Court of Appeal File No. CA47363

COURT OF APPEAL

BETWEEN:

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

APPELLANTS
(PETITIONERS)

AND:

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

RESPONDENTS
(RESPONDENTS)

AND:

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

INTERVENOR
(INTERVENOR)

FACTUM OF THE RESPONDENTS

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CHRONOLOGY

Date	Event
January 27, 2020	First case of SARS-CoV-2, the virus that causes COVID-19, diagnosed in British Columbia.
March 11, 2020	World Health Organization declares the SARS-CoV-2 outbreak a pandemic.
March 16, 2020	Dr. Bonnie Henry, the Provincial Health Officer (Dr. Henry, or the "PHO"), issues the first mass gatherings order, restricting mass gatherings, including worship services, to a maximum of 50 people.
March 17, 2020	Dr. Henry issues a Notice of Regional Event under the *Public Health Act*, S.B.C. 2008, c. 28 ("*PHA*") designating the transmission of COVID-19 a regional event. The Notice of Regional Event remains in effect.
March 18, 2020	The Minister of Public Safety and Solicitor General declares a state of emergency for the Province of British Columbia, pursuant to the *Emergency Program Act,* R.S.B.C. 1996, c. 111. The state of emergency expired at 11:59 p.m. on June 30, 2021.
October-November 2020	The "second wave" of the pandemic begins. There is rapid acceleration of COVID-19 cases, hospitalizations and acute care admissions, particularly in the Fraser and Vancouver Coastal health regions.
November 7, 2020	Dr. Henry exercises her discretion under the *PHA* to make a verbal order further limiting gatherings and events in the Fraser and Vancouver Coastal health regions. Dr. Henry ordered that no social gatherings of any size were permitted with anyone other than members of an "immediate household". Mass gatherings remained limited to a maximum of 50 people.
November 10, 2020	Dr. Henry issues a written *COVID-19 Prevention Regional Measures* order to the same effect as her November 7, 2020 verbal order.
November 11, 2020	Dr. Henry repeals and replaces her November 10 order, to the same effect as her November 7, 2020 verbal order.
November 19, 2020	Dr. Henry makes a verbal *Gatherings and Events* ("G&E") order, expanding the November 7, 2020 order province-wide, with an expiry date of December 8, 2020. Exempted from the order are: weddings, baptisms, funerals to a maximum of 10 people, and private prayer and reflection in religious settings.

November 28, 2020	Appellant Immanuel Covenant Reformed Church writes to Premier John Horgan, Health Minister Adrian Dix, and Dr. Henry requesting that the restriction on in-person worship services be immediately rescinded.
November 30, 2020	Appellants Smith and Riverside Calvary Chapel write to Premier John Horgan, Health Minister Adrian Dix, and Dr. Henry requesting that the restriction on in-person worship services be rescinded.
December 2, 2020	Dr. Henry repeals and replaces November 10, 2020 G&E order – no change with respect to religious gatherings.
December 4, 2020	Dr. Henry repeals and replaces December 2, 2020 G&E order – no change with respect to religious gatherings.
December 4, 2020	Appellant Immanuel Covenant Reformed Church writes to Dr. Henry demanding that the restriction on in-person religious services be rescinded.
December 7, 2020	Dr. Henry extends the December 4, 2020 G&E order to January 7, 2021. Dr. Henry responds to concerns raised by religious organizations, and notes her concern that some religious groups were continuing to meet despite the G&E orders.
December 9, 2020	Dr. Henry repeals and replaces December 4, 2020 G&E order. Restrictions on gatherings and events extended to January 8, 2021. Drive-in events, including religious services, with up to 50 vehicles permitted.
December 15, 2020	Dr. Henry repeals and replaces December 9, 2020 G&E order and clarifies that religious services can be provided to a person in their residence.
December 18, 2020	Dr. Henry writes to appellants Smith, Riverside Calvary Chapel, Koopman and Chilliwack Free Reformed Church urging them to comply with the G&E orders and inviting them to seek reconsideration under s. 43 of the *PHA*.
December 22, 2020	Appellant Koopman responds to Dr. Henry's December 18 correspondence and declines to seek reconsideration under s. 43 of the *PHA*.
December 24, 2020	Dr. Henry repeals and replaces December 15, 2020 G&E order – no change with respect to religious gatherings.
January 7, 2021	Appellants file Petition seeking judicial review of Dr. Henry's G&E orders of November 19, 2020, December 2, 4, 9, 15, and 24, 2020, and "such further orders as may be pronounced".
January 8, 2021	Dr. Henry repeals and replaces December 24, 2020 G&E order. Restrictions on gatherings and events extended to February 5, 2021.

January 29, 2021	Appellants' counsel writes to Respondents' counsel to request reconsideration of the G&E orders under s. 43 of the *PHA*. Counsel for the Respondents writes to seek clarification of the Appellants' request.
February 2, 2021	Respondents file Response to Petition.
February 3, 2021	Appellants' counsel responds to request for clarification, and advises that the affidavits filed by the Appellants in support of the Petition contain additional relevant information for Dr. Henry to consider on her s. 43 reconsideration.
February 5, 2021	Dr. Henry repeals and replaces January 8, 2021 G&E order and adds an exemption for Jewish divorce proceedings.
February 9, 2021	Counsel for the Appellants provides unsworn, unfiled copies of the affidavits of Dr. Kettner and Dr. Warren to counsel for the Respondents. The affidavits and their exhibits comprise over 1000 pages of material.
February 10, 2021	Dr. Henry repeals and replaces February 5, 2021 G&E order. Restrictions on gatherings and events extended indefinitely – no other change with respect to religious gatherings. Dr. Henry includes an express exemption for outdoor protests.
February 12, 2021	Chambers judge hears Respondent's application for injunction compelling the Appellants' compliance with G&E orders.
February 15, 2021	Appellants confirm that they rely on the affidavits of Dr. Kettner and Dr. Warren as part of their reconsideration request under s. 43 of the *PHA*.
February 17, 2021	Chambers judge dismisses injunction application: 2021 BCSC 248.
February 25, 2021	In response to the reconsideration request, Dr. Henry grants an indefinite conditional variance to Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C (the "Religious Appellants") permitting weekly outdoor religious services of up to 25 people, subject to certain conditions (the "Reconsideration Decision").
March 1-3 and 5, 2021	Chambers judge hears petition on merits.
March 18, 2021	Chambers judge dismisses the Appellants' application for judicial review as it relates to the Religious Appellants and grants the declaratory relief sought by Mr. Beaudoin: 2021 BCSC 512.

OPENING STATEMENT

Since March 16, 2020, Dr. Bonnie Henry, in her role as Provincial Health Officer (Dr. Henry, or the "PHO"), has exercised her authority under the *Public Health Act* to restrict public gatherings and events in order to limit the risk of transmission of COVID-19. Dr. Henry imposed these restrictions broadly at times, and no sector of society was untouched by pandemic measures. At all times, Dr. Henry's objective was to avoid exponential growth of the virus and limit serious illness, hospitalizations, and death, so as to protect the most vulnerable members of society and preserve the functioning of the healthcare system, while minimizing social disruption.

In the fall of 2020, British Columbia faced exponential rates of transmission. The healthcare system began to experience an inability to contain and treat the virus (and to provide other, non-COVID related healthcare) and was at risk of becoming overwhelmed. Existing measures proved insufficient. Vaccines were not yet widely available. The available evidence linked cluster outbreaks to religious events and other in-person social gatherings, notwithstanding the existing measures Dr. Henry had put in place.

In November 2020, Dr. Henry announced a temporary, province-wide ban on in-person gatherings, including religious gatherings. The temporary ban did not apply to virtual services, drive-in services, individual meetings with religious leaders, or private prayer or contemplation. It also permitted funerals, baptisms, and weddings to continue under strict restrictions. Exemptions were available under s. 43 of the *Public Health Act* and were granted to a number of groups who sought reconsideration, including the Religious Appellants.

