further request for reconsideration may be made.
>
> (6) An order is not suspended during the period of reconsideration unless the health officer agrees, in writing, to suspend it.
>
> …

[35] Section 44 provides that a person affected by an order may request a review of the order, but only after the order has been reconsidered pursuant to s. 43.

[36] Section 45 provides that, subject to the regulations, a person affected by an order may request the health officer who issued the order to reassess the circumstances relevant to the making of the order to determine whether it should be terminated or varied.

[37] Part 5 of the *PHA* provides for enumerated emergency powers. For present purposes, an "emergency" is defined in s. 51 to mean a regional event that meets the conditions set out in s. 52(2). A "regional event" means "an immediate and significant risk to public health throughout the region or the province".

[38] Pursuant to s. 52(2) of the *PHA*, emergency powers must not be exercised in respect of a regional event unless the PHO provides notice that they reasonably believe at least two of the following criteria exist:

> (a) the regional event could have a serious impact on public health;

> (b) the regional event is unusual or unexpected;
>
> (c) there is a significant risk of the spread of an infectious agent or hazardous agent;
>
> (d) there is a significant risk of travel or trade restrictions as a result of the regional event.

[39] In an emergency, a health officer (including the PHO) may, pursuant to ss. 54(c) of the *PHA*, do orally what must otherwise be done in writing. In addition, pursuant to s. 54(h), a health officer (including the PHO) has the authority not to reconsider an order under s. 43, not to review an order under s. 44, and not to reassess an order under s. 45.

[40] Sections 70–72 of the *PHA* provide for the appointment of medical health officers who exercise powers within the geographic area of British Columbia to which they are designated. Section 67(1)(a)(i) of the *PHA* provides that the PHO may exercise the power or perform a duty of a medical health officer if the PHO reasonably believes it is in the public interest to do so because the matter extends beyond the authority of one or more medical health officers and coordinated action is needed.

[41] The Gatherings and Events ("G&E") orders made by the PHO that are the subject of this appeal were made pursuant to ss. 30, 31, 32, 39, 43 and 54 of the *PHA*.

[42] As previously noted, the orders at issue on this appeal were made between November 19, 2020, when in-person gatherings for religious worship were suspended by order of the PHO, and February 10, 2021, when the PHO made an order permitting outdoor assemblies (protests) for the purpose of communicating a position on a matter of public interest or controversy.

[43] The parties agree that this Court can take judicial notice of the fact that none of the impugned G&E orders are currently in force. On March 23, 2021, the ban on in-person gatherings for religious worship services was lifted, subject to certain conditions. On March 10, 2022, the PHO removed all remaining conditions on gatherings for in-person worship.

3. The Record on Judicial Review

[44] Throughout the course of the pandemic, including between November 19, 2020 and February 10, 2021, the PHO regularly received and reviewed scientific literature and evidence, including global, national, and provincial epidemiological data regarding the characteristics and spread of COVID-19. She also regularly received information pertaining to identified outbreaks of COVID-19 and predictive modelling concerning the likely course of the virus.

[45] In addition, the PHO received regular informational updates from her Federal/Provincial/Territorial counterparts, provincial MHOs, and public health experts from the BCCDC.

[46] The BCCDC operates the provincial microbiology laboratory, conducts surveillance, and prepares reports on the identification, prevalence, and incidence of communicable diseases on behalf of the PHO.

[47] The PHO was privy to new COVID-19 cases reported to the BCCDC and recorded in its COVID-19 Case Report Form. The form includes information on the geographic location and setting in which transmission of the virus was believed to have occurred.

[48] The PHO met regularly with public health officials from the Pacific Northwest States to discuss emerging scientific evidence.

[49] The PHO was also part of a WHO Working Group tasked with developing guidelines for mass gatherings.

[50] Given the vast amount of information available to the PHO when the impugned orders were made, it was necessary to reconstruct the record for the purposes of judicial review.

[51] Dr. Emerson provided the primary record affidavit. He summarized the background context and gave evidence of what was known to the PHO when she made the G&E orders. I do not understand Mr. Beaudoin or the religious petitioners to take issue with the contents of Dr. Emerson’s affidavit. His affidavit conveniently set out general background information known to the PHO when she made the impugned G&E orders. It is admissible on judicial review pursuant to the

"general background" exception which applies in cases of procedural or factual complexity where the record considered by the administrative decision maker is voluminous and, as in this case, constantly evolving. The rationale for the exception is that it is useful for a court to receive an affidavit that briefly reviews, "in a neutral and uncontroversial way", the steps taken and evidence considered by the administrative decision maker: *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para. 45.

[52] As is apparent, the parties disagree on the question of which additional materials should also have formed part of the record on judicial review. I will address those disagreements later in these reasons.

[53] In addition to the affidavit of Dr. Emerson, the record included affidavits filed by Mr. Beaudoin, Mr. Van Muyen, Pastors Smith and Koopman, and other spiritual leaders in the Christian community. The religious petitioners attached to their affidavits correspondence that passed between them and the PHO. The record on judicial review also included the PHO's verbal and written G&E orders, select correspondence relating to the reconsideration request, and variances granted by the PHO to other religious groups at relevant times.

4. The First Wave of the Pandemic

[54] British Columbia diagnosed its first case of COVID-19 on January 27, 2020. On January 30, 2020, the Director General of the WHO determined that COVID-19 constituted a Public Health Emergency of International Concern. The WHO declared a pandemic on March 11, 2020, due to the extensive international spread of the infectious agent SARS-CoV-2 that causes COVID-19.

[55] By mid-March, British Columbia was in the first wave of the pandemic. Case counts were rapidly rising. It was understood at this time that an infected person could transmit the virus to others with whom they were in contact, and that gatherings of people in close contact would promote transmission. It was also known that there was no treatment or cure for COVID-19, and no vaccine to protect against SARS-CoV-2.

[56] On March 16, 2020, the PHO issued the first public health order that prohibited mass gatherings in excess of 50 people. The order applied to all individuals, societies, corporations or other organizations including municipalities,

colleges, and religious organizations that own or operate theatres, sports arenas, conference halls, churches, recreation centres, casinos, parks and festival sites. In-person gatherings for religious worship were permitted, subject to the 50-person capacity limit. The order was designed to limit the spread of the virus.

[57] On March 17, 2020, the PHO gave notice pursuant to s. 52(2) of the *PHA* that the spread of the infectious agent causing COVID-19 constituted a regional event as defined in s. 51. In her view, all of the criteria set out in s. 52(2) of the *PHA* were present. The designation of a regional event permitted the PHO to exercise emergency powers under Part 5 of the *PHA*, including the power to make oral and written public health orders in response to the COVID-19 pandemic. This was the first time emergency powers under the *PHA* had been triggered in respect of a communicable disease in British Columbia.

[58] On the same day, the Minister of Public Safety and Solicitor General declared a state of emergency throughout the province pursuant to the *Emergency Program Act*, R.S.B.C. 1996, c. 111 [“*EPA*”].

[59] The PHO’s orders were regularly updated to respond to local surveillance data, information about evolving situations from MHOs, and national and international epidemiological information about the spread of COVID-19.

[60] As required by the legislation, all of the PHO’s orders in issue gave written notice to persons affected by the order that they could request a variance by making a request for reconsideration to the PHO under s. 43 of the *PHA*. As noted earlier, s. 54(1)(h) of the *PHA* authorizes the PHO when exercising emergency powers not to reconsider an order. That authority was never expressly invoked by the PHO.

[61] Two of the three petitioning churches discontinued in-person services for a short time during the first wave of the pandemic before they were under any legal obligation to do so.

[62] In August 2020, a protocol was developed to guide the process for reconsideration of the PHO’s orders. The protocol emphasized the importance of undertaking prompt reconsideration to avoid the unnecessary prolongation of burdens stemming from the restrictive nature of the PHO’s orders. The protocol

emphasized the principles of consistency in decision-making, and integrating local knowledge into the decision-making process to allow for nuance in the exercise of discretion. The decision-making criteria, set out below, invited consideration of a number of questions to the end of achieving a proportional balance between the amelioration of public health risks and the imposition of burdens on individuals or groups affected by the PHO's orders:

> Will granting a variance undermine the overall intent of the order?
>
> Will the proposal, if implemented, meet the objectives of the order?
>
> Will not granting a variance result in extraordinary hardship that is out of proportion to the risk posed by adherence to the order as published?

[63] Between March and November 2020, the PHO made a number of orders, including new orders and orders revoking or amending prior orders, in response to the changing circumstances of the pandemic in British Columbia. None of them are of particular relevance to this appeal.

5. The Second Wave of the Pandemic

[64] With the onset of the fall, and in light of the modelling projections available to her, the PHO anticipated that British Columbians would experience a second wave of the pandemic. She was right. By mid-October 2020, the province began experiencing a surge in cases, hospitalizations, and admissions to intensive care units.

[65] On November 7, 2020, the PHO issued a verbal order banning social gatherings of any size except for immediate households. The order applied to the Vancouver Coastal region (except for the Central Coast and Bella Coola Valley) and the Fraser Health region where the data showed that transmission rates and adverse consequences were the most worrisome. The order did not extend to the Central Coast or Bella Coola Valley because those areas were not considered to be high risk areas, and the PHO "didn't want to put in barriers that were not necessary in those areas." This order did not apply to in-person religious worship services which remained subject to the existing 50-person capacity limit and other prescribed COVID-19 safety protocols. Gatherings for funerals and weddings were permitted, but attendance was limited to immediate households with no receptions to be held.

[66] In explaining the order, the PHO said that "[f]rom the outset of our pandemic, the goal of our COVID-19 response has been to maintain capacity within our healthcare system, so we can support and care for people—not only [those] who are suffering from this virus, but for all of the other health care needs that we have to protect those who are most vulnerable, particularly … our elders and seniors." The order was to expire on November 23, 2020.

[67] On November 13, 2020, the Minister of Public Safety and Solicitor General issued Ministerial Order No. M416 pursuant to the *EPA*. The G&E orders made by the PHO, as amended or replaced from time to time, were incorporated into the terms of the Order. The Order prohibited any gathering or event contrary to an order made by the PHO.

6. Summary of Information Known to the PHO on November 19, 2020

[68] It is important to extract from the record what was known by the PHO when the impugned decisions were made. As Justice Pomerance noted in *Ontario (Attorney General) v. Trinity Bible Chapel*, 2022 ONSC 1344 [*Trinity Bible Chapel*] at para. 6, hindsight is not the lens through which to assess whether the G&E orders made by the PHO were reasonable and proportionate to the apprehended risk of harm. As she put it, "historical measures must be understood against the backdrop of historical knowledge. The question is not what we know now; it is what was reasonably known and understood at the time of each impugned action": at para. 6.

[69] As of November 19, 2020, when the first order prohibiting in-person gatherings for worship was made, the following information was known to the PHO:

- Compared to influenza, COVID-19 has higher transmissibility, is transmissible prior to symptom onset, and has a higher infection fatality rate;
- The surge of cases noted in mid-October was continuing, as were hospitalizations and the admission of COVID-19 patients to ICUs;
- The transmission of the virus seemed to be highest in crowded settings or settings involving sustained interpersonal engagement (defined as 15 minutes or more) indoors or in enclosed spaces;

- Transmission occurs through direct contact with respiratory droplets from an infected person, propelled when that person coughs, sneezes, sings, shouts or talks;

- Behavioural factors increase the risk of transmission. Gatherings that involve loud talking, chanting or singing were known to increase the risk of transmission because these activities lead to the release of large respiratory droplets—the primary means through which COVID-19 is transmitted;

- Forceful exhalations associated with loud singing can result in greater numbers of particles being released. As a result, the risk of COVID-19 transmission is increased when people are singing together in-person. This is especially true for large groups and in circumstances where microphones, music stands or music binders are shared. These enhanced activity-based risks were addressed in BCCDC's Informational Bulletin entitled *Faith-Based, Spiritual and Worship Practices*;

- Higher community prevalence and transmission rates increase the risk that people attending a gathering or event will shed the virus and infect others;

- SARS-CoV-2 was estimated to have a reproductive number of 2.87, meaning that each infected individual is likely to transmit the virus to another two to three people. Public health interventions were known to reduce the reproductive number;

- Asymptomatic transmission was occurring;

- Enhanced transmission of the virus was likely to occur in the winter months;

- The risks associated with COVID-19 were greater for the vulnerable, including the elderly and people with underlying health conditions;

- The pandemic was unlikely to be halted by "herd immunity" until more than 60% of the population had developed some immunity from the virus, either through natural infection or vaccination;

- Vaccines were in development but were not yet available to the general population and likely would not become available until early 2021;

- The capacity of the public healthcare system to deliver essential services could be breached during the peak periods of COVID-19 activity;

- The restrictive nature of public health measures taken prior to November 2020 had negatively impacted the health and well-being of community members;

- The PHO was also aware of the impact her G&E orders were having on faith communities and religious practices, both before and after November 19, 2020. She attended interfaith conference calls in March, April, May, July, November and December 2020. In recognition of the difficulties that faith-based communities were experiencing as a result of the prohibition on in-person gatherings, particularly faith communities for whom alternatives to in-person gathering were not viable options, the province retained Dr. Robert Daum from the Simon Fraser University Centre for Dialogue to facilitate further roundtable discussions. One of the purposes of these discussions was to discuss the impacts of the G&E orders on faith-based practices;

- A reasonable worst-case scenario was that a fall/winter peak would occur in 2022 and be two to three times higher than the incidence experienced at the peak of the first wave, with corresponding increases in mortality. In this peak, demand for healthcare resources, including hospitalizations, ICU beds, ventilators and personal protective equipment could overwhelm the capacity of the system; and

- The pandemic had led, not only in Canada but globally, to the extraordinary implementation of broad, restrictive community-based public health measures.

[70] The record before the PHO concerning known transmission of the virus in religious settings was summarized by Dr. Emerson in his affidavit (affirmed February 2, 2021):

> 97. The evidence assessed by the PHO to determine the risk of transmission of SARS-CoV-2 through religious gatherings in British Columbia includes: epidemiological data regarding COVID-19 transmission associated with religious activities globally, nationally and in British Columbia, evidence regarding SARS-CoV-2 transmission and disease, factors leading to elevated transmission risk in religious settings, and COVID-19 epidemiology in British Columbia.
>
> 98. The data and literature available to the PHO included reports [that] showed continuing COVID-19 cases and clusters in religious settings throughout the summer and fall of 2020, both nationally and globally, despite ongoing public health guidance recommending infection control precautions (such as physical distancing, masking, and environmental cleaning).
>
> 99. In addition, the information available to the PHO showed that outbreaks resulting from religious gatherings in Alberta, Manitoba and Saskatchewan, had spillover cases in British Columbia.
>
> …
>
> 101. Here in British Columbia, over the course of the pandemic, the data has showed instances of COVID-19 exposures and transmission within religious settings and weddings across all health authorities in British

Columbia, with the exception of Island Health Authority. Based on the information provided to the PHO by the MHOs for each Health Authority, the PHO was aware of the following cases and clusters associated with religious settings in British Columbia.