In coming to her decision to restrict religious gatherings, Dr. Henry considered and gave weight to the importance of religious freedom and exercise, but determined that, in her view, the restrictions were necessary and proportionate to the objective of protecting public health. On judicial review, the chambers judge considered the record before Dr. Henry and agreed. He made no error in this regard. On any legal test, the limits imposed by Dr. Henry were proportionate to the peril faced by the Province of British Columbia (the "Province"). The appeal should be dismissed.

PART 1 – STATEMENT OF FACTS

1. The Respondents do not accept the facts as framed by the Appellants. The Appellants' statement of facts includes improper argument and inaccurate characterizations of the facts. Further, the Appellants rely on extra-record evidence found inadmissible by the chambers judge[1] as well as the lay opinion evidence of counsel.[2] The Respondents provide the following factual overview, grounded in admissible evidence.

I. *The Public Health Emergency Caused by COVID-19 in British Columbia*

2. Dr. Henry is the senior public health official for the Province.[3] For the last two years, Dr. Henry has borne the "formidable responsibility" [4] of making decisions to protect the citizens of British Columbia from the COVID-19 pandemic. The Public Health Act[5] ("*PHA*") provides the PHO with authority to make complex decisions in an ever-shifting landscape.

3. The first diagnosed case of COVID-19 in British Columbia was discovered on January 27, 2020.[6] By early March, public health officials understood that SARS-CoV-2 was the infectious agent causing outbreaks of COVID-19, and that gatherings of people in close contact could increase transmission.[7] Dr. Henry issued her first Mass Gatherings Order on March 16, prohibiting gatherings in excess of 50 people.[8] On March 17, Dr. Henry declared COVID-19 to be a "regional event" under s. 51 of the *PHA.*[9] The Notice of Regional Event triggered the PHO's authority under the *PHA* to exercise emergency powers, including the power to issue orders respecting "health hazards".[10] Each of the

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[1] Appellants' Factum ("AF") at para. 38 and footnote 41.
[2] AF at paras. 13-14 and footnotes 19 and 21.
[3] *Public Health Act,* S.B.C. 2008, c. 28 at s. 64 [*PHA*].
[4] *Beaudoin v. British Columbia*, 2021 BCSC 512 ("RFJ") at para. 14.
[5] S.B.C. 2008, c. 28
[6] RFJ at para. 9; Affidavit #1 of Brian Emerson, made February 2, 2021 ("Emerson #1") at para. 29 (Appellants' Appeal Book ("AAB") Vol. 1 at 331).
[7] RFJ at para. 9; Emerson #1 at para. 30 (AAB Vol. 1 at 331-332).
[8] Emerson #1 at para. 33, Ex. "9" (AAB Vol. 1 at 332; Vol. 2 at 456). The PHO made the March 16, 2020 Mass Gatherings Order pursuant to her powers under s. 67(1) of the *PHA.*
[9] RFJ at para. 28; Emerson #1 at para. 34 (AAB Vol. 1 at 332). The PHO's March 17, 2020 Notice of Regional Event remains in effect.
[10] RFJ at para. 29; Emerson #1 at para. 35 (AAB Vol. 1 at 332).

impugned G&E Orders were made by the Dr. Henry pursuant to ss. 30, 31, 32 and 39(3) of the *PHA*.[11]

Risk Factors for COVID-19 Transmission

4. The information available to Dr. Henry in 2020 indicated that COVID-19:

   a. had higher transmissibility and fatality rates than influenza;

   b. could be transmitted prior to symptom onset, even where an individual remained entirely asymptomatic;

   c. was likely to be more transmissible during the winter months;[12] and

   d. posed different levels of risk to different sectors of the population, depending on age, underlying health conditions, and other social conditions.[13]

5. In 2020, the information available to Dr. Henry indicated that transmission of COVID-19 was highest in settings of sustained interpersonal interaction (defined as 15 minutes or more) indoors or in enclosed spaces. People gathering together increased the probability that someone present will be infected and transmitting virus. Higher community prevalence and community transmission increases the risk that people attending a gathering or event will transmit the virus and infect others. Crowding, and in particular, being closer that two metres from other people, also increased risk because when someone coughs or sneezes, the droplets containing the virus generally spread within two metres. The risk increases with singing, chanting or loud talking (which can contribute to droplet spread). Limited ventilation was also a factor in transmission in that it allows smaller droplets to build up in a space. The more people there were in a space, and the smaller the size of the space, the greater the risk that droplets carrying the virus would be inhaled by other people.[14]

6. At all material times, the information available to the Dr. Henry indicated that protective measures can be put in place to try to address these risks and, notably, that

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[11] RFJ at para. 26.
[12] Emerson #1 at paras. 41, 46 (AAB Vol. 1 at 333-334).
[13] *Ibid.*
[14] Emerson #1 at para. 60 (AAB Vol. 1 at 337-338).

the effectiveness of protective measures will vary based on people's compliance with safety protocols and the prevalence of transmission in the community.[15]

Evidence of Transmission in Religious Settings

7. The data and literature available to Dr. Henry included reports of 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).[16]

8. Further, the available data showed instances of COVID-19 exposures and transmission within religious settings across all health authorities in British Columbia, with the exception of Island Health Authority.[17] A majority of these exposure and transmission events took place in the fall of 2020 during a time when the relevant orders required compliance with public health safety plans.

9. By contrast, the data available to Dr. Henry in 2020 did not demonstrate that British Columbia was experiencing significant or routine transmission of COVID-19 arising from encounters at grocery and retail stores, restaurants, or in other transactional environments.[18]

II. *The Gatherings and Events Orders*

10. From the outset of the pandemic through the first wave (March through August 2020), Dr. Henry limited gatherings and events to a maximum of 50 people and provided public health guidance to persons sponsoring events.[19] Dr. Henry and other public health officials monitored surveillance data respecting the emergence and progression of COVID-19 in B.C.[20] as well as national and international data regarding the virus.[21]

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[15] Emerson #1 at para. 61 (AAB Vol. 1 at 338).
[16] Emerson #1 at para. 98 (AAB Vol. 1 at 345).
[17] Emerson #1 at paras.101-106 (AAB Vol. 1 at 345-346).
[18] Emerson #1 at para. 108 (AAB Vol. 1 at 347).
[19] Emerson #1 at para. 50 (AAB Vol. 1 at 335).
[20] Situation reports summarizing the data are made available to the public on the BCCDC's website and are included in the record. See Emerson #1 at paras. 47-55, 72, 78, 83 and 90; Ex. 18-22, 26-27, 32-33 and 38 (AAB Vol. 1 at 335-336, 339, 341-343; Vol. 2 at 543-596, 631-654, 724-747; Vol. 3 at 837-848).
[21] RFJ at para. 26; Emerson #1 at para. 38 (AAB Vol. 1 at 333).

11. Starting in the fall of 2020, the epidemiological situation in British Columbia changed. The number of new cases, hospitalizations and the reproduction rate of the COVID-19 virus all climbed. In mid-October 2020, case numbers accelerated rapidly, demonstrating exponential growth of the virus.[22] There was evidence of cases and clusters associated with social gatherings, bars and nightclubs, and religious gatherings.[23] Modelling showed that the situation could dramatically worsen if personal contact was not substantially reduced.[24]

12. On November 7, 2020, Dr. Henry responded to a "dangerously high and rapid increase" of COVID-19 cases by issuing an oral order imposing further restrictions on gatherings in the Vancouver Coastal and Fraser Health regions, areas where the healthcare system's capacity to contain and trace the transmission of the virus was most strained.[25] She provided reasons in the form of a media briefing announcing the oral order.[26] The November 7 order targeted social gatherings, including some "religious-based events" such as weddings and funerals.[27]

13. Dr. Henry followed the November 7, 2020 oral order with written orders dated November 10 and 11, 2020, that applied only to the Vancouver Coastal and Fraser Health regions. These included written recitals setting out the reasons for the order.[28]

14. Notwithstanding Dr. Henry's region-specific orders, the surge of cases continued across British Columbia.[29] On November 19, 2020, Dr. Henry made an oral order extending restrictions on gatherings and events province wide. The order applied to religious services, but provided exemptions for funerals, baptisms, and weddings to

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[22] Emerson #1 at para. 73, Ex. 18-22 (AAB Vol. 1 at 340; Vol. 2 at 543-596).
[23] Emerson #1 at paras. 64, 70 and 101 (AAB Vol. 1 at 338-339 and 345).
[24] Emerson #1 at paras. 95-96, Ex. 39-40 (AAB Vol. 1 at 344-345; Vol. 3 at 877 and 918).
[25] RFJ at para. 37; Emerson #1 at para. 76 (AAB Vol. 1 at 340-341). The PHO may issue oral orders pursuant to s. 54(1)(c) of the *PHA*.
[26] Emerson #1, Ex. 23 (AAB Vol. 2 at 597-610).
[27] The Appellants' assertion at paragraph 9 of their factum is correct: in-person worship services were not treated as social gatherings under the November 7 order. However, the appellants incorrectly attributes error to the chambers judge in this regard. The chambers judge noted only that "religious-based events" were included in the scope of November 7 order. See RFJ at para. 44(k).
[28] Emerson #1, Ex. 24-25 (AAB Vol. 2 at 611-630).
[29] Emerson #1 at para. 78 (AAB Vol. 1 at 341).

continue with a limit of 10 people in attendance. In her reasons for the November 19 order, Dr. Henry noted that there had been transmission in faith-based settings under the existing rules; that some activities are higher risk; and that without intervention, the health care system would be overwhelmed.[30] She explained that the measures would be reviewed every two weeks.

15. On December 2, 2020, Dr. Henry issued a written G&E Order, repealing and replacing her written order of November 10 and confirming her oral order of November 19, 2020.

16. Between November 2020 and the hearing of the Petition, Dr. Henry made the following G&E Orders in respect of which the Appellants have sought judicial review:

Date of Order	Material Change	Dr. Henry's Reasons in the Record
November 19, 2020 oral order	• Extended the restrictions on indoor gatherings and events, including religious services, province-wide • Provided exemptions for weddings, baptisms, and funerals to a maximum of 10 people, and permitted private prayer or reflection in religious settings • Set to expire December 8, 2020	• November 19, 2020 Briefing (Emerson #1, Ex. 1, AAB Vol. 2 at 655-671).
December 2, 2020 written order	• Repealed and replaced November 10, 2020 written order • No change vis-à-vis religious services	• Recitals to the Order (Emerson #1, Ex. 29, AAB Vol. 2 at 672-691).
December 4, 2020 written order	• Repealed and replaced December 2 , 2020 written order • No change vis-à-vis religious services	• Recitals to the Order (Emerson #1, Ex. 30, AAB Vol. 2 at 692-711).
December 9, 2020 written order (announced orally on December 7, 2020)	• Repealed and replaced December 4 written order • Extended restriction on gatherings and events to January 8, 2021 • Permitted drive-in events with up to 50 vehicles	• December 7, 2020 Briefing (Emerson #1, Ex. 34, AAB Vol. 3 at 748-758). • Recitals to the Order (Emerson #1, Ex. 35, AAB Vol. 3 at 759-780).

[30] Emerson #1, Ex. 28 (AAB Vol. 2 at 655-671).

December 15, 2020 written order	• Repealed and replaced December 9, 2020 written order • Clarified that a religious service can be provided to an occupant in their own home	• Recitals to the Order (Emerson #1, Ex. 36, AAB Vol. 3 at 781-803).
December 24, 2020 written order	• Repealed and replaced December 15, 2020 written order • No change vis-à-vis religious services	• Recitals to the Order (Emerson #1, Ex. 37, AAB Vol. 3 at 804-836).
January 8, 2021 written order	• Repealed and replaced December 24, 2020 written order • Extended restriction on gatherings and events to February 5, 2021	• Recitals to the Order (Affidavit #2 of Vanessa Lever made February 2, 2021, Ex. A, AAB Vol. 1 at 205-237).
February 5, 2021 written order	• Repealed and replaced January 8, 2021 written order • Included an express recital regarding the Charter • Added an exemption for Jewish divorce court proceedings	• February 8, 2021 Briefing ((Affidavit #1 of Megan Patterson made February 8, 2021 (“Patterson #1”), Ex. C, AAB. Vol. 1 at 309-323). • Recitals to the Order (Patterson #1, Ex. A, AAB Vol. 1 at 240-272).
February 10, 2021 written order	• Repealed and replaced February 5, 2021 written order • Expressly did not apply to outdoor protests • No change vis-à-vis religious services • Extended restrictions with no expiry date	• February 12, 2021 Briefing (Affidavit #2 of Valerie Christopherson made February 25, 2021 (“Christopherson #2”), Ex. A, AAB Vol. 4 at 1176-1185). • Recitals to the Order (Affidavit #1 of Valerie Christopherson made February 11, 2021 (“Christopherson #1”), Ex. A (AAB Vol. 3 at 1023-1055).

17. The February 10, 2021 order was the order in effect at the time of the hearing before the chambers judge. On February 12, 2021, in her first public briefing after issuing the February 10 order, Dr. Henry, in response to a question from a reporter, provided the following reasons for her restrictions on religious services:

> 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?

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 with your small group of people.

Having said that, we engaged very early with faith leaders across the province. And they recognize the important role that they play. I just want to reiterate, we know 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 needed. We talked about different things that happen in different – whether it's church, or a gudwara, or a temple, or a synagogue – and we 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 in its highly transmissible state during the winter respiratory season.

So it was because of that we put in additional measures to stop the in-person services starting at 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.[31]

18. Dr. Henry and her team continually analyze the data and changing epidemiologic circumstances of the COVID-19 pandemic in British Columbia and other jurisdictions, with a view to reducing the nature and scope of restrictions.[32] It is a matter appropriate for judicial notice that none of the impugned G&E Orders are currently in force.[33] Since March 2021, in-person worship services have been permitted, subject to certain conditions.[34] As of March 10, 2022, Dr. Henry removed all conditions imposed on religious services. [35]

Reconsideration of the G&E Orders under Section 43 of the *PHA*

19. Under s. 43 of the *PHA,* a person affected by an order may request the health officer who issued the order to reconsider the order. Reconsideration under s. 43(1)(a) requires the applicant to identify "additional relevant information that was not reasonably available to the health officer" at the time of the order. Reasons are required if reconsideration under s. 43(1)(a) is denied.

20. Although s. 54(1)(h) of the *PHA* allows a provincial health officer not to reconsider an order under section 43 in an emergency, at all material times, Dr. Henry had not applied this section to the G&E Orders. Each of the G&E Orders contained language expressly inviting requests for reconsideration under s. 43.

III. *Additional Context for Dr. Henry's Decision Making*

21. Dr. Brian Emerson, the (then) Acting Deputy PHO, provided the primary record affidavit, as it was as of February 2, 2021. That affidavit sets out the background context and provides evidence of what was known to Dr. Henry when she made the G&E Orders.

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[31] Christopherson #2, Ex. A at 7-8 (AAB Vol. 4 at 1182-1183).
[32] Emerson #1 at para. 126 (AAB Vol. 1 at 350).
[33] *R. v. Find,* 2001 SCC 32 at para. 48. Each of the PHO Orders are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy on the PHO's website: https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus.
[34] See: https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-variance-outdoor-worship-march-23-2021.pdf
[35] https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-pho-order-gatherings-events.pdf.

The Respondents highlight two additional areas of that record, not addressed in the Appellants' statement of facts, to give additional context for Dr. Henry's decision making and the information on which she relied.

22. First, the "Ethics Framework and Decision Making Guide" for public health guides Dr. Henry when she exercises her powers under the *PHA*.[36] This guide sets out both ethical principles and a process for decision making in public health. The principles include: (a) the "precautionary principle", which provides that lack of full scientific certainty should not be a reason to postpone public health interventions in the name of prudent concerns of the population; and (b) proportionality, which provides that public health intervention should be proportionate to the threat faced and should not exceed those measures necessary to address the actual risk.[37]

23. Second, throughout the course of the pandemic in 2020 and into 2021, Dr. Henry met regularly with religious leaders from hundreds of different faith groups from across British Columbia to discuss the impact of restrictions on gatherings and events on their faith communities and religious practices.[38] Dr. Robert Daum from the Simon Fraser University Centre for Dialogue facilitated these roundtable discussions.