102. The data from Vancouver Coastal Health showed that, in Vancouver Coastal Health, from September 15, 2020 to January 15, 2021, 25 places of worship were affected with 61 associated cases. Twenty-eight cases and one death were associated with an outbreak at a religious setting in Vancouver in November 2020, and it is also likely that 2 index cases from that religious setting sparked a large outbreak at another facility. In addition, 5 cases were linked to a religious setting in Richmond in November 2020, and 3 cases were associated with another religious setting in Vancouver in November 2020. Vancouver Coastal Health did not implement a searchable information system until September 2020, so the data on the location of events from prior to September is not available to the PHO.

103. The data from Fraser Health showed that, in Fraser Health, from March 15, 2020 to January 15, 2021, 7 places of worship were affected with 59 associated cases. Of these cases, 24 were associated with a religious setting in Chilliwack in October 2020, 12 were linked to a religious setting in Burnaby in December 2020, 8 cases were associated with a religious setting in Maple Ridge in November 2020, and 6 cases were associated with a religious setting in Langley in November 2020.

104. The data from Interior Health showed that, in Interior Health, from March 15, 2020 to January 15, 2021, 11 places of worship were affected with 20 associated cases. Of these cases, 11 were associated with two religious settings in Kelowna in September and November respectively. The data showed that all of the cases in religious settings in Interior Health occurred between August 2020 and January 2021, with the majority of places of worship being affected in the fall (October and November 2020).

105. In Northern Health, from March 15, 2020 to January 15, 2021, 5 religious settings were affected with 40 associated cases. In November 2020 alone, 9 cases were associated with staff in a religious setting, and 4 cases were associated with a different religious setting in Prince George. In addition, Northern Health saw 27 cases associated with one funeral in August and 5 cases associated with three weddings (held in Surrey, Toronto and Vernon) in October 2020. Northern Health also has a number of recent exposures from funerals that are not included in the numbers above as they are still under investigation.

106. The data available to the PHO from Northern Health also indicated that a further 24 cases occurred in residents of Northern Health associated with a religious gathering in Alberta in August.

107. It should be recognized that it is possible that some of the cases that the Health Authorities consider to have been associated to these religious settings could have been acquired elsewhere in the community, but they have been included here because of their attendance in these settings. In addition, these numbers reflect direct cases only and not the secondary cases that arose from these direct cases, including cases that led to exposures and outbreaks in healthcare settings and schools.

> 108. To date, the data before the PHO does not demonstrate that BC is experiencing significant or routine transmission of COVID-19 arising from encounters such [as] at grocery and retail stores, restaurants, or in other transactional environments where WorkSafeBC standards require COVID-19 safety plans to be in place and safety procedures to be followed.

[71] On October 15, 2020, Dr. Theresa Tam, Chief Public Health Officer of Canada, wrote an open letter to faith-based community leaders advising them that "a number of reported outbreaks have been linked to gatherings such as weddings, funerals, and other religious and community gatherings."

7. The Decision-Making Framework on November 19, 2020

[72] When the first order was made prohibiting gatherings for in-person worship on a province-wide basis, exercise of the PHO's discretion was shaped by agreed-upon frameworks, protocols, and established public health ethical principles that serve to guide the making of public health orders in exigent circumstances.

[73] First, the PHO's exercise of discretion was guided by the *BCCDC Ethics Framework in Decision-Making Guide* [*BCCDC Ethics Guide*]. The *BCCDC Ethics Guide* identifies principles to be considered in resolving the difficult question of when and to what extent it is just and proper for a public health entity to limit individual freedoms for the betterment of the community as a whole. The guiding principles include:

> ***Respect for Autonomy*****:** Respecting a person's capacity and right to make decisions for him or herself, based on his or her own values preferences and goals. It is, in essence, a respect for persons' freedoms and liberties. It is this respect for autonomy that is the source of tension with competing concepts of justified paternalism and justified harm prevention.
>
> …
>
> ***Harm Principle*****:** … It is a fundamental concept in public health ethics and is attributed to John Stuart Mill: "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." This is essentially a justification for intervention by the state, and a warrant for infringements on personal autonomy in the name of harm prevention or reduction. In public health practice this is most commonly considered in the context of a duty to protect the public from harm.
>
> ***Precautionary Principle*****:** In the face of scientific uncertainty, it is this principle that warrants public health interventions when there is the theoretical risk of harm to the population even before all scientific data are obtained. Lack of full scientific certainty should not be a reason to postpone action in the name of the prudent concerns of the population….

> …
>
> ***Transparency*****:** In public health, transparency is a core principle. It is desirable to cast a wide net in securing the input of as many stakeholders as possible in the development of a program. Transparency must also be maintained in the implementation of a program and in the practice of public health by sharing information derived from public health interventions.
>
> ***Proportionality*****:** This is the notion that any public health intervention should be proportionate to the threat faced, and that measures taken should not exceed those necessary to address the actual risk.
>
> ***Public Justification*****:** This is related to transparency. When a public health program threatens to infringe on the liberties of an individual or community, public justification is the notion that the agency has a responsibility to explain and justify this infringement.

[74] It is axiomatic that there is no way to restrict gatherings to promote public health and safeguard the integrity of our healthcare system in a pandemic, without limiting, to some degree, the fundamental freedoms guaranteed by the *Charter*. The *BCCDC Ethics Guide* acknowledges the need for public health officials to weigh the concerns of both the individual and the community, and recognizes that "there is no simple way to reconcile the perennial tension between … personal liberty and harm reduction." The *BCCDC Ethics Guide* also recognizes that any interference with personal rights and liberties carries with it a significant moral cost and commits the BCCDC and its employees to "use the least restrictive or coercive means possible to achieve its goals."

[75] At the relevant time, the PHO also had available to her public health decision-making guidance provided in the *F/P/T COVID-19 Response Plan*. Like the *BCCDC Ethics Guide*, the *F/P/T COVID-19 Response Plan* sought to "achieve a better balance between minimizing the impact on morbidity and mortality with the impact of societal disruption in order to support a long-term, sustainable response." It recognized that while restrictive measures had averted widespread essential service disruption due to illness, they were associated with negative physical and mental health consequences. As Dr. Emerson noted in his affidavit, consistent with the *F/P/T/ COVID-19 Response Plan*, "the overriding concern is to ensure that public health orders and guidance protect the most vulnerable members of the society while minimizing social disruption."

[76] While these guiding principles do not establish that the impugned orders were reasonable and proportionate, judicial review of the PHO's orders must take

account of this context, particularly in circumstances where the record reflects that the PHO was, in practice, guided by these principles in her decision-making process. I note, for example, that the PHO invoked what might be regarded as the Respect for Autonomy and Proportionality Principles on November 7, 2020, when she explained that the making of restrictive public health orders “are always a last resort”.

8. The November 19, 2020 Order

[77] On November 19, 2020, in the face of rapidly climbing case counts in all areas of the province, outbreaks in the healthcare system and long-term care settings, and associated tragic outcomes, the PHO made a verbal order extending the restrictions on gatherings and events province-wide.

[78] The order suspended all indoor and outdoor events, including in-person gatherings for religious worship. The order was set to expire on December 8, 2020, corresponding with the virus’s two-week incubation period. Funerals, weddings, and other religious ceremonies like baptisms could proceed with a maximum of 10 people present. No associated receptions were to take place. Religious organizations were permitted to gather to prepare meals for those in need or host support group meetings with appropriate safety measures. At the same time, restaurants and pubs were permitted to remain open with COVID-19 safety plans. Salons, spas, and retail stores were also permitted to remain open with safety measures in place, including masking.

[79] In explaining the order, the PHO said that “despite our best efforts we have seen transmission happening” in religious gatherings and that it was necessary to suspend religious gatherings of up to 50 people for a “short period of time”. She emphasized that the order did not ban individual attendance at a place of worship.

9. Subsequent Orders and Events

[80] On November 25, 2020, a Jewish Orthodox synagogue submitted a request for reconsideration to allow in-person services on the Sabbath. The justification for the request was that the synagogue observed traditional Jewish law which prohibits the use of electronic devices, including computers, on the Sabbath. As a result, religious services could only be conducted in person. The proposal contemplated services taking place outdoors in an open tent with the synagogue

building locked and no more than 25 people in attendance. Physical distancing and masking would be enforced. The exemption was granted. In December 2020, the exemption was extended on the same conditions to 12 additional synagogues.

[81] In a letter dated November 28, 2020, that was emailed to the PHO on December 3, the Correspondence Clerk for the Immanuel Covenant Reformed Church asked that the order made on November 19 be rescinded. On November 30, 2020, Pastor Smith sent a similar letter to the PHO.

[82] In support of this request, the writers complained that religious gatherings were “arbitrarily” being limited to a greater degree than other commercial entities such as grocery stores, retail stores, and airlines. The writers asserted that “if the government could demonstrate with data that Christian worship services were major spreaders of COVID-19” local churches might give more favourable consideration to the order temporarily halting worship services. The writers explained that gathering for in-person worship was essential to the congregation’s spiritual health, and necessary to comply with their churches’ understanding of the dictates of scripture. If the order was not rescinded, the churches gave notice of their intention to resume in-person worship services on November 29. They agreed to take what they considered to be “reasonable precautions” to limit the risk of transmission, and “strongly encourage” those who were feeling unwell not to attend. They pledged to immediately suspend in-person worship service in the event of an outbreak.

[83] Neither the letter from the Immanuel Covenant Reformed Church nor the letter from Pastor Smith identified additional relevant evidence not reasonably available to the PHO when the order was made, nor did the letters put forward a specific proposal that the churches claimed would meet the objectives of the order. Rather, it was a request that the order be rescinded. For these reasons, it appears that the letters were not considered to have been requests for reconsideration pursuant to s. 43 of the *PHA*. The PHO did not directly respond to them.

[84] The religious petitioners gathered for in-person religious services in violation of the G&E orders. They put precautions in place in an effort to reduce the risk of transmission.

[85] On December 2, 2020, the PHO issued a written G&E order confirming her oral order of November 19, 2020. The order provided that no person may permit a place to be used for an event except as provided for in the order. “Event” was defined to be an in-person gathering of people in any place whether private or public, inside or outside, organized or not, on a one-time, regular or irregular basis, including … a worship or other religious service…”.

[86] On December 4, 2020, a further written order was issued repealing and replacing the December 2 order and reconfirming the oral order made on November 19, 2020. No amendments to the order of any consequence to this appeal were made.

[87] On December 7, 2020, the PHO made a verbal order extending the order of December 4 to January 8, 2021. The order permitted drive-in and stay events involving up to 50 vehicles provided, among other things, that the occupants were from a single household and remained in their vehicles for the duration of the event. The effect of the order was to permit drive-in religious worship services for up to 50 vehicles.

[88] In making this order, the PHO noted that in the previous three days, 35 people in British Columbia had died of COVID-19, that there were 57 active outbreaks in long-term care and assisted living, and eight outbreaks in acute care units. She noted that there were 1,697 active cases in long-term care. She also noted that the number of people in hospital with COVID-19 was straining the system. The PHO advised that British Columbia expected to receive its first delivery of the Pfizer vaccine the following week.

[89] The PHO expressed concern about faith groups that were continuing to meet despite public health orders prohibiting in-person gatherings for religious worship. She emphasized that “[t]hese restrictions are about recognizing there are situations where this virus is spreading rapidly, and we have seen when we come together and congregate indoors, in particular, those are settings where the virus is transmitted, despite our best efforts, despite the measures that we have had in place for several months that were working for many months. We are now seeing that those are not enough right now.”

[90] On December 9, 2020, a new written G&E order was made. It repealed and replaced the December 4 order and reconfirmed the oral order made on November 19, 2020. In the recitals to the order, the PHO noted that seasonal and other celebrations and social gatherings in private residences and other places had resulted in a rapid increase in COVID-19 cases and hospital admissions. For present purposes, the most significant effect of the order was to expressly permit individual attendance at a place of worship for the purpose of prayer or quiet reflection.

[91] On December 15, 2020, a further written G&E order was made. It repealed and replaced the December 9 order and reconfirmed the oral order made on November 19, 2020. The order permitted attendance at a residence to provide religious ministrations to an occupant.

[92] On December 18, 2020, the PHO sent identical letters to Pastor Koopman and Pastor Smith enclosing the latest G&E order and advising that the number of COVID-19 cases had escalated significantly in recent weeks. The PHO advised that, “epidemiological data in BC demonstrates that a number of cases of transmission of the virus have occurred from religious gatherings including temples, churches and other religious settings.” She explained her decision-making process:

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

> to ensure that attendees keep appropriate physical distance from each other in the intimate setting of gatherings for religious purposes attended by persons outside of each attendee's own household. Additionally, singing, chanting and speaking loudly are proven to increase the risk of infection when indoors.
>
> You will see that the Order includes an excerpt of section 43 of the *Public Health Act,* S.B.C. 2008 c. 28. which permits a person affected by an order under the Act, to request that I reconsider the order. I have considered and approved case-specific requests in the past and am open to a request from your church. If you believe that your church can conduct its activities in a manner that meets the objectives of the Orders you may submit a written proposal to me in accordance with section 43 (1) of the Act. Upon receipt of your request, I will evaluate your proposal and consider whether, in my view, your proposal satisfactorily minimizes the risk of transmission of COVID-19.
>
> [Emphasis added.]

[93] Pastor Smith did not respond to the PHO's letter. Pastor Koopman did. In a letter dated December 22, 2020, he noted that reconsideration requests made on behalf of other faith groups had gone unanswered. He concluded:

> Your offer to consider a request from our church to reconsider your Order sadly rings hollow. Any such decision by you would be discretionary and revokable at any time. Further, this offer fundamentally fails to address the central issue, which is the discriminatory and overbroad nature of your Order which directly prohibits an essential practice of our faith.
>
> As many others have done, we urge you to allow in-person worship services.
>
> [Emphasis added.]

[94] On December 24, 2020, a further written G&E order was made. It repealed and replaced the order of December 15 and exempted from its reach additional activities that are not relevant to this appeal.

[95] Immediately following the PHO's December orders, the case rate declined. Unfortunately, it started to increase again between December 28 and January 4, 2021.

[96] On January 8, 2021, the PHO extended the prohibition on in-person gatherings (including gatherings for in-person religious worship) to February 5, 2021. The PHO was concerned that the post-holiday uptick in cases could be the harbinger of another surge. She was also concerned that new, more transmissible

variants of the virus from the United Kingdom and South Africa had been detected in British Columbia.

[97] Also on January 8, 2021, Dr. Emerson advised that the variance granted to the 12 synagogues had been extended to February 5, 2021.

[98] The PHO issued a further G&E order on February 5, 2021. By that date, British Columbia had received approximately 155,000 doses of vaccine. The February 5 order permitted Jewish court divorce proceedings with a maximum of 10 people in attendance. The order maintained the ban on in-person religious worship. What is notable about the February 5 order is its Recitals which read, in material part, as follows:

> 7. Gatherings and events in private residences and other places continue to pose a significant risk of promoting the transmission of SARS-CoV-2 and increase in the number of people who develop COVID-19 and become seriously ill;
>
> 8. Virus variants of concern are now present in Canada and the province, and have heightened the risk to the population if people gather together;
>
> 9. I recognize the societal effects, including the hardships, which the measures which I have and continue to put in place to protect the health of the population have on many aspects of life, and with this in mind continually engage in a process of reconsideration of these measures, based upon the information and evidence available to me, including infection rates, sources of transmission, the presence of clusters and outbreaks, the number of people in hospital and in intensive care, deaths, the emergence of and risks posed by virus variants of concern, vaccine availability, immunization rates, the vulnerability of particular populations and reports from the rest of Canada and other jurisdictions, with a view to balancing the interests of the public, including constitutionally protected interests, in gatherings and events, against the risk of harm created by gatherings and events;
>
> 10. I further recognize that constitutionally-protected interests include the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, including specifically freedom of religion and conscience, freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association. These freedoms, and the other rights protected by the *Charter*, are not, however, absolute and are subject to reasonable limits, prescribed by law as can be demonstrably justified in a free and democratic society. These limits include proportionate, precautionary and evidence-based restrictions to prevent loss of life, serious illness and disruption of our health system and society. When exercising my powers to protect the health of the public from the risks posed by COVID-19, I am aware of my obligation to choose measures that limit the *Charter* rights and freedoms of British Columbians less intrusively, where this is consistent with public health principles….