IV. *The Appellants and the Impugned Orders*

24. The Religious Appellants include three churches in the Fraser Valley and their leaders. The seventh Appellant, Mr. Beaudoin, organized outdoor protests in Dawson Creek in December 2020 and received a violation ticket from the RCMP.

25. Each of the individual Religious Appellants attests to holding religious beliefs that require in-person worship. Nevertheless, in the spring of 2020, two of the three Appellant churches opted not to provide in-person services.[39] In the fall of 2020, however, each of

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[36] Emerson #1, Ex. 3 at 51-62 (AAB Vol. 2 at 401-412).
[37] Emerson #1 at para. 14, Ex. 3 at 54-55 (AAB Vol. 1 at 329; Vol. 2 at 404-405).
[38] Emerson #1 at paras. 110-111 (AAB Vol. 1 at 347).
[39] Affidavit #1 of John Van Muyen made December 22, 2020 ("Van Muyen #1") at para. 10 (AAB Vol. 1 at 102); Affidavit #1 of Brent Smith made January 5, 2021 ("Smith #1") at para. 10 (AAB Vol. 1 at 185).

the Religious Appellants refused to comply with the G&E Orders and were issued violation tickets by the RCMP.[40]

26. On December 18, 2020, on becoming aware of their decision not to abide by the G&E Orders, Dr. Henry wrote to the Appellants Smith and Riverside Calvary Chapel, and to the Appellants Koopman and Chilliwack Free Reformed Church. Those letters set out the reconsideration process under s. 43 of the *PHA,* noted that Dr. Henry had previously approved case-specific requests under this provision, and stated that she was "open to a request from [their] church".[41]

27. The Appellant Koopman of the Free Reformed Church of Chilliwack responded on December 22, 2020, stating: "your offer to consider a request from our church to reconsider your Order sadly rings hollow […] As many others have done, we urge you to allow in-person worship services".[42]

The Religious Appellants' Request for Reconsideration under Section 43

28. On January 29, 2021, three weeks after filing the underlying Petition, counsel for the Appellants, on behalf of the Religious Appellants, sent a written request for reconsideration under s. 43(1) of the *Public Health Act* to counsel for the Respondents.[43]

29. On February 14, 2021, counsel for the Respondents wrote to counsel for the Appellants to inquire whether the Religious Appellants relied on the affidavits of Dr. Kettner and Dr. Warren, provided after the January 29 letter, as part of the record on

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[40] Van Muyen #1 at Ex. B, C (AAB Vol. 1 at 112-113); Affidavit #1 of John Koopman made December 23, 2020 ("Koopman #1") at Ex. G (AAB Vol. 1 at 154-158); Smith #1 at Ex. C, E (AAB Vol. 1 at 195-196, 201-203).
[41] Emerson #1, Ex. 49 at 608 (to Riverside Calvary Chapel, AAB Vol. 3 at 958); Ex. 50 at 634 (to Chilliwack Free Reformed Church, AAB Vol. 3 at 984).
[42] Emerson #1, Ex. 51 at 660 (AAB Vol. 3 at 1010).
[43] Affidavit #1 of Vanessa Lever made February 2, 2021 ("Lever #1"), Ex. D (Respondents' Appeal Book ("RAB") at 18).

reconsideration. Counsel confirmed that the Religious Appellants expected Dr. Henry to consider them.[44] The affidavits and their exhibits totalled over 1,000 pages.

30. On February 25, 2021, Dr. Henry provided a response to the s. 43 application. She did not grant the specific variance requested by the Religious Appellants, but granted a conditional variance allowing outdoor worship services, subject to a number of conditions. Dr. Henry provided written reasons justifying the Reconsideration Decision, and included several enclosures, including two reviews by Dr. Naomi Dove, and specifically reviewed the Appellants' "expert" affidavits.[45]

V. *The Appellants' Treatment of the Evidence*

31. The Appellants' treatment of the evidence in their factum is problematic in three key ways: (1) they mischaracterize the evidence in the record; (2) they purport to rely on inadmissible lay opinion evidence; and (3) they rely on extra-record evidence found inadmissible by the chambers judge.

The Appellants Mischaracterize the Evidence

32. In their factum, the Appellants mischaracterize the evidence in two significant ways. First, they repeatedly and incorrectly refer to the G&E Orders as a "categorical ban" or "prohibition" on in-person worship. As the chambers judge observed, the limitations imposed by the G&E Orders do not represent an "absolute prohibition" on in-person religious gatherings.[46] Rather, the G&E Orders permitted multiple forms of in-person religious gatherings, including baptisms, weddings and funerals with up to 10 people in attendance, personal prayer or reflection, meetings with a religious leader in a personal residence, and, as of December 2020, drive-in services with up to 50 vehicles.

33. Second, the Appellants make the bold and unsupported claim that "nothing in the record" supports the view that COVID-19 transmission was a risk where worship services followed COVID safety plans. The Appellants isolate and over-emphasize a comment by Dr. Henry on October 26, 2020, that transmission was down when COVID-19 safety plans

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[44] Affidavit #3 of Vanessa Lever made February 26, 2021 ("Lever #3"), Ex. B at 3 (AAB Vol. 4 at 1253).
[45] Christopherson #2, Ex. B (AAB Vol. 4 at 1186-1192).
[46] RFJ at para. 192.

were followed in churches and temples.[47] Dr. Henry made that comment in the context of urging people to comply *before* the data became available that led to the G&E Orders. On December 7, 2020, Dr. Henry publicly responded to the concerns of religious organizations as follows:

> It is a challenge. I know. There are many faith groups. There are a few faith groups that are continuing to meet and that concerns me. It concerns me because it is a misunderstanding of why we are trying to put restrictions in place. These 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.[48] [emphasis added]

34. The Appellants' assertion that Dr. Henry's reference to "our best efforts" refers only to Dr. Henry's best efforts, and not those of people gathering, is a distinction without a difference. Dr. Henry's "best efforts" were to impose orders requiring that gatherings abide by safety plans. By the fall of 2020, the evidence before Dr. Henry demonstrated that those measures were no longer sufficient in certain high-risk settings where transmission was occurring, "despite the measures" that had previously been in place.

35. The best evidence before Dr. Henry in the fall of 2020 was that transmission was in fact occurring in British Columbia in worship services.[49] These cases occurred while the same restrictions proposed by the Appellants were in place province wide. In her reasons given at the February 12, 2021 public briefing (reproduced above), Dr. Henry addressed this issue head-on in response to a question about why religious services could not be subject to safety plans like restaurants or health clubs, and explained that, in the context of religious gatherings, "the measures that we thought were working were no longer good enough to prevent transmission".[50]

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[47] Full statement is found in the Affidavit #2 of John Koopman made February 8, 2021 at para. 5 (AAB Vol. 4 at 1057). See, for example, paras. 7, 16 and 93(a) of the AF.
[48] Emerson #1, Ex. 34 at 406 (AAB Vol. 3 at 756).
[49] Emerson #1 at paras. 97-109 (AAB Vol. 1 at 345-347).
[50] Christopherson #2, Ex. A (AAB. Vol 4 at 1176-1185).

The Appellants Provide Lay Opinion Evidence

36. The Appellants assume the role of armchair statistician, purporting to calculate the percentage of total cases in British Columbia attributable to religious and other settings and then drawing conclusions from these figures.[51] None of the Appellants (or their counsel) are qualified to provide this evidence. It was not in the record and this statistical evidence was not before the chambers judge. In any event, the statistics relied upon by the Appellants fail to account for the different time periods in the data sets, and the fact that a majority of religious settings were closed in the spring and fall of 2020.

37. Moreover, the Appellants' reliance on these statistics fundamentally misses the point: Dr. Henry was concerned about evidence of transmission in higher risk settings. Dr. Henry was not required to wait until transmission in religious settings matched or exceeded transmission in all other sectors of society before taking action.

The Appellants Rely on Extra-Record Evidence

38. Finally, without alleging any error on the part of the chambers judge in his treatment of the scope of the record, the Appellants rely on evidence found to be inadmissible on judicial review. This issue is addressed as a matter of legal argument in Part 3 below.

VI. *The Decision of the Chambers Judge*

39. With respect to Mr. Beaudoin, the Respondents conceded below that the G&E Orders made between November 19, 2020 and February 10, 2021 prohibiting outdoor gatherings for public protests were of no force and effect. By the time the matter came on for hearing, the chambers judge correctly observed that "those parts of the G&E Orders that infringed the *Charter* rights asserted by Mr. Beaudoin no longer form a part of the orders".[52] The chambers judge therefore issued the declaration sought by Mr. Beaudoin.

40. Accordingly, there exists no live issue in this appeal involving Mr. Beaudoin. His appeal is moot.

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[51] See AF at paras. 10, 13-14, 122; footnotes 19, 21.
[52] RFJ at para. 144.

41. With respect to the Religious Appellants, the chambers judge held that they were required to seek judicial review of the Reconsideration Decision, not the G&E Orders. This finding was dispositive of the issues with respect to the Religious Appellants. The chambers judge, however, went on to discuss the constitutional issues raised in the Petition.

42. The Respondents conceded below the G&E Orders breached ss. 2(a), 2(b) and 2(c) of the *Charter*. The chambers judge also found a breach of s. 2(d). He declined to make findings under ss. 7 and 15 of the *Charter*. Applying the framework from *Doré v. Barreau du Québec,*[53] the judge found the G&E Orders were justified under s. 1.

PART 2 – ISSUES ON APPEAL

43. The issues on appeal are as follows:

(a) What is the appropriate record before this Court?

(b) Did the chambers judge err in finding the Religious Appellants were required to seek judicial review of the Reconsideration Decision?

(c) Did the chambers judge err in declining to decide:

i. whether s. 15(1) of the *Charter* was violated by the G&E Orders; and

ii. whether the requirement for outdoor protests to follow guidelines in Dr. Henry's February 10, 2021 Order unjustifiably infringed the *Charter*?

(d) Did the chambers judge err in applying the framework set out in *Doré*, and in finding the restrictions on the Religious Appellants' *Charter* rights to be justified?

44. The appeal should be dismissed. For the reasons articulated by the chambers judge,[54] the Religious Appellants were not entitled to challenge the G&E Orders under s. 2 of the *Judicial review Procedure Act.*[55] Even if they were open to challenge, the G&E

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[53] 2012 SCC 12 [*Doré*].
[54] RFJ at paras. 67-79, 250.
[55] R.S.B.C. 1996, c. 241 [*JRPA*].

Orders were reasonable and the infringement of the Religious Appellants' *Charter* rights was justified under s. 1.

PART 3 – ARGUMENT

I. *Standard of review*

45. This appeal engages issues reviewable on both the correctness and reasonableness standards.

46. The Respondents agree the applicable appellate standard of review is correctness with respect to those issues raising questions of law, where the chambers judge was the decision maker at first instance.[56] Those issues include whether the chambers judge: (a) adequately defined the record; (b) appropriately held that the Appellants were required to judicially review the Reconsideration Decision; and (c) determined the necessary legal issues before him.

47. Where the chambers judge engaged in judicial review of Dr. Henry's G&E Orders, the applicable standard of review is reasonableness.[57] On an appeal from a judicial review, the appellate court's role is to step into the shoes of the lower court and perform a *de novo* review of the administrative decision.[58] In conducting this review, this Court owes no deference to the chambers judge.

II. *The chambers judge correctly confined the record to the "record of proceeding"*

48. The chambers judge correctly confined the record before him on judicial review to the record that was before Dr. Henry.[59] The Appellants allege no error on this point. Nevertheless, the Appellants' treatment of the record in their factum is both overinclusive and underinclusive, depending on whether it is convenient to their cause. As discussed below, the Appellants expressly rely on extra-record evidence found inadmissible by the

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[56] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.
[57] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at para. 34.
[58] *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 10.
[59] RFJ at paras. 80-118. See, s. 1 of *JRPA*; *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 [*Beedie*] at paras. 75-76.

chambers judge and misconstrue his reasons on the admissibility of Dr. Henry's reasons for decision of February 12, 2021.

The Affidavits of Dr. Kettner and Dr. Warren Are Not Part of the Record

49. The "purportedly expert evidence"[60] of Dr. Warren[61] and Dr. Kettner[62] was not available to Dr. Henry when she made the impugned orders. Thus, the chambers judge correctly concluded that those affidavits did not form part of the record on judicial review,[63] and could not be relied upon by the Appellants.

50. The chambers judge's reasoning discloses no legal error. With limited exceptions, in a judicial review the evidence is confined to the record before the decision maker.[64]

51. This Court should not condone the Appellants' incessant attempts to bypass the evidentiary record that was before Dr. Henry and present the court with extra-record "expert" evidence. The Appellants' approach demonstrates a lack of deference to the findings of fact on the face of the record that underpins the exercise of judicial review; it also disregards the safeguards developed by the courts pertaining to the use of expert evidence in a civil action. To permit the Appellants to rely on this evidence would "judicialize" administrative law in the manner expressly rejected by this Court in *Beedie*.[65] Having failed to assert or establish any legal error in the chambers judge's findings on the scope of the record, and consistent with the court's supervisory role on judicial review, this Court ought to disregard all references to the evidence of Dr. Kettner and Dr. Warren in the Appellants' factum.[66]

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[60] RFJ at para. 118.
[61] Affidavit #1 of Dr. Thomas Warren made February 10, 2021 (AAB Vol. 4 at 1136).
[62] Affidavit #1 of Dr. Joel Kettner made February 12, 2021 (AAB Vol. 4 at 1156).
[63] RFJ at para. 118. Importantly, however, had the Appellants judicially reviewed the Reconsideration Decision, the record before Dr. Henry would have included the affidavits of Dr. Kettner and Dr. Warren, which were put before her by the Appellants.
[64] *Beedie; SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353; *Albu v. The University of British Columbia*, 2015 BCCA 41 at para. 35-36; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at para. 52; *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387.
[65] *Beedie* at para. 78.
[66] AF at paras. 33, 110, 117; footnotes 33, 41, 101-102, 113, 114.

The Transcript of Dr. Henry's February 12 Media Briefing Is Part of the Record

52. The "record of proceeding" on judicial review includes "any reasons" given by a decision-maker.[67] The Appellants' petition expressly sought to challenge future orders made by Dr. Henry and, in such circumstances, the decision maker must be able to include the "record of proceeding" for decisions made after the filing of her initial record affidavit in order to provide the court with the appropriate record for judicial review.

53. In their statement of facts, the Appellants incorrectly allege the chambers judge excluded the transcript of Dr. Henry's February 12, 2021 media briefing from the record, and further erred by relying on it extensively in his reasons.[68] As is apparent from a review of his reasons, the chambers judge accepted that the February 12 transcript provides Dr. Henry's reasons for her decision to restrict worship services during the second wave of the pandemic.[69] The February 12 transcript was attached as Exhibit "A" to Affidavit #2 of Valerie Christopherson. Exhibit "B" to that same affidavit was the Reconsideration Decision. It is the Reconsideration Decision, and not the transcript, the chambers judge described as "irrelevant" to the judicial review before him.

III. *The Religious Appellants were required to seek judicial review of Dr. Henry's Reconsideration Decision*

54. The chambers judge correctly held that the Religious Appellants were required to seek judicial review of the Reconsideration Decision.[70] The judge applied well-settled principles of judicial review from this Court's decision in *Yellow Cab Company Ltd. v. Passenger Transportation Board*.[71] There is no basis to disturb this finding on appeal.

55. The Appellants make two unsupportable arguments in aid of their position that their petition was not precluded by the remedies provided under s. 43 of the *PHA*.

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[67] *JRPA*, s. 1.
[68] AF at para. 36.
[69] RFJ, at paras. 58-60.
[70] RFJ at para. 73-79.
[71] *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 [*Yellow Cab*].

56. First, the Appellants' own evidence belies their bare assertion that they "attempted" to seek a variance of Dr. Henry's orders between November 19 and December 24, 2020. In December 2020, Dr. Henry invited Brent Smith, Riverside Calvary Chapel, John Koopman and Chilliwack Free Reformed Church to seek reconsideration under s. 43 of the *PHA*.[72] This invitation was *expressly rejected* by Mr. Koopman[73] and was not taken up by the others.[74] Dr. Henry cannot be faulted for failing to reconsider orders in the absence of a request to do so. By the time the Religious Appellants *did* submit a request, the November 19 to December 24, 2020 orders had been repealed and replaced.