> [Emphasis added.]

[99] On February 10, 2021, the PHO made a further G&E order that repealed and replaced the February 5 order. What is notable about this order—and of particular relevance to Mr. Beaudoin's appeal—is that it added to Recital 10 of the February 5 order (excerpted above) the following language:

> …In consequence, I am not prohibiting outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy, subject to my expectation that persons organizing or attending such an assembly will take the steps and put in place the measures recommended in the guidelines posted on my website in order to limit the risk of transmission of COVID-19.
>
> [Emphasis added.]

[100] In a media briefing held on February 12, 2021, the PHO was asked to explain what it is about in-person religious gatherings that make them more prone to the spread of the virus than activities that occur in bars, restaurants and health clubs, which had not been shut down, assuming similar safety protocols were respected in all of these settings. The question asked the PHO to explain the distinctions drawn between settings as reflected in her past orders. She responded:

> Reporter: Dr Henry, I would like to ask you if churches were able to put in the same safety protocols as bars, restaurants, and health clubs, what is it about churches or other religious gathering points that still makes them more of a public health threat for the spread of the virus?
>
> Dr. Henry: I think we need to look back on what we were seeing. And this is something that is not unique to this pandemic. We have seen it with other outbreaks as well – that the nature of the interaction, the social interaction that you have with a faith group is fundamentally different than some of the transactional relationships we have if we're going to a store or even an individual working out in a gym, an individual going to a restaurant, or with your small group of people.
>
> Having said that, we engaged very early with faith leaders across this province. And they recognize the important role that they play. I just want to reiterate, we [k]now how important – essential – faith services are for people and for communities across BC. And that is why we have been working with faith community leaders since March of last year.
>
> And we stopped all of those types of interactions when we were learning about this virus, and what was happening with this virus, and how it was transmitted, and in what situations it was being transmitted last March. And then when we reopened gatherings,

> and particularly faith gatherings, we did talk with the community about what were the things that made it safer.
>
> And those measures were in place. We limited numbers, we had spacing, we introduced masks when that [was what] we needed. We talked about the different things that happen in different – whether it's a church, or a gurdwara, or a temple, or a synagogue – and tried to make rational approaches that would support people.
>
> We also know that there is a demographic that goes to many faith services that is older and more at risk in some cases. So we needed to take that into account. And we were able to allow and to have active in-person services through most of the summer and into the fall.
>
> As with many other things, as we got into the respiratory season, we saw the transmissibility of the virus increasing. And what we were seeing was that there was transmission in a number of faith settings despite having those measures in place. So that spoke to us about there was something about those interactions that meant that the measures that we thought were working were no longer good enough to prevent transmission of the virus in its highly transmissible state during the winter respiratory season.
>
> So it was because of that that we put in additional measures to stop the in-person services starting in the end of November. It really was because we were seeing, despite people taking their best precautions, we were still seeing transmission. We were seeing people ending up in hospital, and sadly, we had some deaths in particularly older people who were exposed in their faith settings.
>
> I want to get back – and I have been talking with the faith leaders – as soon as we can. Once we're out of that danger zone; once we understand what's happening with these variants; once we get our community levels low enough that it's not that risky any more, then absolutely. We will be going back to those safety precautions that we know work.
>
> [Emphasis added.]

[101] The religious petitioners say they have been issued 14 Violation Tickets totalling over $32,000 for repeated violation of the G&E orders.

10. The Reconsideration Request

[102] On January 29, 2021, about three weeks after the petition was filed, counsel for the religious petitioners (not counsel on appeal) formally requested that the PHO reconsider, pursuant to s. 43 of the *PHA*, her order banning gatherings for in-person religious worship.

[103] On the same day, counsel for the AGBC replied to the request seeking clarification on: (1) whether the petitioners were advancing a specific proposal

that, if implemented, would meet the objectives of the order (s. 43(1)(b) of the *PHA*); (2) whether the request was being made on behalf of a class of persons and, if so, the identity of the class (s. 43(7) of the *PHA*); and (3) whether the petitioners were asking the PHO to consider additional relevant information not available to her when the order was made (s. 43(1)(a) of the *PHA*).

[104] By letter dated February 3, 2021, the petitioners made a specific proposal in support of their reconsideration request. It would require congregants from different households to maintain a physical distance of at least two metres, to wear masks, and to use hand sanitizer. The proposal also contemplated that the churches would perform contact tracing.

[105] On February 15, 2021, the religious petitioners confirmed their expectation that the PHO would, as part of their reconsideration request, consider the medical opinions of Dr. Warren and Dr. Kettner. These opinions were contained in affidavits sworn by Dr. Warren on February 10, 2021 and by Dr. Kettner on February 12, 2021. The affidavits (and accompanying exhibits) consisted of over 1,000 pages of material. To reiterate, the affidavits of Dr. Warren and Dr. Kettner were not before the PHO when her earlier orders were made.

[106] Dr. Warren, a medical doctor and infectious disease specialist, was asked to provide an opinion on the risk of transmission of the virus at in-person gatherings for religious worship conducted by the religious petitioners. Dr. Warren was also asked to provide an opinion on the risk of transmission in this setting relative to the risk of transmission associated with activities in other settings that were permitted under existing public health orders, including activities in restaurants, gyms, schools, public transit, pubs, and in the retail sector.

[107] Dr. Kettner, a medical doctor and infectious disease specialist, was similarly asked to provide an opinion on the risk of transmission associated with in-person religious worship compared to other activities permitted under existing public health orders.

[108] On February 25, 2021, less than a week before the first day fixed for the hearing of the petition, the PHO advised the petitioners that she was not prepared to grant the variance requested. She did, however, conditionally vary the G&E order to allow *outdoor*, in-person weekly worship services with a number of

conditions, including that no gathering would consist of more than 25 people. Other conditions were attached to the variance. The PHO advised that relaxing the restrictions to a greater extent "would pose an unacceptable risk to public health".

[109] In explaining her decision to vary the G&E orders, the PHO reiterated the objectives of past G&E orders and the rationale upon which they were based, including the November 19, 2020 verbal order that prohibited in-person religious worship services on a province-wide basis. She confirmed that the need for restrictions in higher risk settings were being assessed in a manner consistent with the principles set out in the *BCCDC Ethics Guide*. As the chambers judge determined that the decision given by the PHO on reconsideration did not form part of the record on judicial review, I will not further detail its content, nor will I have regard to it in determining the reasonableness of the PHO's pre-reconsideration G&E orders.

[110] Despite granting the variance, the PHO confirmed that the affidavits of Dr. Warren and Dr. Kettner did not contain information that was not available to her when she made the earlier orders.

[111] To complete the picture, on February 23, 2021, Orthodox Jewish congregations were granted a limited class exemption by the PHO to gather in-person and indoors for the holiday of Purim and for the Sabbath that immediately followed.

[112] On March 1, 2021, the PHO advised Orthodox Jewish congregations that the February 23, 2021 order was being varied to make clear that weekly Sabbath services at all synagogues had to be held outdoors, subject to the same enumerated conditions that governed the religious petitioners. In making this revised order the PHO said:

> With respect to the risk of indoor services, the likelihood of transmission of SARS-CoV-2 is greater when people are interacting in communal settings, when people are close to each other, in crowded settings, in indoor settings due to less ventilation and outdoor settings; and when people speak, and especially when they sing, chant or speak at a higher than conversational volume. These are all conditions that … exist when services are held indoors, which make them of particular concern.
>
> The likelihood of transmission also increases exponentially in a population when a number of people are simultaneously infected in a group setting, and subsequently infect their contacts, who infect their contacts and so on. This can, and has, quickly result in a scenario where local public health

> resources can be overwhelmed such that they are no longer able to trace all the contacts of such an exposure and require them to self-isolate. If this occurs, community spread can quickly become rampant, leading to increased case counts and, in time, has the potential to overwhelm our healthcare system as hospitalizations increase. As well, transmission in religious settings have led to introductions of the virus into vulnerable community settings such as long-term care homes leading to serious outbreaks with resultant deaths.
>
> For these reasons I am revising the variance to the order to be clear that weekly Sabbath services at all Jewish Orthodox Synagogues must be held outdoors, according to the following conditions...
>
> [Emphasis added.]

IV. The Petition

[113] As noted earlier, the petition was not amended to seek judicial review of the reconsideration decision.

[114] Among other things, the petitioners sought a declaration that the G&E orders made by the PHO on November 19, December 2, 9, 15, and 24, 2020, "and such further orders as may be pronounced which prohibit or unduly restrict gatherings for public protests and for worship and/or other religious gatherings including services, festivals, ceremonies, receptions, weddings, funerals, baptisms, celebrations of life and related activities associated with houses of worship and faith communities" are of no force and effect as unjustifiably infringing the petitioners' rights and freedoms under ss. 2(a), (b), (c), (d), 7 and 15(1) of the *Charter*.

[115] "In addition, or in the alternative", the petitioners sought an order under ss. 2(2) and 7 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*] setting aside the G&E Orders as unreasonable.

[116] The petitioners also sought an order enjoining the AGBC from further enforcement action in relation to in-person gatherings for religious worship, and an order dismissing the Violation Tickets that had been issued to them and to Mr. Beaudoin.

V. The Reasons for Judgment (2021 BCSC 512)

[117] Following *Yellow Cab* at para. 40, the chambers judge held that where a party has taken advantage of a reconsideration process, it is only the

reconsideration decision that can be judicially reviewed.

[118] As noted earlier, the petitioners did not amend the petition to challenge the reconsideration decision. In fact, they declined to do so. In the result, the chambers judge had to determine: (1) whether to proceed with judicial review of the G&E orders that preceded the reconsideration decision and, if so; (2) the scope of the record properly before him on that judicial review.

[119] The chambers judge held that the religious petitioners were not entitled to challenge the G&E orders that preceded the reconsideration decision.

[120] Despite this finding, the chambers judge engaged in a robust, substantive review of the religious petitioners' challenges to the pre-reconsideration G&E orders. Having done so, the chambers judge concluded that, even if the religious petitioners could challenge the G&E orders made between November 19, 2020 and February 10, 2021, the petition failed because the orders reflect a proportionate and reasonable balancing by the PHO of the public health risks and constitutional interests in play.

[121] In defining the record for the purposes of the review, the chambers judge excluded the affidavits of Dr. Warren and Dr. Kettner. He concluded that the religious petitioners could not decline to challenge the reconsideration decision made on February 25, 2021, and expect the record to include materials that were only provided to the PHO in support of the reconsideration request. The chambers judge noted that allowing the religious petitioners to rely on this opinion evidence in challenging the pre-reconsideration G&E orders would permit them to bypass the PHO as the statutory decision maker. It would also fail to afford her the deference to which she is entitled on the findings she made based on the record that was before her when the impugned G&E orders came into effect.

[122] The chambers judge found it was necessary to reconstruct the record for the purposes of judicial review. As noted earlier, the AGBC relied primarily on the affidavit of Dr. Emerson as summarizing the information available to the PHO when she made the impugned G&E orders.

[123] The judge rejected the petitioners' argument that when a decision is challenged on constitutional grounds, the principle that the evidence on judicial

review is limited to the record before the decision maker does not apply.

[124] The chambers judge determined that the record included all of the communications between the religious petitioners and the PHO up to and including February 10, 2021—the G&E order in effect when the petition was argued.

[125] The chambers judge concluded that the order made by the PHO on reconsideration, and the correspondence that preceded it, also formed part of the record, but for the limited purpose of demonstrating that a reconsideration request was made by the religious petitioners and resolved by the PHO on its merits. Neither the decision made on reconsideration, nor the materials filed in support of the reconsideration request, formed part of the record for the purpose of assessing the reasonableness of the G&E orders that preceded it.

[126] The chambers judge held that evidence of the variances granted to Jewish Orthodox synagogues in February and March 2021 did form part of the record before the PHO because it served to explain her previous G&E orders, and was relevant to the application of s. 1 of the *Charter* and to the assessment of whether the orders minimally impaired the constitutional rights of the religious petitioners.

[127] The chambers judge rejected the petitioner's contention that because the judicial review was, in substance, a *Charter* challenge to the G&E orders, no deference was owed to the PHO. The chambers judge held that in the areas of science and medicine, the PHO was entitled to deference and that "reasonableness" was the appropriate standard of review.

[128] Notably, the chambers judge held that even if he had included in the record on judicial review the opinions of Dr. Warren and Dr. Kettner—that the risks associated with transmission of the virus through in-person religious worship were overstated by the PHO or comparatively no greater than the risk of transmission associated with other permitted activities and settings—their opinions represented "at best, an alternate view of the risks…considered and weighed by Dr. Henry." He would not have been persuaded by the alternative views of Dr. Warren and Dr. Kettner that the PHO's G&E orders, or the factual conclusions underlying them, were unreasonable.

[129] In addressing the petitioners' *Charter* claims, the chambers judge noted the absence of any suggestion by the petitioners that a provision of the *PHA* under which the PHO made the G&E orders violated the *Charter*. Rather, the petitioners suggested that the effect of administrative decisions made by the PHO was to unjustifiably limit their constitutional rights.

[130] In these circumstances, the chambers judge considered that the *Doré* framework applied. The issue was whether the G&E orders made by the PHO reflected a proportionate balancing of the *Charter* protections at play, having regard to the objectives of the measures that limited constitutional rights. Relying on *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 [*Loyola*] at paras. 3 and 40, the chambers judge noted that *Doré* worked the "same justificatory muscles" as the *Oakes* framework, but that it required a "robust proportionality analysis consistent with administrative law principles".

[131] The chambers judge recognized that he was obliged to consider whether there were other reasonable avenues open to the PHO that would reduce the impact her orders had on the constitutional rights of the petitioners, but still achieve the objectives underlying those orders: *TWU* at paras. 80–81. The chambers judge framed his task in these terms: whether on the information available to her as reflected on the record reconstructed for judicial review, and allowing for curial deference, the PHO's G&E orders fall within a range of reasonable outcomes.

[132] The religious petitioners conceded that the protection of public health is a sufficiently important objective to justify limitations on *Charter* rights. They argued, however, that the measures implemented by the PHO were arbitrary, irrational and disproportionate to the risks posed by in-person gatherings for religious worship.