57. Second, the Appellants allege that Dr. Henry's Reconsideration Decision was "a transparent machination…coordinated by her counsel".[75] This Court ought to reject such a baseless allegation of bad faith.[76] After commencing litigation, the Religious Appellants chose to engage the reconsideration process under s. 43 and did so through their counsel.[77] Through counsel, they submitted over 1000 pages of evidence. Ten days after receiving this evidence as a part of the reconsideration, and less than a month after the initial request, Dr. Henry delivered written reasons.[78] There is no basis to displace the presumption of regularity – that Dr. Henry made the Reconsideration Decision.

58. Dr. Henry's responses to other applicants who applied for reconsideration of the G&E Orders, such as the Orthodox Jewish rabbis and Rev. Garry Vanderveen,[79] have no bearing on the analysis. The Religious Appellants do not allege any breach of procedural fairness, nor have they sought to review the Reconsideration Decision.

59. The passage from *Yellow Cab* relied upon by the Appellants is wholly inapt. *Yellow Cab* addressed a situation where a decision maker *denied leave* for reconsideration. Dr. Henry in this case reached a decision *on the merits* of the Religious Appellants'

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[72] Koopman #1, Ex. I (AAB Vol. 1 at 164-165).
[73] Koopman #1, Ex. J (AAB Vol. 1 at 168).
[74] Emerson #1 at para. 123 (AAB Vol. 1 at 349).
[75] AF at para. 77.
[76] *Adams v British Columbia (Workers' Compensation Board)*, [1989] BCJ No 2478, 42 BCLR (2d) 228, 18 ACWS (3d) 256 at para. 13.
[77] Lever #1, Ex. D (RAB at 18).
[78] Christopherson #2, Ex. B (AAB Vol. 4 at 1186-1192).
[79] Affidavit #1 of Garry Vanderveen made February 8, 2021 at Ex. "A"; Emerson #1 at paras. 110-119, Ex. 43-47 (AAB at pp. 347-349; 934-949).

application for reconsideration. The broader holding in *Yellow Cab* is that, as a necessary corollary to the requirement to exhaust alternative available remedies and that judicial review is available only for *final* administrative decisions, where a party takes advantage of reconsideration, only the reconsideration decision may be judicially reviewed. The chambers judge made no error in applying these well-established principles.

IV. *The chambers judge did not err in declining to decide s. 15(1) of the Charter*

60. The Appellants demonstrate no legal error in the chambers judge's refusal to make findings under s. 15(1) of the *Charter.* Having found infringements under s. 2 of the *Charter*, the chambers judge held it was "unnecessary" to make a finding with respect to s. 15(1).[80] His exercise of judicial restraint was well-supported by the record[81] and is consistent with the approach adopted by this Court and the Supreme Court of Canada.[82]

61. Where the factual impacts on the interests of the claimants are clearly protected by particular rights in the *Charter,* courts generally do not engage in an analysis of other provisions. The Appellants raise no arguments to suggest the analysis under s. 1 would differ depending on the right giving rise to the *prima facie* infringement. The Appellants have failed to demonstrate *any* legal consequence flowing from this alleged error. Put differently, even if the chambers judge had considered s. 15(1), his s. 1 analysis would remain unchanged. As such, this Court should not give effect to this ground of appeal.

62. In the alternative, the Appellants cannot satisfy the two-part test for infringement of s. 15(1).[83] The Appellants cannot establish *intentional* distinction or discrimination. There is no evidence in the record to support the Appellants' allegation that in-person worship services were restricted "because they were in a broad sense *religious*".[84] The

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[80] RFJ at paras. 197-198.
[81] See Transcript, p. 126, ls.3-8, where counsel for the Appellants stated that s. 15 was not "the strongest bow in our quiver" and "you need not decide this case on s. 15".
[82] *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.,* 2009 BCCA 39 at para. 39; *Carter v. Canada (Attorney General),* 2015 SCC 5 at para. 93 (declining to conduct a s. 15 analysis upon finding s. 7 was breached); *Devine v. Quebec (Attorney General),* [1988] 2 SCR 790 (declining to conduct a s. 15 analysis upon a finding s. 2(b) was breached).
[83] *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 40. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at paras. 27 and 30, per Abella J.
[84] AF at para. 80.

definition of "event" under the G&E Orders was extraordinarily broad. There was no singling out of religious events. The G&E Orders captured "events" that Dr. Henry deemed high risk based on the evidence of transmission patterns, factors giving rise to transmission, and evidence of cases and clusters across B.C. and in other jurisdictions.

63. The Appellants are wrong that support groups can be meaningfully compared to religious gatherings. Support groups are distinguishable in a number of ways, including: (1) they do not typically feature singing or chanting; (2) the age demographic does not typically skew as much towards the older segments of the population; (3) support group attendees are less likely to know other attendees, compared with religious congregations; and (4) both religious and non-religious support groups were permitted to meet.

64. Nor can the Appellants establish an adverse impact upon members of a protected group *qua* group. Section 15 does not allow a government to disadvantage a group of persons based on their religious beliefs, but it is not about neutrality among practices or beliefs, which is addressed by s. 2(a) of the *Charter*. There is no evidence that the restrictions in the G&E Orders specifically disadvantaged a group of people based on their religious beliefs. The restrictions applied equally to activities and settings of secular and religious people. Religious schools were as open as secular ones. Funerals could be conducted by any religious or secular community. Unless they were covered by a specific exemption, non-religious people had no more ability to gather than religious ones. There is no basis for the Appellants' allegation[85] that Dr. Henry was stereotyping religious groups. She founded her comments about the difficulties in achieving compliance in religious settings on the differences between commercial or retail establishments, which are subject to regulation by WorkSafe BC, and social gatherings.[86]

65. In any event, even if s. 15 interests are engaged, the same s. 1 *Doré* analysis must be applied.

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[85] AF at para. 81.
[86] Koopman #1, Ex. I (AAB Vol. 1 at 164-165); Emerson #1 at para. 108, Ex. 23 (AAB Vol. 1 at 347).

V. *The constitutionality of Dr. Henry's orders with respect to protests after February 2021 are not properly before this Court*

66. The Respondents repeat and rely on the mootness arguments set out in their Notice of Motion dated March 15, 2022. In the event this Court dismisses that motion or exercises its discretion to hear from Mr. Beaudoin on appeal, the Respondents make the following submissions.

67. The chambers judge did not err in refusing to decide whether the G&E Order of February 10, 2021 violated ss. 2(b) and 2(c) of the *Charter.* The Respondents conceded that the G&E Orders made between November 19 and February 10, 2021 unjustifiably infringed Mr. Beaudoin's rights under ss. 2(b) and 2(c) of the *Charter* and accordingly, the chambers judge issued the declaratory relief sought by Mr. Beaudoin.[87] The February 10, 2021 order permitted outdoor protests, subject to Dr. Henry's expectation that organizers would follow public health guidance.[88] There was no evidence in the record that Mr. Beaudoin, or anyone else, was unable to exercise their *Charter* protected rights to participate in an outdoor protest under the February 10 order. Neither party filed any evidence with respect to the guidelines Mr. Beaudoin now seeks to challenge. This Court has no record upon which to adjudicate this ground of appeal and Mr. Beaudoin lacks standing to advance it. The Court should dismiss this ground of appeal.

VI. *Doré/Loyola is the applicable framework under s. 1*

68. The chambers judge did not err in applying the framework in *Doré,* rather than *Oakes*, to decide whether the G&E Orders were justified under s. 1. The framework for analyzing whether limits on *Charter* rights and freedoms are justified under s. 1 depends on what is being challenged: an exercise of administrative discretion or a law. In *Vavilov,* the Supreme Court of Canada distinguished between cases in which an exercise of administrative discretion is alleged to unjustifiably limit *Charter* rights, and cases in which an enabling statute itself is alleged to be unconstitutional. [89]

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[87] RFJ at paras. 147 and 251.
[88] Christopherson #1, Ex. "A" (AAB, Vol. 3 at 1023-1055).
[89] *Vavilov* at para. 57. See also, *Redmond v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development,* 2022 BCCA 72 at paras. 46-51.

69. In cases like this one, where the exercise of administrative discretion is alleged to infringe the *Charter,* the framework for analysis is set out in the Supreme Court of Canada's 2012 decision in *Doré*. On judicial review, an administrative decision-maker's exercise of discretion is reviewable on the reasonableness standard.

70. The *Oakes* and *Doré* frameworks "work the same justificatory muscles" at the proportionality stage.[90] In *Vavilov,* the Supreme Court confirmed that *Doré* remains good law and applies where administrative decisions (rather than enabling statutes) are under challenge.[91] For good reason, *Vavilov* makes no distinction as to the applicability of *Doré* based on how many people are affected by the administrative decision at issue.

71. Orders under the *PHA* are not "laws of general application",[92] but are discretionary decisions authorized by the *PHA*. Under s. 30 of the *PHA,* Dr. Henry has broad discretion to make orders directed at "health hazards". Under s. 39(3) of the *PHA*, these orders may be directed at individuals, small groups or classes. *Loyola* and *TWU* involved the rights of groups of people, demonstrating that isolated phrases about the rights of an individual in some cases do not constitute a "test". If they did, then health orders applied to named individuals would be subject to *Doré* analysis, while those issued on a class basis would be subject to *Oakes* analysis, even if the issues were identical.

72. The *Christian Medical and Dental Society of Canada* cases out of Ontario do not assist the Appellants. The trial decision relied on the pre-*Vavilov* decision in *Dunsmuir* to apply the *Oakes* test.[93] The Ontario Court of Appeal did not directly consider the issue.[94] Furthermore, unlike *Vavilov,* neither decision is binding on this Court.

73. Decisions across the country demonstrate a patchwork in terms of their treatment of the appropriate framework under s. 1 when analyzing public health orders:

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[90] *Doré* at para. 3-5. *Loyola High School v. Quebec (A.G.)*, 2015 SCC 12 [*Loyola*]; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*TWU*].
[91] *Vavilov* at para. 57.
[92] AF at para. 64.
[93] *The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at para. 56.
[94] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393.

a. In *Taylor v. Newfoundland and Labrador*, the Newfoundland Supreme Court applied *Oakes,* but did not directly consider the issue.[95]

b. In *Gateway Bible Baptist Church et al. v. Manitoba et al.,*[96] the Manitoba Court of Queen's Bench was urged by both parties to apply the *Oakes* test (and did so), but after some discussion, noted that there "remains a reasonable argument" that *Doré* should be applied.[97]

c. More recently, in *Ontario v. Trinity Bible Chapel,*[98] the Ontario Superior Court of Justice applied *Oakes* on the basis that the orders in Ontario were issued by the government, not medical experts. That Court distinguished the decision of the chambers judge in *Beaudoin*, on the basis that the restrictions in British Columbia *were* issued by medical experts and that, because those orders were administrative decisions, the *Dore* framework applied.

74. Where a party challenges a statute, *Oakes* is the appropriate analysis. Where a party challenges an exercise of administrative discretion, the appropriate framework for analysis is *Doré.* The chambers judge made no error in his determination that *Doré* applied, or in applying it.

VII. *Dr. Henry's orders reasonably balanced Charter rights*

75. Under the *Doré* analysis, the issue is not whether the exercise of administrative discretion that limits a *Charter* right is correct (i.e., whether the court would come to the same result), but whether it is reasonable (i.e., whether the decision falls within the range of acceptable alternatives once appropriate curial deference is given).[99] *Doré* sets out the role of the decision-maker when faced with a conflict between constitutionally-guaranteed freedoms, and the public interest that their statute requires them to uphold.[100]

76. The court's review of an exercise of administrative discretion that engages the protections of the *Charter* must consider whether the decision reflects a proportionate balancing of the *Charter* protections at play."[101] This balancing is reviewable on the

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[95] 2020 NLSC 125 [*Taylor*]. The court in that case also faced a challenge to the underlying enabling statute.
[96] 2021 MBQB 219 [*Gateway Bible*].
[97] *Gateway Bible* at para. 36.
[98] 2022 ONSC 134 [*Trinity Bible Chapel*].
[99] *Doré* at para. 45.
[100] *Doré* at para 55-56.
[101] *Doré* at para 57.

reasonableness standard and the administrative decision maker is afforded a "margin of appreciation" or curial deference in this determination.[102]

77. Dr. Henry's decision to restrict gatherings and events is a discretionary decision taken pursuant to the *PHA.* Public health decisions are the classic example of decisions that must be made in real time based on specialized expertise. Dr. Henry's decision, as reflected in the G&E Orders, reflects a proportionate balancing of the *Charter* protections at play and her statutory mandate to protect public health. Courts have afforded substantial deference to measures adopted by expert public health officials to combat the evolving COVID-19 public health emergency. As Pomerance J. recently recognized in *Trinity Bible Chapel,* with respect to the analysis of Ontario's restrictions on religious gatherings:

> This case calls for even greater deference to government decision making. Public officials were faced with an unprecedented public health emergency that foretold of serious illness and death. … The task at hand called for a careful balancing of competing considerations, informed by an evolving body medical and scientific opinion. … It is frankly difficult to imagine a more compelling and challenging equation….The question of what is "just right" will, to some extent, lie in the eye of the beholder. This mix of conflicting interests and perspectives, centered on a tangible threat to public health, is a textbook recipe for deferential review.[103]
>
> [emphasis added]

78. There is a clear, principled thread that runs through Dr. Henry's reasoning: as of November 2020, British Columbia faced the prospect of exponential growth of COVID-19. Exponential growth of cases would overwhelm both the capacity of British Columbia's healthcare system to treat and care for citizens, as well as the system's capacity to contract trace. This would mean British Columbians would suffer preventable deaths and serious illness and, in turn, would necessitate more extreme measures to curb the spread of the virus.

79. In determining what additional restrictions to impose, Dr. Henry was alive to the material difference between transactional or retail settings, compared with more communal settings - the latter carrying an inherently higher risk for transmission. Dr.

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[102] *Doré* at para 57.
[103] *Trinity Bible Chapel* at paras. 126-127

Henry's premises and conclusion are logically coherent and were repeatedly explained. Ultimately, they were also vindicated, at least to the extent that the curve was flattened.

80. Dr. Henry did not single out religious worship services, but included them in a broader restriction that limited communal gatherings. Dr. Henry reasoned that worship services are not transactional, so there is a greater tendency for people to come into close contact during such services. They also generally involve a period of sustained contact, indoors, and often involve speaking, singing and chanting - all factors which increase the risk of transmission. Further, because of the age skew of those British Columbians who regularly attend religious services, Dr. Henry reasoned they disproportionately involved the demographic most vulnerable to serious illness or death if infected, and most likely to have contacts with people in that demographic.

81. In the vast majority of cases, religious communities continued to offer worship services online. Where a particular faith group could not accommodate online services, they had the option of drive-in services, or the ability to seek reconsideration under s. 43.

82. Gatherings and events are a known route of transmission. Whether less intrusive measures would be 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 G&E Orders, and explained her reasoning.

83. The evidence supports Dr. Henry's finding, that British Columbia faced the prospect of exponential growth of COVID-19 cases in November 2020. Equally, her findings about the relative likelihood of transmission in transactional, as opposed to religious, settings were based on her background in epidemiology, general observations of human behaviour, and evidence of outbreaks in religious settings.

84. The Appellants repeatedly point to the absence of specific evidence of transmission in religious settings where safety protocols were not followed. This argument contains two critical flaws. First, there is no suggestion in the record that Dr. Henry had that level of detailed information available to her. On the information available to her, transmission was occurring in religious settings, despite the fact that measures requiring safety protocols were already in place. Second, Dr. Henry's principled approach was based on avoiding transmission events that were more likely to result in exponential

growth of COVID-19 cases. In other words, it was less about evidence of transmission in a religious setting specifically where safety protocols had not been followed, and more about the nature of the interactions in communal settings such as religious events, and the disproportionate potential for exponential spread to result, and to harm older and more vulnerable members of society.