[133] The salient portions of the judge's analysis follow:

> [224] Containing the spread of the Virus and the protection of public health is a legitimate objective that can support limits on *Charter* rights under s. 1. An outbreak of a communicable disease is an example of a crisis in which the state is obliged to take measures that affect the autonomy of individuals and of communities within civil society.
>
> [225] The respondents concede that there is no question that restrictions on gatherings to avoid transmission of the Virus limit rights and freedoms guaranteed by the *Charter*, as well as personal liberty in a more generic sense. But they contend that protection of the vulnerable from death or

severe illness and protection of the healthcare system from being swamped by an out-of-control pandemic is also a matter of constitutional importance.

[226] The intervenor [ARPA] submits that the risks of in-person religious gatherings were “obviously identical risks” to those present in school, gymnasium, support group or restaurant settings. This simplistic analysis fails to account for the key distinguishing factors relied on by Dr. Henry in restricting religious gatherings including the ages of the participants, the intimate setting of religious gatherings, and the presence of communal singing or chanting in religious gatherings (and the religious petitioners’ evidence shows that masks do not appear to be used throughout religious services and that singing is not prohibited).

…

[233] …I have set out the series of G&E Orders made by Dr. Henry between November 7, 2020 and February 10, 2021, and the basis upon which they were made. I find that they were based upon a reasonable assessment of the risk of transmission of the Virus during religious and other types of gatherings.

[234] On the record in this case, I find that Dr. Henry turned her mind to the impact of her orders on religious practices and governed herself by the principle of proportionality. She consulted widely with faith leaders and individually asked for the input of the leaders of two of the churches making up the religious petitioners, while affirming the need for respect for the rule of law and public health.

[235] Under *Vavilov* [*Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65*] at para. 101, there are two bases for holding a decision maker's decisions to be unreasonable. One is a failure of rationality internal to the reasoning process. The second is where the decision is untenable in light of a factual or legal constraint.

[236] A decision has internal rationality if the reviewing court can trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and there is a line of analysis that could reasonably lead the decision maker from the evidence before it to the conclusion at which it arrived: *Vavilov* at para. 102.

[237] I accept that under either approach to reasonableness, a reasonableness review begins with the reasons of the decision maker and “prioritizes the decision maker’s justifications for its decisions”. What matters is not whether there are formal reasons but whether the reasoning process underlying the decision is opaque.

[238] I have concluded that Dr. Henry’s reasons, both in the preambles to the orders and in the media events, do not exhibit a failure of internal rationality. Gatherings and events are a route of transmission. Whether measures less intrusive than prohibition are effective depends on the prevalence of the Virus in the community and behavioural factors. Dr. Henry responded to evidence of accelerating transmission when she made the orders, and she has explained her reasoning.

[239] I find that in making the impugned G&E Orders, Dr. Henry assessed available scientific evidence to determine COVID-19 risk for gatherings in B.C. including epidemiological data regarding transmission of the Virus

associated with religious activities globally, nationally and in B.C., factors leading to elevated transmission risk in religious settings, and COVID-19 epidemiology in B.C.

[240] I also find that in making the impugned G&E Orders Dr. Henry was guided by the principles applicable to public health decision making, and in particular, that public health interventions be proportionate to the threat faced and that measures should not exceed those necessary to address the actual risk. Her orders are limited in duration and constantly revised and reassessed to respond to current scientific evidence and epidemiological conditions in B.C.

[241] Through the pandemic, Dr. Henry has consistently expressed her awareness of the impacts of her orders, of her mandate to protect public health, and of her duty to do so in a way that is proportionate to those impacts, but the religious petitioners assert that she did not account for their *Charter* rights adequately, or at all.

[242] While she made no specific reference to *Charter* rights and values prior to her G&E Orders of February 5 and 10, 2021, I am unable to accept that those rights and values were not considered by Dr. Henry from the outset of her G&E Orders in November 2020.

[243] I find that Dr. Henry carefully considered the significant impacts of the impugned G&E Orders on freedom of religion, consulting with the inter-faith community to discuss and understand the impact of restrictions on gatherings and events on their congregations and religious practices.

[244] The dangers that Dr. Henry's G&E Orders were attempting to address were the risk of accelerated transmission of the Virus, protecting the vulnerable, and maintaining the integrity of the healthcare system. Her decision was made in the face of significant uncertainty and required highly specialized medical and scientific expertise. The respondents submit, and I agree, that this is the type of situation that calls for a considerable level of deference in applying the *Doré* test.

[245] The respondents point to a number of ways in which Dr. Henry's G&E Orders have attempted to minimize impacts on the rights in question. She waited until there was evidence of exponential increase in cases, first in the Vancouver Coastal and Fraser Health regions and then across the province, before tightening restrictions. She has also permitted individual prayer, reflection, and other forms of religious activity at places of worship, and individual meetings with religious leaders. And, perhaps most importantly, where appropriate, Dr. Henry has made exemptions for religious organizations under s. 43 of the *PHA*.

[246] I find that Dr. Henry's decision fell within a range of reasonable outcomes. There is a reasonable basis to conclude that there were no other reasonable possibilities that would give effect to the s. 2 *Charter* protections more fully, in light of the objectives of protecting health, and in light of the uncertainty presented by the Virus.

[247] Although the impacts of the G&E Orders on the religious petitioners' rights are significant, the benefits to the objectives of the orders are even more so. In my view, the orders represent a reasonable and proportionate balance.

> [248] Thus, the respondents have proven that the limits the G&E Orders place on the religious petitioners' s. 2 *Charter* rights are justified under s. 1 of the *Charter*.
>
> [Emphasis added.]

[134] Noting the concession of the AGBC in relation to the constitutional question raised by Mr. Beaudoin, the chambers judge issued a declaration that the G&E orders made by the PHO on November 19, 2020, December 2, 9, 15 and 24, 2020, January 8, 2021 and February 5, 2021, unjustifiably infringed the right to organize and participate in outdoor protests as guaranteed under ss. 2(c) and (d) of the *Charter*. The PHO's orders were found to be of no force and effect to the extent of the infringement. The chambers judge declined to adjudicate the validity of the Violation Tickets given to Mr. Beaudoin.

[135] The petition of the religious petitioners was dismissed for reasons the chambers judge summarized near the end of his judgment:

> [250] The religious petitioners have not satisfied me that they are entitled to challenge the G&E Orders on their judicial review under s. 2 of the *JRPA*. Even if they could do so, the infringement of their s. 2 *Charter* rights by the impugned G&E Orders is justified under s. 1 of the *Charter*.
>
> [Emphasis added.]

VI. The Grounds of Appeal

[136] Two preliminary issues arise on this appeal:

a) whether Mr. Beaudoin's appeal is moot and, if so, whether it should be dismissed; and,

b) whether this Court should admit the fresh evidence the appellants seek to tender.

[137] In addition to these preliminary issues, there is an additional unstated ground of appeal that relates to the scope of the record properly before this Court. This issue arises because the appellants continue to rely on evidence found by the chambers judge not to form part of the record on judicial review—specifically, the evidence of Drs. IWarren and Kettner.

[138] The appellants (the religious petitioners and Mr. Beaudoin), advance five grounds of appeal. I would restate them as follows:

1. Did the chambers judge err by finding that the religious appellants were not entitled to challenge the G&E orders, but were required instead to seek judicial review of the reconsideration decision?

2. Did the chambers judge err by failing to decide whether the G&E orders, to the extent that they prohibited gatherings for in-person worship, violated s. 15(1) of the *Charter*?

3. Did the chambers judge err by failing to determine whether, as a consequence of the PHO's February 10, 2021 order, there remained in place a vague and unspecified restriction on outdoor protests and, if so, whether those restrictions unjustifiably violated the *Charter*?

4. Did the chambers judge err by failing to apply the s. 1 framework set out in *Oakes*, instead of *Doré*?

5. Was the temporary prohibition on gatherings for in-person religious worship unjustified under *Oakes* or, in the alternative, unreasonable under *Doré*?

VII. Analysis

1. Standard of Review: Preliminary Observations

[139] This Court's task on an appeal from an application for judicial review is to "step into the shoes" of the chambers judge and determine whether they identified the correct standard of review and applied that standard correctly: *Agraira* at paras. 45–47, *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46 at para. 26, leave to appeal to S.C.C. ref'd, 38580 (8 August 2019). On an appeal of a judicial review decision, it is not necessary for the appellate court to identify a specific error on the part of the judge who conducted the judicial review: *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 at para. 48. Further, although the chambers judge's reasoning may be instructive, his decision is not entitled to deference: *Yu v. Richmond (City*), 2021 BCCA 226 at para. 45.

[140] The appeal raises issues reviewable on both the correctness and reasonableness standards.

[141] The parties agree that the correctness standard of review applies to questions of law in respect of which the chambers judge was the decision maker at first instance. Those issues include whether the judge erred: in defining the record on judicial review; by concluding that the appellants were required to judicially review the reconsideration decision; by deciding that he was not required

to address the s. 15(1) *Charter* claim of the religious appellants; and, by applying the framework in *Doré*, rather than *Oakes*, to decide whether the G&E orders were justified under s. 1.

[142] It is also common ground on appeal that judicial review of the PHO's G&E orders attracts a reasonableness standard of review. As noted earlier, the issue in this case is not whether a provision of the decision maker's enabling statute violates the *Charter*—an issue that would attract a correctness standard of review: see *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at para. 57 [*Vavilov*]. Rather, the issue is whether the acknowledged authority of the PHO was exercised in a reasonable way.

[143] As explained in *Vavilov* at para. 16, judicial review of administrative decisions starts with a presumption that reasonableness is the applicable standard of review. Reasonableness review finds its starting point in the principle of judicial restraint. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court: *Vavilov* at para. 13. Review for reasonableness nonetheless remains a robust form of review: *Vavilov* at paras. 12–13.

[144] A reviewing court must strive to understand the decision maker's reasoning process and ask whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at para. 99.

[145] The burden is, of course, on the party challenging the decision to show that it is unreasonable. To be reasonable, a decision must be based on reasoning that is both rational and logical: *Vavilov* at paras. 100, 102.

[146] The decision maker may assess and evaluate the evidence before them. Absent exceptional circumstances, a reviewing court will not interfere with the decision maker's factual findings: *Vavilov* at para. 125. A reasonable decision is one that is justified in light of the facts: *Vavilov* at para. 126.

[147] As the Court noted in *Vavilov*, many administrative decision makers, like the PHO, are entrusted with an extraordinary degree of power over the lives of

ordinary people: at para. 135. I think it is beyond dispute that the PHO's orders—although clearly made in unprecedented, exigent circumstances—had a significant impact on the petitioners, including the religious petitioners, their congregants and the churches to which they belong, by temporarily curtailing their right to manifest deeply held spiritual beliefs, and to do so in a way essential to the observance of their faith. I think it is also beyond dispute that the orders went to the core of the religious petitioners' individual and group identities and affected, for a relatively short time, their ability to meaningfully participate in their chosen community of faith.

[148] In recognition of the significant impact administrative decisions may have, the Court in *Vavilov* noted that the principle of "responsive justification" means that the decision maker must take account of the perspective of the individual (or institution) over whom authority is being exercised: at para. 133. In such cases—and I would include this case among them—administrative decision makers have a "heightened responsibility" to ensure that their reasons demonstrate consideration of the consequences of their decision and satisfaction that those consequences are justified in light of the facts and law: *Vavilov* at paras. 134–135.

[149] While a decision maker's expertise is no longer relevant in determining the standard of review, the specialized knowledge and experience possessed by a decision maker remains a relevant consideration in conducting reasonableness review—one that calls for an understanding of the institutional limitations of the court and a correspondingly respectful measure of judicial deference: *Vavilov* at paras. 31, 75, 93; *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at para. 36 [*Air Canada*].

[150] In the public health context, courts have consistently acknowledged the specialized expertise of public health officials and the need to judicially review decisions made by them in emergent circumstances with a degree of judicial humility. In *Gateway Bible Baptist Church et al. v. Manitoba et al*., 2021 MBQB 219 [*Gateway Bible*], a case broadly analogous to the one at bar, Chief Justice Joyal said this in the context of an *Oakes* analysis:

> [292] In the context of this deadly and unprecedented pandemic, I have determined that this is most certainly a case where a margin of appreciation can be afforded to those making decisions quickly and in real time for the benefit of the public good and safety. I say that while recognizing and underscoring that fundamental freedoms do not and ought

> not to be seen to suddenly disappear in a pandemic and that courts have a specific responsibility to affirm that most obvious of propositions. But just as I recognize that special responsibility of the courts, given the evidence adduced by Manitoba (which I accept as credible and sound), so too must I recognize that the factual underpinnings for managing a pandemic are rooted in mostly scientific and medical matters. Those are matters that fall outside the expertise of courts. Although courts are frequently asked to adjudicate disputes involving aspects of medicine and science, humility and the reliance on credible experts are in such cases, usually required. In other words, where a sufficient evidentiary foundation has been provided in a case like the present, the determination of whether any limits on rights are constitutionally defensible is a determination that should be guided not only by the rigours of the existing legal tests, but as well, by a requisite judicial humility that comes from acknowledging that courts do not have the specialized expertise to casually second guess the decisions of public health officials, which decisions are otherwise supported in the evidence.
>
> [Emphasis added.]

[151] The need for judicial deference, rooted in the expertise of public health officials, has been echoed in subsequent cases. In *Trinity Bible Chapel*, which also attracted an *Oakes* analysis for reasons I will address later, Pomerance J. determined that the situation called not for a “blind or absolute deference” from the courts, “but a thoughtful deference that recognizes the complexity of the problem presented to public officials, and the challenges associated with crafting a solution”: at para. 6(5). I agree.

[152] As in the case at bar, Pomerance J. noted that public health officials in Ontario were faced with an unprecedented public health emergency that would inevitably result in serious illness and the loss of life. Restrictive measures would necessarily impact on social, commercial, and religious activities. The task called for a careful balancing of competing considerations, informed by an evolving body of medical evidence and scientific opinion. She found it difficult to imagine a more compelling and challenging equation. The need to balance conflicting interests and perspectives, centred on a tangible and, in modern times, unprecedented threat to public safety was held to be a textbook recipe for deferential review: at paras. 126–128; see also *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 at paras. 456–459 [*Taylor*]. Again, I agree.

[153] In the case at bar, the chambers judge identified that the PHO’s orders were reviewable on a standard of reasonableness and had to reflect a proportionate balancing of *Charter* values. He recognized that in the areas of

science and medicine, the PHO was entitled to deference. In my view, and for the reasons I will develop, the chambers judge identified and applied the correct standard of review.

2. Issues Relating to the Scope of the Record

[154] As a general rule, in a petition for judicial review the evidence is confined to the record that was before the decision maker when the impugned decision was made: *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at paras.75–79 [*Beedie*]; *Air Canada* at paras. 34–44; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at para. 52 [*Sobeys*]; *Albu v. The University of British Columbia,* 2015 BCCA 41 at paras. 35–36 [*Albu*].

[155] The affidavits of Drs. Warren and Kettner were not before the PHO when she made the G&E orders at issue on appeal. Those affidavits were submitted in support of the petitioners' reconsideration request. As previously noted, the petitioners chose not to judicially review the reconsideration decision made by the PHO. That decision varied the G&E order then in effect by permitting outdoor gatherings for religious worship, subject to certain restrictions.