85. Dr. Henry carefully considered the impacts of the G&E Orders on *Charter* protected rights and freedoms, including religious freedom. She consulted with faith communities to discuss and understand the impact of restrictions on gatherings and events on their congregations and religious practices. She provided exemptions in the orders for special ceremonies or celebrations, such as weddings, funerals, baptisms and Jewish divorce proceedings. Where appropriate, she granted exemptions under s. 43 of the *PHA.*

86. In making the G&E Orders, Dr. Henry adhered to public health decision making principles, including the principle that public health interventions be proportionate to the threat faced and that measures should not exceed those necessary to address the actual risk. The G&E Orders were limited in duration, and constantly revised and reassessed to respond to current scientific evidence and the evolving epidemiological conditions in British Columbia. An administrative decision-maker is not required to choose the option that *least* limits the *Charter* protection at issue. Rather, the question for the reviewing court is always whether the decision falls within a range of reasonable outcomes.[104]

87. Dr. Henry balanced the Appellants' *Charter* rights against her statutory objectives in a reasonable manner. Dr. Henry's pursuit of her statutory objective, namely, to protect public health by reducing transmission of COVID-19 (and thus minimize serious illness, hospitalization and death, and preserve the functioning of British Columbia's healthcare system) was proportionate to the time-limited restrictions on the Appellants' *Charter* rights.

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[104] *TWU* at para. 81.

VIII. *In the alternative, Dr. Henry's orders were justified under s. 1*

88. In the alternative, even if *Oakes* applies, the G&E Orders are justified under s. 1.

Ultimately, it makes no difference whether the G&E Orders are reviewed under *Doré* or *Oakes*; there is "analytical harmony" between these two justificatory frameworks.[105] While the *Oakes* test does not involve the application of a true administrative "standard of review", it nevertheless requires a reviewing court to answer the same basic question: can the law (or discretionary decision) be justified under s. 1 of the *Charter*. When deciding whether a *Charter* infringement is justified, a reviewing court applying *Oakes* must work "the same justificatory muscles" as flexed under *Doré*.[106]

89. It is not possible to limit how people may come together without affecting fundamental freedoms. However, rights and freedoms under the *Charter* are not absolute. Protection of vulnerable members of society from death or severe illness, and protection of the public healthcare system from being overwhelmed by a global pandemic, are also objectives of clear constitutional importance.

90. Containing the spread of COVID-19 is a legitimate objective that can support limits on *Charter* rights under s. 1.[107] Protection of public health is the kind of objective that can justify "reasonable limits" under s. 1 of the *Charter.* [108] A global pandemic is a perfect example of a crisis in which the state is obliged to take measures that temporarily affect the autonomy of individuals and communities within civil society. Courts across the country have acknowledged the constitutional importance of combatting this pandemic.[109]

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[105] *Doré* at para. 57; *TWU* at para. 79; *Loyola* at para. 40.
[106] *Doré* at para. 5.
[107] This point was conceded by the Appellants in the court below. See RFJ at para. 222.
[108] *R. v. Oakes,* [1986] 1 SCR 103 [*Oakes*] at para. 76 (reduction of incidence of substance use disorder is pressing and substantial objective); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at para. 65. See also, *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 518 (s. 7 violations may be justified by "epidemics").
[109] *Trest v. British Columbia (Minister of Health),* 2020 BCSC 1524; *Toronto International Celebration Church v. Ontario (Attorney General),* 2020 ONSC 8027*; Springs of Living Water Centre Inc. v. The Government of Manitoba*, 2020 MBQB 185; *Ingram v. Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806; *Taylor; Gateway Bible; Trinity Bible Chapel; Spencer v. Canada (Health),* 2021 FC 621.

91. The "pressing and substantial objective" advanced by the Appellants is too narrowly construed. The objective of the G&E Orders was to reduce transmission of COVID-19 and thus minimize serious illness, hospitalization and death, and preserve the functioning of B.C.'s healthcare system. These are pressing and substantial objectives.

92. Although the Appellants contest that there is a rational connection between avoiding the spread of COVID-19 and prohibiting religious gatherings, the burden on Dr. Henry at this stage is not particularly onerous.[110] Limiting interactions between large groups of people congregating at a religious service limits the transmission of COVID-19 at those gatherings and the resulting community transmission. In turn, reductions in transmission alleviate the resulting burden on the healthcare system, protect vulnerable individuals, and prevent serious illness and death. The existence of any risk of transmission of the virus at gatherings or events (or even a plausible case based on reason or evidence) is sufficient for the rational connection test.

93. Finally, the G&E Orders minimally impaired the Appellants' rights. At this step, the test is not whether Dr. Henry chose the least restrictive possible measure, but whether the measure falls within a range of reasonable alternatives. The Supreme Court has held that "courts must accord some leeway to the legislator" and will "not find [a law] overbroad merely because they can conceive of an alternative which might better tailor objective to infringement."[111] Nor is Dr. Henry required, in the name of minimal impairment, to "choose the least ambitious means to protect vulnerable groups."[112]

94. In considering whether the G&E Orders "minimally impair" the Appellants' rights, it is important to recognize that these decisions are made for the purposes of protecting the vulnerable. This calls for the greatest level of deference in the application of *Oakes*:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an

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[110] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 2000 SCC 69 at para. 228.
[111] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 37; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para. 43; *RJR-MacDonald* at para. 160.
[112] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*] at 999.

> assessment of conflicting scientific evidence and differing justified demands on scarce resources. [113]

95. Taking this into account, there are a number of ways in which the G&E Orders were "minimally impairing." First, Dr. Henry waited to impose them until there was evidence of exponential increase in cases, first in the Vancouver Coastal and Fraser Health regions, and then across the province. Unlike in Manitoba, Dr. Henry allowed drive-in services.[114] She made it clear that individual prayer and other forms of religious activity could continue at places of worship. She encouraged online religious gatherings. After consulting with religious leaders, Dr. Henry allowed exemptions for funerals, weddings, baptisms and Jewish divorce proceedings. Finally, she granted variances under s. 43.

96. The Appellants' insistence on an "evidentiary burden", and their claims around the insufficiency of evidence of transmission, fail to account for the challenging context in which these decisions are made. In an evolving and novel global pandemic, Dr. Henry cannot be required to wait for transmission to reach a certain level, or for the government to retain individual inspectors to go and inspect the safety protocols followed at each and every religious institution across the province, before taking action.

97. As the court recognized in *Taylor,* the COVID-19 pandemic has involved "emergent and rapidly evolving situations" in which "the time available for seeking out and analyzing evidence shrinks…[and] the margin for error may be narrow." The precautionary principle permits public health officials to take action to prevent anticipated harm absent scientific consensus on all issues. This allows government decisions to be taken on the basis of imperfect information, and should not be undermined later with the benefit of hindsight.

98. When it comes to the final proportionality stage of the *Oakes* test, it is important to note that very few laws have ever been struck down at this stage. Most importantly, evidence of harm to others has always been a basis for limitations on s. 2 freedoms, including religious freedom:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and

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[113] *Irwin Toy* at 993-994.
[114] See *Gateway Bible* at para. 348.

> opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[115]

99. There are few injuries to neighbours more palpable than increased risk of death and serious illness. Without question, the state must respect the Appellants' freedom to hold and to manifest the beliefs of their conscience. That said, it must sometimes step in and protect those who may not share such beliefs, but do share the community, the air and vulnerability to novel viruses.

PART 4 – NATURE OF ORDER SOUGHT

100. The Respondents seek an order dismissing the appeal.

101. The Appellants seek declaratory relief, which is not available or appropriate in the circumstances. This Court ought to follow the normal course and set aside any offending portion of the decision and remit the matter for reconsideration. This Court should not substitute its own judgment or direct the result of the reconsideration.[116]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March, 2022.

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[115] *R. v. Big "M" Drug Mart,* [1985] 1 S.C.R. 295 at para. 123.
[116] *Vavilov* at para. 141-142; *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344 at para. 60; *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill,* 2011 BCCA 49 at paras. 50-52.

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