[156] Against this background, the chambers judge concluded that the affidavits of Drs. Warren and Kettner did not form part of the record on judicial review. I agree with him. Receiving this evidence as part of the record on judicial review would be inconsistent with the limited supervisory jurisdiction of the court. As the chambers judge pointed out, it would also "judicialize" review of the administrative decision by bypassing the PHO and the deference to which she is entitled. It would place the reviewing court in the untenable position of assessing matters afresh on an expanded record as something of an "armchair epidemiologist"—a role it is ill equipped to discharge: *Trinity Bible Chapel* at para. 6(1).

[157] While the appellants do not directly challenge the conclusion of the chambers judge on this point, they nevertheless seek to rely on the affidavit evidence of Drs. Warren and Kettner, referring to it in their factum and in oral argument. In my view, it is not open to the appellants to do this, and it would be improper for this Court to place any reliance on this evidence.

[158] I wish to address one other issue relating to the scope of the record. The appellants say the chambers judge ruled that a transcript of the PHO's February

12, 2021 media briefing did not form part of the record, but then fell into error by relying on the content of that briefing as evidence of the PHO's reasons for temporarily banning in-person gatherings for religious worship.

[159] Respectfully, the petitioners misunderstand the chambers judge's ruling on this point. The reconsideration decision was held not to form part of the record on judicial review. The transcript of the PHO's February 12 media briefing was, however, implicitly found to form part of the record.

[160] I see no error in the chambers judge's approach to this issue. Like Dr. Emerson's affidavit, the February 12 media briefing provided "general background" information on the evidence before the PHO, and the rationale for decisions she made between November 2020 and February 2021. In that briefing, the PHO was asked to explain the basis upon which past decisions had been made to distinguish between the risks associated with transactional and in-person religious settings. The PHO was not offering an *ex post facto* justification for her orders for the first time. Rather, she was reiterating the epidemiological risks unique to in-person religious gatherings. The briefing formed part of the reasons given by the PHO for the orders she made. It was properly considered as part of the "record of the proceeding" under s. 1 of the *JRPA*.

[161] I would add that even if the judge erred in considering the February 12 media briefing transcript, excluding it from the evidence on review would make no difference to the outcome. The rationale of the PHO as reflected in this briefing is evident elsewhere in the record.

3. Mootness and the Appeal of Mr. Beaudoin

[162] The AGBC seeks the dismissal of Mr. Beaudoin's appeal on grounds that it is moot. It relies on the two-stage approach set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353, 1989 CanLII 123 [*Borowski*]. At the first stage, it is necessary to determine whether the required tangible and concrete dispute has disappeared and whether the issues have become academic. If so, the court must determine at the second stage whether it should nevertheless exercise its discretion to hear the case. Criteria relevant to the exercise of this discretion include the presence of an adversarial context, the concern for judicial economy, and the need for the court to be sensitive to its role

as the adjudicative branch in our political framework. Generally speaking, courts refrain from deciding cases that are moot because doing so is an inefficient use of judicial resources, and because it will require the court to engage in unnecessary fact-finding and legal analysis: *British Columbia (Technology, Innovation and Citizens' and Services) v. Columbus Real Estate Inc*., 2018 BCCA 340.

[163] The doctrine of mootness was explained in *Borowski* at 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

[164] At the first stage of the inquiry, the AGBC submits that the substratum of the litigation has dissolved: orders made by the PHO prohibiting outdoor protests have been declared to be of no force and effect, and the Violation Tickets issued to Mr. Beaudoin have been stayed. Further, the AGBC says there are no PHO orders currently in place that prohibit outdoor gatherings for public protest.

[165] At the second stage of the inquiry, the AGBC submits this Court should decline to exercise its discretion to hear the appeal given the absence of an adversarial context and concerns about judicial economy. In addition, the AGBC submits that the adjudicative function of this Court weighs against hearing Mr. Beaudoin's appeal for declaratory relief in circumstances where it is not apparent that the issuance of a declaration would have any practical value: *Independent Contractors and Businesses Association v. British Columbia (Attorney General)*, 2020 BCCA 245 at paras. 27, 35–36.

[166] Mr. Beaudoin takes issue with the proposition that the prohibition on outdoor protests is no longer operative. He submits that while the chambers judge declared the restrictions on outdoor protests reflected in G&E orders made by the PHO between November 19, 2020 and February 5, 2021 to be of no force and

effect, he did not address the impact of the February 10, 2021 order itself. It will be recalled that the PHO's February 10 order clarified that outdoor protests were not prohibited, subject to her "expectation" that persons organizing or attending such an assembly would take the steps and put in place the measures recommended in guidelines posted on the PHO's website to limit the risk of transmission of COVID-19.

[167] Mr. Beaudoin submits that the effect of the February 10, 2021 order is to continue to regulate outdoor protests in accordance with guidelines fixed by the PHO.

[168] For the reasons that follow, I would dismiss Mr. Beaudoin's appeal as moot.

[169] First, I do not regard the PHO's statement that individuals organizing or participating in outdoor protests after February 10, 2021 were expected to observe protective measures to be the equivalent of an order. In her media briefings explaining why specific orders were made, the PHO distinguished between her "recommendations" and "expectations" on the one hand, and her orders, on the other. For example, in the PHO's oral order made November 19, 2020, she made clear that while the order did not prohibit travel within the province, it was nevertheless her "expectation" that residents and visitors to the province would limit non-essential travel as much as possible. Against this background, the expectations expressed by the PHO on February 10, 2021, cannot reasonably be regarded as an order, the breach of which would attract sanctions. Rather, it was a plea for the exercise of good judgment and common sense. For these reasons, I am satisfied that the effect of the February 10, 2021 order was to lift the ban on public protests.

[170] It follows that neither Mr. Beaudoin nor anyone else is prohibited from engaging in outdoor protests arising out of pandemic-related public health orders. Additionally, the charges against Mr. Beaudoin have been stayed. He is no longer in jeopardy as a result of the Violation Tickets issued to him. He faces no collateral consequences as a result of organizing the protests.

[171] In response to the AGBC's motion to dismiss the appeal as moot, the appellants tendered the affidavit of Nadine Podmoroff sworn March 24, 2022. Ms. Podmoroff deposes that she was issued a Violation Ticket for participating in a

"Freedom Rally" in Nelson on April 3, 2021. I note, however, that proceedings on that ticket have also been stayed by the Crown. In short, there is no evidence before us that anyone is in jeopardy as a consequence of participating in a public protest in violation of orders made by the PHO that have now been set aside.

[172] In these circumstances, I am of the view that the issue has become academic as the tangible underpinnings of the controversy have disappeared.

[173] Turning to the second stage of the *Borowski* framework, I would decline to hear Mr. Beaudoin's appeal, largely for the reasons set out in the arguments advanced by the AGBC. Additionally, the nature and complexity of the pandemic continues to change and, in my view, it would be unwise to make broad constitutional pronouncements in a factual vacuum and in the face of an uncertain future.

[174] Finally, I note that the issue pressed by Mr. Beaudoin on appeal—that the ban on public protests continued even after the February 10, 2021 order—was first articulated in oral argument before the chambers judge. The record before us does not include the guidelines the PHO said she expected protesters to follow. The record is deficient because the AGBC conceded the infringement of Mr. Beaudoin's constitutional rights. In light of the concession, neither party considered it to be necessary to adduce the guidelines in argument of the petition. Had I concluded that the PHO's statement of expectation could reasonably be regarded as an extant order, this deficiency in the record would need to be addressed. In light of the conclusion I have reached on that issue, I need not address the implications of this deficiency.

[175] My conclusion on this issue is dispositive of the third ground of appeal advanced by Mr. Beaudoin.

4. The Fresh Evidence Application of the Religious Petitioners

[176] The religious appellants apply to adduce on appeal both new evidence (evidence that came into existence after the petition was argued) and fresh evidence (evidence that was available when the petition was argued, but not put before the chambers judge). The evidence consists of two affidavits sworn March 7, 2022, by Pastor Garry Vanderveen and Anthony Roy.

[177] The religious appellants require an extension of time as the application was not served and filed at least 30 days before the hearing of the appeal as required by what was then Rule 31 of the *Court of Appeal Rules,* B.C. Reg. 297/2001 (now Rule 59 of the *Court of Appeal Rules*, B.C. Reg. 120/2022). The AGBC opposes both the application to extend time and the admission of this evidence on appeal.

[178] In response to the fresh evidence application, the AGBC expressed reservations about the propriety of admitting fresh evidence in judicial review proceedings, but submitted that the evidence would not, in any event, meet the well-known test for the admission of fresh evidence set out in *Palmer v. The Queen*, [1980] 1 S.C.R 759 at 775, 1979 CanLII 8 [*Palmer*].

[179] As noted earlier, on judicial review, the reviewing court does not, as a rule, admit evidence that is not part of the record. Doing so would usurp the role of the decision maker and "judicialize" the hearing by sanctioning what amounts to a *de novo* hearing rather than a review based on the record that was before the decision maker.

[180] In *Sobeys* at para. 52, Newbury J.A. summarized the point this way: "The court is reviewing, and must show some deference for the decision already taken, rather than decide the matter anew on different evidence."

[181] The issue was revisited in *Beedie*. There, Newbury J.A. reiterated the general rule that fresh or extrinsic evidence not considered by the decision maker should not be admitted on judicial review: at para. 76. Subject to certain exceptions well-recognized in the jurisprudence, attempting to introduce fresh evidence in respect of the merits of the challenged decision on an application for judicial review misapprehends the nature of judicial review.

[182] As this Court steps into the shoes of the chambers judge and determines whether the standard of review was identified and applied correctly, I see no reason why the same principled constraint on the admission of fresh evidence should not operate on appeal. Indeed, on occasion, this Court has refused to admit fresh evidence on appeal by applying basic judicial review principles, quite apart from consideration of the *Palmer* test: see *Zakreski v. British Columbia Public School Employers' Association*, 2018 BCCA 43 at para. 23.

[183] I do not propose saying more about the way in which the *Palmer* test for the admission of fresh evidence fits with the principles of judicial review. The point was not developed in argument. I understand both parties to have invited us to apply the *Palmer* test to the admission of this evidence and I am content to do so for the purposes of this case. Neither the principles that govern judicial review nor the *Palmer* test support the admission of this evidence.

[184] The Court in *Palmer* at 775 identified four criteria to be applied in determining whether to admit fresh evidence on appeal:

> i. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial [or on the petition] provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
>
> ii. the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial [or petition];
>
> iii. the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> iv. it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial [or on the petition], be expected to have affected the result.

[185] The overarching question is whether admitting the fresh evidence is in the interests of justice. The *Palmer* test applies whether a party seeks to admit new or fresh evidence: *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 3 [*Barendregt*].

[186] Pastor Vanderveen is the spiritual leader of Christ Covenant Church in Langley, British Columbia. Neither Pastor Vanderveen nor the church he represents are parties to this proceeding.

[187] Pastor Vanderveen deposes that, in letters dated December 7, 2020 and January 7, 2021, Christ Covenant Church asked the PHO to reconsider her order banning in-person gatherings for religious worship. Pastor Vanderveen appends to his affidavit an email response to the reconsideration request he received from Dr. Emerson on May 5, 2021. It reads, in material part, as follows:

> As you might imagine Dr. Henry has received a large volume of requests for reconsideration of Provincial Health Officer Orders. The time and expertise required to consider them has become beyond her capacity to

> manage and would require resources which are better directed at assessing and responding to threats to the health of the public as a whole.
>
> Therefore, in the interest of protecting the public health, Dr. Henry is not accepting requests to reconsider Orders until the level of transmission of infection, the incidents of serious disease, the number of hospitalizations, admissions to intensive care units and deaths, and the strain on the public health and healthcare systems, are significantly reduced.
>
> To this end Dr. Henry has issued an order varying existing orders to suspend reconsiderations subject to an exception for a request which establishes an infringement of a right or freedom protected by the *Charter of Rights and Freedoms*; except a request to reconsider the prohibition of indoor worship services, since the prohibition, and applications to vary it, have been fully considered and are now before the courts.
>
> [Emphasis added.]

[188] The appellants submit that a potentially determinative issue on appeal is whether, having sought reconsideration and obtained a conditional variance of the order, they were confined to judicially reviewing the reconsideration decision. They submit that the PHO's inability to reconsider orders made prior to the hearing of the petition "goes directly to the issue of whether [s. 43 of the *PHA*] was in fact an adequate alternative remedy." They submit that the probative value of the fresh evidence is that it "could reasonably be expected to have the effect of the lower court's determination that [the] appellants were precluded from seeking judicial review of the [pre-reconsideration G&E] orders prohibiting in person worship services." Respectfully, these are curious submissions for the appellants to make.

[189] At the time the petition was argued, it was known that the PHO was not responding (or not responding in a timely way) to reconsideration requests made by or on behalf of non-party church groups affected by the temporary ban on in-person worship. The record before the chambers judge included affidavits from other religious leaders and counsel acting on behalf of church groups attesting to the fact that at least some reconsideration requests had gone unanswered. Indeed, the chambers judge had before him an affidavit sworn by Pastor Vanderveen on February 8, 2021, which attached the December 7, 2020 letter and a proposal outlining how in-person religious services could safely be conducted. Pastor Vanderveen deposed in his February 8 affidavit that the reconsideration request made on behalf of Christ Covenant Church in December 2020 had not been answered.

[190] The only new evidence sought to be adduced by the appellants is that on April 21, 2021—more than a month after the petition was argued and decided—the PHO formally suspended the processing of reconsideration requests because she was overwhelmed by the number of them and no longer capable of managing such requests and attending to her other duties.

[191] I do not see how the PHO's decision in April 2021 to suspend the processing of reconsideration requests is relevant to any issue, let alone a decisive issue, in the petition. Further, I do not see how this evidence could be expected to have affected the result. I say this for a number of reasons.

[192] The reconsideration request of the appellants was dealt with in a timely way and on its merits. If the appellants are saying that their ability to meaningfully engage the reconsideration process contemplated by the *PHA* was compromised and did not present them with an adequate alternative remedy, that submission is not supported by what actually occurred. Further, the PHO's response to reconsideration requests made by non-parties are irrelevant. Finally, the new evidence does not in any way inform the legal question of whether the appellants were obliged to seek judicial review of the reconsideration decision, as opposed to the G&E orders that preceded it. For these reasons, I would not admit on appeal the affidavit of Pastor Vanderveen.

[193] I have come to the same conclusion regarding the evidence of Mr. Roy, but for different reasons.

[194] The affidavit of Mr. Roy attaches the following data he received from the BCCDC in response to requests he made pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165:

1. COVID-19 case numbers by Health Authority and exposure setting from September 1, 2020 to March 31, 2021. The BCCDC data indicates that, with respect to religious institutions, 12 COVID-19 related events were reported with an associated range of 12–60 cases. With respect to fitness studios and gyms, 19 events were reported with an associated range of 49–225 cases. With respect to restaurants, bars and lounges, 173 events were reported with an associated range of 173–865 cases. Mr. Roy received this information on July 21, 2021;

2. COVID-19 case numbers by Health Authority and exposure setting from May 1, 2020 to October 31, 2021. The BCCDC data indicates that, with

> respect to religious institutions, 158 cases were reported in the above-noted period. With respect to fitness studios and gyms, 268 cases were reported. With respect to restaurants, bars and lounges, 353 cases were reported. Mr. Roy received this information on January 31, 2022.

[195] Letters accompanying the BCCDC data provided to Mr. Roy include this caveat: “The enclosed records and data may be challenging to interpret due to the limited exposure setting data held at the BC Centre for Disease Control, and should therefore be interpreted carefully.”

[196] The appellants argue that this data is relevant to a potentially decisive question on the petition—whether the orders in issue are a reasonable and proportionate response to the risk of transmission associated with in-person religious services. More specifically, the appellants seek to rely on this data to support their argument that settings that do not enjoy constitutional protection, but were permitted to continue providing in-person service, were a more significant source of COVID-19 transmission than religious settings.

[197] In response to the affidavit of Mr. Roy, the AGBC tendered a further affidavit from Dr. Emerson. Dr. Emerson deposes that, in many cases, information respecting case exposure by setting was not reported to the BCCDC. For this reason, when making orders under the *PHA*, the PHO relied on much more detailed information than that which was reported to the BCCDC and recorded on its COVID-19 Case Report Form—the source of the fresh evidence summarized by Mr. Roy. The many different sources of information relied on by the PHO are summarized herein, at paras. 44–49.

[198] Dr. Emerson deposes that the fresh evidence set out in Mr. Roy’s affidavit represents information reported to the BCCDC that served as little more than the “jumping off point” for further inquiries and more specific setting-based data collection. He deposes that more specific case exposure data was held by the Health Authorities, and that it was reported to the PHO in her frequent (sometimes daily) conference calls with MHOs from each Health Authority. Information received by the PHO from each of the Health Authorities included specific place names, locations, and dates associated with each COVID-19 case, cluster, or outbreak.

[199] Further, Dr. Emerson deposes that the case count associated with particular settings, as summarized in the affidavit of Mr. Roy, is not helpful in determining the risk of virus transmission in that setting as compared to others. He explains:

> This is because that data is numerator data (i.e., raw numbers), not rates. If one wishes to compare risk by setting, then rates would need to be calculated to compare risk between settings, which means determining an appropriate denominator. The numerator is the total number of cases associated with the setting. The denominator would be determined by taking into account such things as the number of people that are in a setting, the time they spend in the setting, the demographic make up of the people in that setting (in particular, age), and the nature of the interactions between the people in the setting.
>
> To properly assess risk, one would calculate the rate by determining the numerator as well as an appropriate denominator, so that one could calculate a rate of case occurrence by setting, thereby coming up with a potential comparison of risk by setting. Even then, this calculation would serve only as a single source of information used by Dr. Henry and public health officials to make a decision about what restrictions to impose in different settings.

[200] It is not clear to me that all of Mr. Roy's evidence is "fresh" in the sense that it was not before the PHO when she made the impugned orders. It appears to me incontrovertible that at least some of the raw data reflected in Mr. Roy's affidavit was before the PHO as it was included in the BCCDC's Case Report Forms sent to her before and at the time the impugned orders were made.

[201] It is difficult to determine from the way in which the fresh evidence is presented what portion of the data summarized by Mr. Roy was before the PHO at the relevant times. The G&E orders at issue on appeal were made by the PHO between November 20, 2020 and February 2021. In contrast, the data relied on by Mr. Roy covers periods from September 1, 2020 to March 31, 2021, and from May 1, 2020 to October 31, 2021. Further, the appellants do not explain how these asynchronous datasets are relevant to the resolution of this appeal. In addition, data which post-dates the orders under review does not form part of the record on judicial review. It is irrelevant to the question of whether the PHO's orders under appeal were reasonable.

[202] The problems associated with the application to adduce this evidence on appeal do not end here.

[203] The evidence presented by Mr. Roy forms a relatively small part of the information the PHO relied on in making the orders she did. I accept the uncontested evidence of Dr. Emerson that data contained in the BCCDC's Case Report Forms was only one source of the evidence available to the PHO. Even then, it was incomplete and unreliable.

[204] Standing alone, the raw data contained in Mr. Roy's affidavit tells us nothing. The data does not reflect case counts by setting during the relevant period. It does not account for the fact that lower case counts associated with religious institutions after November 2020 may be explained by the fact that religious gatherings were prohibited after that time. Further, as Dr. Emerson explains, it does not purport to address an issue that lies at the core of the appellant's position—that the PHO unreasonably or unjustifiably banned in-person gatherings for religious worship when the risk of transmission was higher in other settings that were permitted to continue providing in-person services, even though the activities taking place in those settings do not enjoy constitutional protection. This is because the raw data Mr. Roy summarizes says nothing about the assessment of comparative risks as between different settings.

[205] I think it apparent that Mr. Roy is unqualified to give any evidence about how to determine comparative risks between settings. That determination ultimately turns on weighing a variety of factors, including the nature of the activities taking place in the setting, the time people can reasonably be expected to remain in that setting, and the demographic makeup of the gathering group.

[206] In short, the evidence of Mr. Roy is irrelevant to any issue on this appeal and could not reasonably be expected to have affected the result.

[207] In addition, it appears to me that the evidence Mr. Roy obtained could have been obtained by the appellants through the exercise of due diligence. It was open to the appellants to make a timely freedom of information request or seek an order under s. 17 of the *JRPA* directing that the BCCDC Case Report Forms referred to in Mr. Roy's affidavit be filed in court. The appellants did neither of these things. As the Court noted in *Barendregt* at paras. 42–43, while the due diligence criterion is not a rigid one, the unexplained failure to act with due diligence will generally foreclose the admission of fresh evidence.

[208] Even more fundamentally, the appellants seek to introduce this evidence on appeal to undermine one of the core factual findings underlying the PHO's orders concerning religious gatherings—that the activities associated with in-person worship in the appellant churches enhanced the risk of virus transmission, including to individuals more likely to experience adverse outcomes.

[209] As explained in *Vavilov* at para. 125, decision makers will often be obliged to assess and evaluate the evidence before them and that, "…absent exceptional circumstances, a reviewing court will not interfere with its factual findings." Put bluntly, this Court is neither authorized in this context, nor institutionally competent on the record before us, to engage in the sort of fact-finding process the appellants have impliedly invited us to embark on.

[210] In all of these circumstances, I conclude that it is not in the interests of justice to admit Mr. Roy's evidence on appeal. While I would grant the appellants an extension of time to bring the application to adduce fresh evidence, I would dismiss the application.

5. Did the Chambers Judge Err in Concluding that the Religious Petitioners Were Required to Judicially Review the Reconsideration Decision?

[211] The principles of law in this area are well-established. They were summarized by Groberman J.A. in *Yellow Cab*:

> [39] There is a general principle that a party must exhaust statutory administrative review procedures before bringing a judicial review application: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; [*Harelkin v. University of Regina*, [1979] 2 S.C.R. 561]. For that reason, where an alleged error comes within a tribunal's statutory power of reconsideration, a court may refuse to entertain judicial review if the party has not made an attempt to take advantage of the reconsideration provision. Of course, where the power of reconsideration is not wide enough to encompass the alleged error, reconsideration cannot be considered an adequate alternative remedy to judicial review, and the existence of the limited power of reconsideration will not be an impediment to judicial review.
>
> [40] Where a party has taken advantage of a tribunal's reconsideration power, and the tribunal has undertaken the reconsideration, it is the reconsideration decision that represents the final decision of the tribunal. In such a situation, it is only the reconsideration decision that may be judicially reviewed, since it is the final decision of the tribunal.
>
> [Emphasis added.]

[212] The propositions set out in *Yellow Cab* have been reiterated and applied by this Court on countless occasions: see, for example, *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 at para. 119. I do not consider them to be at issue on this appeal.

[213] The thrust of the appellants' submission is that the reconsideration process available under the *PHA* afforded them no effective alternative remedy. In these circumstances, the appellants say they were entitled to judicially review the G&E orders made between November 2020 and February 2021 that prohibited in-person gatherings for religious worship. They say the chambers judge erred in concluding otherwise.

[214] I will say at the outset that there is an artificial quality to the appellants' submission on this point. While the chambers judge found they were obliged to judicially review the reconsideration decision, he nevertheless engaged in a robust review of the G&E orders that preceded it. In short, the appellants were afforded the review they sought despite failing to amend their petition to review the reconsideration decision. In my view, the decision of the chambers judge to entertain judicial review of the pre-reconsideration G&E orders in these circumstances is a complete answer to this ground of appeal.

[215] In light of the review actually undertaken by the chambers judge, I will only engage briefly with the appellants' submission that the reconsideration provisions of the *PHA* did not afford them an adequate alternative to judicial review.

[216] First, the appellants submit that the PHO failed to respond to their requests for reconsideration until the eve of the trial. I do not accept the appellants' position on this point. While some of the appellants requested "rescission" of the PHO's orders banning in-person worship, these demands did not meet the requirements of s. 43 of the *PHA* and cannot be regarded as reconsideration requests.

[217] In December 2020, the PHO invited Pastors Smith and Koopman to seek reconsideration of her orders pursuant to s. 43. The invitation was not taken up. As noted earlier, the invitation was expressly rejected by Pastor Koopman. The appellants did not formally request reconsideration until January 29, 2021. Given the volume of material submitted in support of the reconsideration request, the PHO dealt with the matter in a timely way. In short, the appellants availed

themselves of a reconsideration process which was dealt with promptly and on its merits. The record simply does not support the appellants' contention that there was a failure on the part of the PHO to address their reconsideration request. The reconsideration request resulted in a conditional variance of the relevant provisions of the G&E order. On established authority, the religious appellants were obliged to judicially review this order.

[218] Second, the appellants characterize the AGBC's position that the reconsideration decision was the proper subject of judicial review, as a "transparent machination" co-ordinated by counsel acting on the PHO's behalf to achieve a strategic advantage in the litigation. In my view, there is no merit to this submission. The appellants advance this argument without alleging any breach of procedural fairness. Further, the timing of the reconsideration request was entirely in their hands. The legal implications of the resolution of the reconsideration request on the eve of the hearing of the petition have nothing to do with the conduct of the PHO or her counsel.

[219] Finally, the appellants submitted (for the first time in oral argument) that they were in a "Catch-22" situation. The argument, which I understand to be advanced in the alternative, goes like this: they were obliged to make the reconsideration request to exhaust their statutory administrative remedies before bringing the application for judicial review. Having done so, and following *Yellow Cab*, the focus of the judicial review had to be the reconsideration decision. By being forced to challenge only the reconsideration decision, the appellants forfeited their opportunity to challenge the earlier G&E orders they are alleged to have breached. As mentioned earlier, the appellant churches say they have been issued 14 tickets totaling over $32,000 for alleged contraventions of the pre-reconsideration G&E orders made by the PHO. We were advised on the hearing of the appeal that these charges remain outstanding.

[220] In essence, the appellants say the reconsideration process contemplated under the *PHA* did not provide an adequate alternative remedy because engaging it would foreclose their ability to challenge, on judicial review, the orders under which they were issued Violation Tickets. Put differently, the appellants' alternative concerns do not directly raise the adequacy of the remedy available to them on reconsideration, but the consequences of engaging the reconsideration process.

[221] I do not propose engaging with this issue in any detail for the following reasons. First, it was advanced for the first time in oral argument and not fully developed. Second, the parties did not propose an analytical framework through which this novel argument should be addressed, and significant authorities, including *Strickland v. Canada (Attorney General)*, 2015 SCC 37, were not even mentioned by counsel. Third, engaging the reconsideration process does not deprive the appellants of an opportunity to challenge the Violation Tickets. They can do so if and when those tickets are prosecuted. Finally, in light of the chambers judge's conclusion that the pre-reconsideration G&E orders reflect a reasonable and proportionate balancing of the *Charter* protections at play with the objectives underlying the orders—a conclusion I endorse—engaging with this issue would make no difference to the determination of this appeal.

[222] In summary, it is my view that the chambers judge did not err in his understanding of *Yellow Cab*. Nevertheless, the appellants were permitted to challenge the pre-reconsideration G&E orders on constitutional grounds. Although they were unsuccessful in that challenge, they have no cause for complaint that the scope of the review was unfairly constrained by application of *Yellow Cab*.

[223] The AGBC acknowledged in its factum and in oral argument that because the religious appellants were obliged to judicially review the reconsideration order, not the G&E orders that preceded it, the chambers judge could properly have declined to consider whether the pre-reconsideration G&E orders unreasonably or unjustifiably limited their constitutional rights.

[224] The constitutional issues were, however, fully argued and decided in the court below. These issues were also fully argued before us. On the hearing of the appeal, the Court questioned the parties on the need to address the constitutionality of the pre-reconsideration G&E orders if a conclusion was reached that the religious appellants were obliged to judicially review the reconsideration order. Prior to the issue being raised by the Court in oral argument, the parties had prepared the appeal in anticipation of the constitutional issues being answered regardless of whether the pre-reconsideration G&E orders were properly before the chambers judge on judicial review.

[225] Against this background, a preliminary issue arises as to whether this Court should embark on an analysis of the constitutionality of the pre-reconsideration

G&E orders. I recognize that it is generally inadvisable for courts to make unnecessary pronouncements on constitutional issues: *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paras. 6, 9, 1995 CanLII 86. I acknowledge, however, that the record before us is sufficient to permit the resolution of these issues. Further, I recognize that there is a public interest in the resolution of the constitutional questions that arise in this case.

[226] In the unique circumstances of this case, including the way in which this case was presented, I have determined to address the constitutional grounds of appeal and related applications on the same footing as the chambers judge. Doing so leads me to the same conclusion—that even if the appellants were entitled to judicially review the pre-reconsideration orders on constitutional grounds, the challenge could not succeed. It is to those issues I now turn.

6. Did the Chambers Judge Err by Failing to Decide Whether the G&E Orders Violated s. 15(1) of the *Charter*?

[227] The chambers judge recognized that to establish a *prima facie* violation of s. 15 of the *Charter*, a claimant must demonstrate that the impugned law or state action on its face or in its impact creates a distinction based on enumerated or analogous grounds, and imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 27.

[228] The chambers judge concluded there was no evidence that the G&E orders disadvantaged a group of people based on their religious beliefs. He said, "…[t]he same activities are allowed and restricted for secular and religious people, and whether in a secular or religious setting … religious schools are as open as secular ones … [and] non-religious people have no more ability to gather than religious ones.": at para. 191. He also noted that the orders were not an absolute prohibition on in-person religious gatherings, as drive-in services, personal prayer or reflection, and baptisms, weddings, and funerals with up to 10 people in attendance were permitted: at para. 192.

[229] The chambers judge declined, however, to engage in a more complete analysis of the alleged s. 15 infringement. He said this:

> [197] As with their s. 7 *Charter* submissions [not pursued by the religious appellants on appeal] the religious petitioners addressed their claim pursuant to s. 15 of the *Charter* in only a summary way. They focused their submissions on their s. 2 *Charter* rights. Given the concessions of the respondents and my findings with respect to the *Charter* rights in s. 2, I find that it is unnecessary to expand the jurisprudence relating to s. 15 of the *Charter*, and will make no finding with respect to s. 15.

[230] The appellant takes issue, among other things, with the brief analysis of the chambers judge, arguing that in-person worship services were not prohibited as a result of the particular risks they posed, but *because they were religious*. Further, the appellant submits that the ss. 2(a) and 15(1) claims are analytically distinct—the PHO's orders contravene s. 2(a) because they unjustifiably *burden* religious practice and, at the same time, contravene s. 15(1) because they *allocate* the burden of public health measures in a discriminatory fashion. Accordingly, the religious appellants submit it was incumbent on the chambers judge to resolve the s. 15(1) challenge.

[231] I will deal first with the appellants' contention that the chambers judge erred by not resolving the s. 15 claim.

[232] I note at the outset that the position advanced on appeal appears to be at odds with the position taken by the religious appellants in the court below. There, the appellants acknowledged that, "s. 15 — isn't the strongest bow in our quiver here", and said to the chambers judge, "you need not decide this case on s. 15".

[233] In any event, I am inclined to the view that the chambers judge, having found the G&E orders to infringe ss. 2(a), (b), (c) and (d) of the *Charter*, was not required to consider whether the orders also infringed s. 15: see *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 93 (where the Court found it unnecessary to conduct a s. 15 analysis having concluded that the prohibition on assisted suicide violated s. 7); *Devine v. Québec (Attorney General)*, [1988] 2 S.C.R. 790 at 819–820, 1988 CanLII 20 [*Devine*] (where the Court declined to conduct a s. 15 analysis after determining that the provision in issue violated s. 2(b)); and *TWU* at para. 77 (where the Court declined to embark on an analysis of ss. 2(b), 2 (d) and 15 where the factual matrix underpinning the *Charter* claim was, as it is here, largely indistinguishable, and the religious freedom claim was sufficient to account for the expressive, associational and equality rights of TWU's community members in the context of a *Doré* analysis).

[234] In the case at bar, I can identify no analytical route that could conceivably lead to a different application of the proportionality analysis if, in addition to the s. 2 breaches, the orders were also found to have violated s. 15: *Devine* at 820.

[235] ARPA, in a submission endorsed by the religious appellants, submits that compound *Charter* violations should be weighed cumulatively in a s. 1 analysis. They submit that failing to do so obscures consideration of the depth of the impact on human freedom that may arise from unconstitutional state action: Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms", (2019) 91 S.C.L.R. (2d) 107 at paras. 34–35; see also Jamie Cameron, "Big M's Forgotten Legacy of Freedom", (2020) 98 S.C.L.R. (2d) 15 at paras. 41–42; André Schutten, "Recovering Community: Addressing Judicial Blind Spots on Freedom of Association" (2020) 98 S.C.L.R. (2d) 399 at paras. 26–28.

[236] In addition to scholarly support, ARPA points to the need, in a criminal law context, to consider the cumulative effect of multiple *Charter* breaches in determining whether the admission of evidence obtained in a manner that infringed the *Charter* would bring the administration of justice into disrepute: see, for example, *R. v. Lauriente*, 2010 BCCA 72 at para. 27 [*Lauriente*].

[237] In the criminal context, a pattern of breaches demonstrating disregard for an accused's *Charter* rights elevates the seriousness of the breach and tends to pull the analysis in favour of exclusion of the unconstitutionally obtained evidence. This approach was developed in the context of the test set out in s. 24(2) which is, of course, not applicable here. In addition, it is premised on a series of distinct non-*Charter* compliant acts or omissions. Here, the breach of interrelated constitutional guarantees flowed from a single act—imposition of the G&E orders. For this reason, Pomerance J. rejected ARPA's argument in *Trinity Bible Chapel*, concluding (at para. 117) that the gravity of the infringement "…should not be inflated by an artificial tally of provisions".

[238] I, too, would not accede to this argument. Quite apart from the contextual factors that distinguish a *Lauriente* analysis from the circumstances of the case at bar, I consider ARPA's argument—that a "cumulative breach" analysis must inform the s. 1 inquiry in every case—to be foreclosed by governing jurisprudence, including *Carter* and *Devine*. The point was underscored in *TWU*. There, the Court

determined that it was unnecessary to resolve overlapping claims to *Charter* protections before embarking on a *Doré* proportionality analysis:

> (2) Overlapping *Charter* Protections
>
> [76] Three other *Charter* protections are potentially implicated in this case, namely free expression (s. 2(*b*)); free association (s. 2(*d*)); and equality (s. 15).
>
> [77] The factual matrix underpinning a *Charter* claim in respect of any of these protections is largely indistinguishable. Further, the parties themselves have almost exclusively framed the dispute as centring on religious freedom. In our view, the religious freedom claim is sufficient to account for the expressive, associational, and equality rights of TWU's community members in the analysis.
>
> [78] Put differently, whether the *Charter* protections of prospective students of TWU's proposed law school are articulated in terms of their freedom to engage in the religious practice of studying law in a learning environment that is infused with the community's religious beliefs, their freedom to express and associate in a community infused with those beliefs, or their protection from discrimination based on the enumerated ground of religion, such limitations were, as we explain next, proportionately balanced against the LSBC's critical public interest mandate.

[239] In my view, *TWU* supports the decision of the chambers judge not to embark on an unnecessary s. 15 analysis. While I appreciate that Chief Justice Joyal came to a different result in analogous circumstances in *Gateway Bible* (at paras. 217–230), I would respectfully decline to follow *Gateway Bible* on this point. I would, however, leave open the possibility that a case could arise in which the finding of a s. 15 breach could add value to the analysis. In my view, this is not one of them.

[240] Even if it were necessary to undertake a s. 15 analysis, I would conclude that the religious appellants failed to demonstrate that the G&E orders violated their equality rights.

[241] There is absolutely no basis in the record for the religious appellants' assertion that in-person worship services were prohibited, not because of the risks they posed, but because they were religious gatherings. Rather, the evidence is clear that they were prohibited because of the heightened risk of transmission of the disease in religious settings, given the intimate nature of the activities known to take place during in-person religious worship.

[242] I agree with the chambers judge that the G&E orders, which were broadly drawn and captured all manner of gatherings, did not, on their face or in their impact, create a distinction based on religious grounds.

[243] Further, the G&E orders did not create any distinction based on the religious or non-religious nature of the setting in question. Any distinction between settings permitted to remain open and those required to close was based on epidemiological data and the PHO's assessment—supported by provincial, national and international data and experience—that the level of risk of viral transmission was unacceptably high in certain types of settings or gatherings involving certain types of activities. The risks associated with retail and other permitted activities—typically involving more transient contact between individuals of a transactional nature—were determined to be different than the risks associated with the activities that form an essential component of in-person religious worship and the celebration of faith.

[244] The restrictions on gatherings also applied equally to religious and secular activities of the same kind. A secular choir was no more able to meet in person than a church choir.

[245] The appellants say their position, that the orders created a distinction based on religion, is strengthened by the fact that support groups were permitted to meet while religious gatherings—critical to the spiritual and psychological support of the faithful—were prohibited. I do not accept, for these purposes, the analogy between support groups and religious congregations. It is necessary to consider the different activities that take place in these two types of gatherings: notably, support groups do not typically involve singing or chanting. Moreover, both religious and non-religious support groups were permitted to meet under the impugned G&E orders.

[246] Even assuming that the religious appellants could show that the G&E orders created a distinction on the enumerated ground of religion, the distinction does not arise from any demeaning stereotype, but from the implementation of a neutral and rationally defensible policy choice: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 108 [*Hutterian Brethren*]. I would, in this respect, adopt the analysis of Chief Justice Joyal in *Gateway Bible* at paras. 270–276.

[247] For the foregoing reasons, I would not give effect to the appellants' argument that the chambers judge was obliged to consider their s. 15 claim. Even if he was, I am not persuaded that the G&E orders violated the appellant's equality rights.

7. Did the Chambers Judge Err by Failing to Apply the s. 1 Framework Set Out in *Oakes*, Instead of *Doré*?

[248] The religious appellants argue, as they did below, that the G&E orders are, in substance, "laws of general application" to which the framework set out in *Oakes* should have been applied. They argue that it was incumbent on the respondent to establish that the limitations imposed by the orders were in pursuit of a pressing and substantial objective, and that the means chosen to achieve the objective were reasonable and demonstrably justified.

[249] On the second prong of the *Oakes* test, the appellants submit that the measures adopted to achieve the objective of protecting the public from transmission of a potentially deadly virus were arbitrary and unfair and, thus, not rationally connected to the attainment of the objective. In addition, the appellants submit that the measures reflected in the orders did not impair as little as reasonably possible the freedoms in question. Finally, the appellants submit that the required proportionality between the effects of the measures responsible for limiting their religious freedom and the objectives underlying those measures has not been shown to be present in this case.

[250] The respondent submits that the orders cannot be characterized as "laws of general application". Rather, they are the product of discretionary administrative decisions made by the PHO under the *PHA* that engaged *Charter*-protected freedoms. As such, the chambers judge was correct in concluding that the *Doré* framework applied. The issue for him to decide was whether the orders made by the PHO were reasonable because they reflect a proportionate balancing of the *Charter* protections in play with the PHO's statutory mandate to adopt protective measures in the face of an unprecedented and significant risk to public health.

[251] The respondent acknowledges that decisions across the country addressing the justificatory framework to be applied in this context are not easily reconciled.

[252] In *Taylor* (a constitutional challenge to COVID-related travel restrictions made by the Newfoundland and Labrador's Chief Medical Officer of Health based on ss. 6 [mobility)] and 7 [liberty] of the *Charter*), the Court applied *Oakes*, apparently without considering whether the framework in *Doré* was applicable.

[253] In *Gateway Bible*, (a constitutional challenge to COVID-related restrictions on public and private gatherings, including in-person worship imposed by Manitoba's Chief Public Health Officer) the Court acceded to the joint position of the parties that *Oakes* applied because the orders were akin to legislative instruments of general application, rather than an administrative decision affecting only particular individuals. Notably, under s. 67(3) of Manitoba's *The Public Health* Act, C.C.S.M. c. P210, the Chief Public Health Officer could not issue an order prohibiting public gatherings without first obtaining the Minister's approval. No similar provision exists in the *PHA*. Despite coming to this conclusion, the Court acknowledged (at para. 36) that the issue was not entirely clear and that it remained a reasonable argument that the public health orders could properly be characterized as an administrative decision of a delegated authority reviewable on a standard of reasonableness set out in *Doré.* The Court also concluded (at para. 37) that, "…in the unique…circumstances of this case, little turns on the distinction between the *Doré* proportionality analysis and a formal application of the *Oakes* test under s. 1."

[254] Finally, in *Trinity Bible Chapel*, (a constitutional challenge to COVID-related restrictions on religious gatherings in Ontario) the Court applied *Oakes* on the basis that the Ontario orders were issued by the government, not medical experts: at paras. 123–125.

[255] In my view, the orders made in the case at bar cannot be regarded as laws of general application. Rather, they are appropriately characterized as administrative decisions made through a delegation of discretionary decision-making authority under the *PHA*.

[256] Importantly, the appellants do not challenge on constitutional grounds any provision of the *PHA*, nor do they argue that the PHO had no legislative authority to make the orders in question.

[257] In the circumstances, I am of the view that the judge was correct in identifying *Doré* as the framework under which the PHO's orders should be reviewed. In the result, the reasonableness of the PHO's orders fell to be determined on whether they reflected a proportionate balance between the objectives of the *PHA* and the appellants' *Charter*-protected freedom of religion.

[258] The framework developed in *Doré*, and affirmed in *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12, was summarized in *TWU*:

> [79] In *Doré* and *Loyola*, this Court held that where an administrative decision engages a *Charter* protection, the reviewing court should apply "a *robust* proportionality analysis consistent with administrative law principles" instead of "a literal s. 1 approach" (*Loyola*, at para. 3). Under the *Doré* framework, the administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate (see *Doré*, at para. 7; *Loyola*, at para. 32). *Doré*'s approach recognizes that an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake (*Loyola*, at para. 42; *Doré*, at para. 54). Consequently, the decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case (*Doré*, at para. 54). It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance. *Doré* recognizes that there may be more than one outcome that strikes a proportionate balance between *Charter* protections and statutory objectives (*Loyola*, at para. 41). As long as the decision "falls within a range of possible, acceptable outcomes", it will be reasonable (*Doré*, at para. 56). As this Court noted in *Doré*, "there is ... conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a 'margin of appreciation', or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives" (para. 57).
>
> [80] The framework set out in *Doré* and affirmed in *Loyola* is not a weak or watered-down version of proportionality — rather, it is a robust one. As this Court explained in *Loyola*, at para. 38:
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> > The *Charter* enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the *Charter* in contexts where *Charter* rights are engaged, reasonableness requires proportionality: *Doré*, at para. 57. As Aharon Barak noted, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality". [Emphasis added; text in brackets in original.]
>
> For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the

> decision *proportionately* balances these factors, that is, that it "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Put another way, the *Charter* protection must be "affected as little as reasonably possible" in light of the applicable statutory objectives (*Loyola*, at para. 40). When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.
>
> [81] The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection *least*. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola*, at para. 41, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). However, if there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.
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> [82] The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Loyola*, at para. 68; *Doré*, at para. 56). The *Doré* framework therefore finds "analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (*Loyola*, at para. 40). In working "the same justificatory muscles" as the *Oakes* test (*Doré*, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.
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> [Emphasis in original.]

[259] With this framework in mind, I turn to consider whether, in the context of this case, the temporary prohibition on in-person religious worship reasonably balanced the appellants' freedom of religion with the statutory mandate of the PHO and the objectives underlying the orders she made.

8. Was the Prohibition on Gatherings for In-person Religious Worship Unreasonable under *Doré*?

[260] The religious appellants submit that the decisions of the PHO to impose time-limited restrictions on in-person gatherings for religious worship reveal a

failure of justification, transparency and intelligibility. They also submit that the respondent failed to justify those restrictions as proportionate.

[261] The appellants argued in their factum that there is nothing in the record to suggest that safety measures, when observed, were insufficient to prevent spread of the virus in religious settings. They submit that the decision to prohibit in-person religious gatherings, but permit (subject to regulation) activities in other settings that do not enjoy constitutional protection and in which transmission of the virus was also occurring, was both arbitrary and unjustified. The appellants reiterate their contention, based in part on the fresh evidence I would exclude, that transmission of the virus in religious settings was “very low”. In addition, the appellants submit that the order made on reconsideration that permitted outdoor religious worship (subject to conditions) demonstrates there were reasonable alternatives open to the PHO short of a categorical ban on gatherings for in-person worship.

[262] In oral argument, the appellants clarified that they were not taking issue with the PHO’s factual determination that the transmission risks associated with communal settings, including churches, was higher than in transactional and other settings that were permitted to open. Rather, they argued that the PHO’s orders failed to reasonably reflect the acknowledged distinctions between these two types of settings.

[263] The respondent submits that under a *Doré* analysis the issue is not whether the exercise of an administrative discretion that limits a *Charter* right is correct, but whether it is reasonable, giving the decision maker appropriate curial deference. On this issue, the respondent notes that courts have afforded substantial deference to measures adopted by public health officials to combat COVID-19. The respondent cites *Trinity Bible Chapel* (at paras. 126–127) for the proposition that the complexity of the decision-making framework in which public health officials operated in the second wave of the pandemic “is a textbook recipe for deferential review.”

[264] The respondent emphasizes that the decisions of the PHO had to be made in “real time” in the face of an unprecedented public health emergency. The PHO had the daunting task of making decisions that balanced the protection of individual and group rights with broader societal interests, and do so in rapidly

changing circumstances and in a climate of scientific uncertainty and evolving knowledge. The respondent includes here uncertainty about the extent to which the virus would mutate into new, more transmissible, and potentially more deadly variants of concern.

[265] The respondent further submits that, to properly discharge her statutory mandate, the PHO was obliged to consider: the health needs of a diverse population, including the vulnerable; the transmission risks associated with all manner of gatherings; the activities that characterize particular types of gatherings, including when congregations come together in the appellant churches; the likely demographics of church-goers and their vulnerability to the disease; the need to arrest exponential spread of the disease and stop preventable deaths from occurring; and, the capacity of our healthcare system to service the needs of COVID patients and others with acute medical care needs.

[266] The chambers judge was tasked with considering whether the orders prohibiting in-person religious services were reasonable in light of the evidence before the PHO. As mentioned earlier, the role of this Court on appeal is to determine whether the chambers judge identified the correct standard of review and applied that standard correctly. I am satisfied that he did.

[267] In my view, the limitation on the religious freedom of the appellants stemming from the G&E orders has been shown to be a proportionate one in light of the unprecedented risk to public health that arose during the second wave of the virus, the need to take precautions to stop preventable deaths from occurring, and the need to protect the capacity of the healthcare system.

[268] I emphasize that hindsight has no place in this analysis: *Trinity Bible Chapel* at para. 6(2). Regard must be had to what was known about the potential for the virus to cause widespread death and disable the delivery of essential services, including health care services to British Columbians. The analysis must recognize that, when the orders were made, vaccines were not widely available. The prospect of the exponential growth of COVID-19 cases was very real. Failing to act in a timely and reasonable way to prevent transmission in settings identified as high-risk could lead to the imposition of more extreme measures at a future date to curb the spread of the virus.

[269] In my view, there was an ample evidentiary basis upon which the PHO could reasonably conclude that, when faith-based communities gathered for worship, the risk of transmission was unacceptably high. As the PHO noted, observance of the liturgy requires a spiritual communion of faith that involves participation of the congregation in physically intimate acts—sharing communion, prayer, and song. These activities were known to be associated with a heightened risk of transmission. As noted above, I do not understand the appellants to suggest that the setting and activity-based distinctions drawn by the PHO were unreasonable. They were certainly not arbitrary. In my view, there is no proper basis upon which a reviewing court could interfere with the scientific determinations underlying the PHO's orders: see *Vavilov* at para. 125. The PHO was uniquely qualified to draw distinctions between different settings and would, in any event, be entitled to considerable deference on factual findings of this kind.

[270] I am unable to accept the appellants' submission that it was unreasonable for the PHO to prohibit in-person gatherings for worship because of the absence of evidence that transmission was occurring in churches in which safety protocols had been adopted. On the information available to her in the fall of 2020, COVID-19 cases and clusters associated with religious gatherings were occurring despite ongoing public health guidance recommending infection control precautions.

[271] In making her order on December 7, 2020, the PHO explained that transmission continued to occur in faith-based settings despite the fact that protective measures had been in place for several months.

[272] On December 18, 2020, the PHO noted that it had been difficult to achieve compliance with infection control measures given the nature of the activities that form an essential component of in-person worship by congregations.

[273] In making her order on December 24, 2020, the PHO again noted that transmission in faith-based settings was occurring despite the existence of protective measures. She concluded that, "there was something about those interactions that meant that the measures that we thought were working were no longer good enough to prevent transmission of the virus in its highly transmissible state during the winter respiratory season."

[274] I am satisfied that the PHO's decision-making framework, applied by her in the day-to-day, was informed by the proportionality principle—that public health interventions had to be proportionate to the nature of the apprehended harm and not unnecessarily limit constitutional rights. This principle lies at the core of the *BCCDC Ethics Guide*.

[275] This approach is also evident in the recitals to the PHO's February 5, 2021, order. In those recitals, the PHO recognized the need to balance constitutionally protected interests in certain gatherings and events against the risk of harm created by those gatherings and events. She recognized that the imposition of limits on fundamental freedoms, including freedom of religion, had to be proportionate, evidence-based, and necessary to prevent loss of life and societal disruption. She expressed awareness of her obligation to choose less intrusive limiting measures where doing so was consistent with the attainment of public health goals.

[276] I am also satisfied that the orders made by the PHO were proportionate to the very serious threats facing the public during the second wave of the pandemic. The restriction on in-person gatherings for religious worship were time-limited. The restrictions were constantly re-assessed. Exceptions were carved out. Drive-in services were permitted. Individual attendance at churches for personal prayer and reflection was permitted. In-person baptisms, weddings, and funerals with up to 10 people in attendance were permitted.

[277] I have considered whether the decision made on reconsideration to permit outdoor gatherings for religious worship demonstrates that the previous G&E orders were unreasonable in the sense that a less intrusive rights-infringing measure may, with the benefit of hindsight, have been identified at an earlier time. The issue was not addressed by the chambers judge. In my view, the reconsideration decision did not affect the reasonableness of the earlier orders. I say this for two reasons.

[278] First, legislators and decision makers are afforded a level of deference, or margin of appreciation, under both a reasonableness review and in applying the *Oakes* framework. The width of the margin takes its meaning from context. The context that existed when the impugned orders were made was singular in its complexity. The PHO was required to make real-time decisions that

proportionately balanced *Charter* protections with the protection of the public in a time of crisis. Failure to adopt rights-limiting, protective measures in the face of a known and unacceptable risk of transmission arising from faith-based gatherings would likely result in a preventable loss of life.

[279] A conclusion, based on the clarity that only hindsight brings, that the orders made by the PHO were not reasonable because the same objective *might* have been achieved by easing, however slightly, the limitations then in place would take the analysis in a case like this to an impractical extreme.

[280] It must be recalled that drive-in services for religious worship were permitted prior to the reconsideration decision. Fifty vehicles were permitted to attend. Further, the order made on reconsideration was strict and only moderately eased the restrictions that were in place. While the reconsideration order permitted outdoor gatherings for worship, services were restricted to 25 people, each attendee was required to maintain a physical distance of two metres from all other attendees, no sharing of ceremonial objects was to occur, and singing was prohibited.

[281] Second, the decision made on reconsideration—to permit outdoor in-person religious worship—was made at a different point in the second wave of the pandemic. Dr. Emerson noted in his affidavit that by late November 2020, the second wave reached a peak seven-day moving average of 780 cases per day. The case count increased after the Christmas holidays, but began to decline by January 4, 2021. The downward trend continued until a seven-day moving average of 449 cases per day was reached on January 31, 2021. By February 25, 2021, the supply of vaccines was also increasing. In short, the reconsideration decision was made at a *different point* in the pandemic and on the basis of *different evidence*. It cannot easily be inferred from the fact that the reconsideration decision moderately eased the limitations on in-person religious gatherings that the orders previously in place must, therefore, have been unreasonable or disproportionate.

[282] The reasonableness analysis is always contingent on its context: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at para. 18. As we have seen, in the *Charter* context the reasonableness analysis centres on proportionality.

[283] The public health orders made by the PHO at the height of the second wave of the pandemic could not have been made in a more challenging and complex environment. The orders were informed by the PHO's expertise and experience. They are entitled to considerable deference.

[284] In my view, the time-limited ban on in-person gatherings for religious worship fell within a range of reasonable outcomes. The orders reflect a careful attentiveness to the fundamental *Charter* values engaged in this decision-making context. They proportionately balanced the religious appellants' freedoms with the critical and pressing need to protect public health and the system through which public health care services are delivered. I would not give effect to this ground of appeal.

9. Alternative s. 1 Analysis

[285] Although I have decided the chambers judge correctly determined that *Doré* is the appropriate justificatory framework in this case, and that he made no error in the application of that framework, I would have reached the same result applying the *Oakes* test.

[286] Before explaining why, I wish to briefly address ARPA's submission that "institutional pluralism" underpins a s. 1 analysis and is most appropriately addressed at the proportionality stage of the inquiry, whether under *Oakes* or *Doré*.

[287] If, by "institutional pluralism", ARPA means that the state and other institutions that operate within society must accord one another a mutual respect and corresponding "constitutional space", I do not disagree. A free and democratic society is robustly pluralistic. But, in my view, the concept ARPA advances is already baked into the s. 1 analysis. Chief Justice Dickson made the point in *Oakes* at 136:

> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural

> and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.
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> [Emphasis added.]

[288] As the accommodation of a wide variety of beliefs and the social institutions through which those beliefs are manifested already lies at the core of s. 1, adopting "institutional pluralism" as an animating feature of the inquiry would not, in my respectful view, add clarity or value to the analysis.

[289] To the extent that ARPA suggests that the case at bar should be regarded merely as an illustration of the circumstances in which government can be "legitimately inconvenienced" by its obligation to respect religious institutions and practices, I do not agree. I agree with the respondent that the harms at stake in this case rise well above "legitimate inconvenience." In this respect, I adopt the observation of Pomerance J. in *Trinity Bible Chapel* that:

> [172] … Full accommodation of religious freedom would not have resulted in "legitimate inconvenience" for government. It would have represented a wholesale abdication of government responsibility to act in the public interest. It would have meant turning a blind eye to threat of severe health consequences for a large swath of the population.

[290] To begin, and as noted in *Doré* at paras. 56–58, there is a "conceptual harmony" between a reasonableness review and the *Oakes* framework, particularly in conducting the proportionality inquiry. Both frameworks contemplate giving a margin of appreciation to administrative and legislative bodies in balancing *Charter* values against the achievement of broader social objectives. Both frameworks "… [work] the same justificatory muscles: balance and proportionality": *Doré* at para. 5. Under both frameworks, the essential inquiry is "… whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited": *Doré* at para. 6. Finally, under both frameworks, a contextually appropriate degree of deference is required.

[291] It is also useful to recall that the societal context in which the law operates informs the *Oakes* analysis. As Chief Justice Dickson said in *Oakes* at 136:

> The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.
>
> [Emphasis added.]

[292] A similar point was made in *Hutterian Brethren*. Writing for the majority, Chief Justice McLachlin said this:

> [69] … The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.
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> [Emphasis added.]

[293] To be sure, understanding the perspective of the religious claimant is critical in conducting the *Oakes* analysis. Religious freedom is individual, but also "profoundly communitarian": *Hutterian Brethren* at paras. 89–90. And, as Justice Abella observed in *TWU* at para. 64, "… [t]he ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(a)".

[294] At the same time, this perspective must be considered in a broader societal context, "… where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs": *Hutterian Brethren* at para. 90. Religious freedom can be limited where an individual's religious practices have the effect of injuring their neighbours, or when a person's freedom to act in accordance with their beliefs may cause harm to others: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 346; *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras. 61–62; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 26.

[295] As Chief Justice Joyal observed in *Gateway Bible* at para. 279, where, as here, the rights of a religious claimant compete with other constitutionally

protected interests, including the right to life and security of the person enjoyed by other members of the community, it is more likely that a restriction on rights may be found to be proportionate to its objective.

[296] The onus is, of course, on the proponent of the measure to establish on a balance of probabilities that the limitation is reasonable and demonstrably justified in a free and democratic society.

[297] With these general principles in mind, I turn next to apply the *Oakes* framework to the circumstances of the case at bar.

[298] The *Oakes* test requires the respondent in this case to demonstrate that the objective of the measure giving rise to the restriction is pressing and substantial, and that the means employed to achieve that objective was proportionate. The proportionality requirement will be satisfied where: (1) there is a rational connection between the means chosen and the objective; (2) the measure minimally impairs the rights in issue; and (3) there is a proportionality between the salutary benefits and deleterious effects of the measure.

[299] The religious appellants submit that the objective of the G&E orders was to reduce the rate of virus transmission in worship services. I do not accept this narrow formulation of the objective. In my view, the objective of the G&E orders was to reduce transmission of the virus, minimize serious illness and death, and preserve the capacity of British Columbia's healthcare system to provide acute medical service. Properly framed, the objective is pressing and substantial.

[300] The religious appellants also submit that the G&E orders were not rationally connected to the objective. I disagree. The rational connection test is not particularly onerous and, in my view, is easily met in this case. The elevated risk of transmission associated with gatherings for in-person worship is such that suspending such gatherings is rationally connected to the achievement of the objectives.

[301] On the issue of minimal impairment, and viewing the matter contextually, I agree with the respondent that the PHO was not constitutionally required on the basis of what was known to her at the time to choose the least onerous means of protecting the most vulnerable among us from serious illness or death. Time was

of the essence. The margin for error was narrow. Lives were at stake. Chief Justice McLachlin's comments in *Hutterian Brethren* are instructive on this point:

> [37] … Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified". Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused… .

[302] Further, the G&E orders were minimally impairing. They were not imposed until the exponential increase in cases during the second wave of the pandemic required the imposition of more onerous restrictions. They were time-limited. They were subject to reconsideration and the granting of variances under s. 43 of the *PHA*. They did not prohibit individual prayer at places of worship, drive-in services (as of December 7, 2020), or online religious gatherings. Exemptions were allowed for funerals, weddings, and baptisms.

[303] I do not accept the contention of the religious appellants that "there is no discernible reason" why the PHO could not have treated religious settings the same as retail and other settings that were permitted to remain open subject to regulation. The submission ignores the PHO's assessment of the elevated risk of transmission associated with in-person religious worship and the substantial body of evidence that supported her assessment on this issue.

[304] At the final proportionality stage of the analysis, I cannot agree that the deleterious effects of the G&E orders outweighed the salutary benefits to be gained from them. While the orders imposed unprecedented restrictions on religious gatherings, they were made in what were (at least in modern times) unprecedented circumstances.

[305] I return to the societal lens that informs the *Oakes* analysis. While the temporary curtailment of freedoms caused by the orders was significant, so too were the individual and societal interests advanced by imposing them. The orders advanced the collective good at a time when our community was in crisis.

[306] A free society is a pluralistic one in which individuals are entitled to pursue, within reasonable limits, their individual beliefs. But to live in community is also to acknowledge our interdependence. We share limited collective resources upon

which all of us depend, including our healthcare system. We share the environment, the air we breathe, and our susceptibility to transmissible diseases, the burden of which falls disproportionately on the most vulnerable among us.

[307] The COVID-19 pandemic highlighted our interdependence as a community. It forced us to confront the reality that the pursuit of some activities, including the exercise of some constitutionally protected rights, would increase the risk of exponential spread of the disease and the loss of human life. In the exercise of her responsibility to safeguard public health and access to our healthcare system, the PHO made time-limited and setting-specific orders restricting activities she considered to be most likely to foster widespread transmission of the virus. She was uniquely qualified to make these decisions and the exercise of her judgment must be afforded deference.

[308] I acknowledge that the orders imposed significant burdens on many members of our community including, for present purposes, the religious appellants. I do not see how it could have been otherwise. The pressing goals underlying the orders could not be attained without limiting gatherings that posed an unacceptable risk to public health.

[309] In my view, the salutary effects of the PHO's orders outweighed the harm they caused. They have been shown to be necessary to promote public health, minimally impairing in their effects, and to reflect a proportionate balancing of the competing interests at stake.

[310] As Justice La Forest put it in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 72, 1996 CanLII 237, "… freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience… [but it] is subject to such limitations as are necessary to promote public safety, order, health … and the fundamental rights and freedoms of others." This is one of those cases.

VIII. Disposition

[311] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Justice Marchand"