SCC Court File No.:_

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

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

APPLICANTS
(Appellants)

- 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)

APPLICATION FOR LEAVE TO APPEAL
(BRENT SMITH, JOHN KOOPMAN, JOHN VAN MUYEN, RIVERSIDE CALVARY CHAPEL, IMMANUEL COVENANT REFORMED CHURCH AND FREE REFORMED CHURCH OF CHILLIWACK, B.C., APPLICANTS)
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985)

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TABLE OF CONTENTS

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(BRENT SMITH, JOHN KOOPMAN, JOHN VAN MUYEN, RIVERSIDE CALVARY CHAPEL, IMMANUEL COVENANT REFORMED CHURCH AND FREE REFORMED CHURCH OF CHILLIWACK, B.C., APPLICANTS)
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985, c S-26)

TAKE NOTICE that the Applicants, Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C., apply for leave to appeal to the Supreme Court of Canada, under section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156 from the judgment of the Court of Appeal for Alberta (File no. CA47363) made on December 16, 2022, and for any further or other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE that this application for leave to appeal is made on the following grounds and that the case presents issues of national importance:

No. 1. Is the constitutionality of provincial rules of general application that admittedly infringe *Charter* protections and that are imposed by order rather than regulation properly reviewed only under the strictures of administrative law?

No. 2. May citizens challenging the constitutionality of administrative decisions of general application provide evidence relevant to whether the decisions are "demonstrably justified in a free and democratic society."

No. 3. Do citizens challenging the constitutionality of decisions the government admits infringe *Charter* protections bear the burden of proving the unreasonableness and lack of justification for those decisions?

No. 4. Can a province prevent judicial review of the constitutionality of orders applicable to everyone in the province solely on the basis that individuals can apply (or have applied) to the government decision maker for reconsideration?

Dated at the City of Calgary, Province of Alberta this 14th day of February, 2023.

A.K. Pejovic

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Alain Beaudoin
Self-Represented Litigant

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

SCHEDULE "A"

A. Oral Reasons for Judgment in the Supreme Court of British Columbia dated February 10, 2021, *Beaudoin v British Columbia,* 2021 BCSC 226

B. Reasons for Judgment in the Supreme Court of British Columbia dated February 17, 2021, *Beaudoin v British Columbia,* 2021 BCSC 248

C. Reasons for Judgment in the Supreme Court of British Columbia dated March 18, 2021, *Beaudoin v British Columbia,* 2021 BCSC 512

D. Order made after Application, Supreme Court of British Columbia dated March 18, 2021

E. Oral Reasons for Judgment from the Court of Appeal for British Columbia dated February 2, 2022, *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 66

F. Reasons from the Court of Appeal of British Columbia dated December 16, 2022, *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Beaudoin v. British Columbia,* 2021 BCSC 226

Date: 20210210
Docket: S210209
Registry: Vancouver

Between:

Alain Beaudoin, Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church, and Free Reformed Church of Chilliwack

Petitioners

And

Her Majesty the Queen in Right of the Province of British Columbia and Dr. Bonnie Henry in her Capacity as Provincial Health Officer for the Province of British Columbia

Respondents

Before: The Honourable Chief Justice Hinkson

Oral Reasons for Judgment

Counsel for the Petitioners:	P. Jaffe
Counsel for the Respondents:	J. Hughes, Q.C. G. Morley E. Lapper
Counsel for the Applicant ARPA Canada:	G. Trotter
Place and Date of Hearing:	Vancouver, B.C. February 10, 2021
Place and Date of Judgment:	Vancouver, B.C. February 10, 2021

[1] The petitioner Alain Beaudoin protests certain Ministerial and related provincial government orders restricting gatherings and events, including religious gatherings. The orders were made in response to the Covid-19 pandemic, and Mr. Beaudoin seeks to have them declared to be of no force and effect as unjustifiable infringements of his *Charter* rights. In addition, he seeks to have the orders quashed, interim and final injunctions to enjoin the respondents from further enforcement action that would interfere with religious services, and an order quashing certain violation tickets issued pursuant to the impugned orders.

[2] The petitioner Brent Smith is the Pastor of the Riverside Calvary Chapel, and the petitioner Mr. Van Muyen, is the Chair of the Council of Immanuel Covenant Reformed Church. They seek the same relief as Mr. Beaudoin, as do the other petitioners, which are churches, whose members are or may be, affected by the impugned orders.

[3] The respondents are Her Majesty the Queen in Right of the Province of British Columbia, represented by the Attorney General, and Dr. Bonnie Henry, the Provincial Health Officer.

The intervention Application

[4] The Association for Reformed Political Action (ARPA) Canada (“ARPA”) filed an application to intervene in this matter.

[5] ARPA is a not-for-profit, non-partisan, organization which asserts that it serves at the intersection of government and Canada’s Reformed Christian community. It has been active in Canada since the 1970’s. ARPA says that its two-fold mission is (a) educating, equipping, and assisting members of Canada’s Reformed churches and the broader Christian community as they seek to participate in politics and public life; and (b) bringing a Reformed Christian perspective to civil authorities in Canada, including the courts.

[6] ARPA has previously been granted intervenor status in both *Trinity Western University v. Law Society of British Columbia*, 2015 BCSC 2326, and *Lamb v. Canada (Attorney General),* (BCSC Vancouver No. S165851).

[7] In this action, ARPA seeks:

1. An order granting the Applicant leave to intervene and to be added as an intervener in this proceeding;
2. That the style of cause be amended accordingly;
3. That the parties provide the interveners with electronic copies of all pleadings, evidence, or other documents exchanged, or to be exchanged, between them;
4. An order that the Applicant may:
    a. File written submissions in respect of the hearing of the petition of no more than 20 pages; and
    b. Present oral argument at the hearing of the petition not to exceed 30 minutes, or as directed by the Court, and the direction as to the order of oral submissions;
5. An order setting a schedule for the filing of written submissions; and
6. An order that no costs will be ordered in favour of or against the Applicant.

[8] ARPA's application is opposed by the respondents, but supported by the petitioners. The respondents say that if the applicant is permitted to intervene, that, any written submissions should be limited to 10 pages and oral argument should not exceed 15 minutes, and no order as to the order of oral submissions or a schedule for the exchange of written submissions should be made by the Court on this application.

The Test for granting Intervenor Status

[9] I accept the applicant's submission that applications to intervene in this Court are guided by the Court's inherent jurisdiction. Applicants must demonstrate either a direct interest in the litigation or that "the case raises public law issues, legitimately engages the applicant's interests and the applicant represents a perspective or point of view that will assist the court in resolving them". The applicant does not assert any direct interest in the litigation between the parties.

[10] ARPA contends that this case involves important legal issues that transcend the immediate interests of the parties before this Court. ARPA says that its perspective is broader than that of the parties as its goal is not to win a case, but to intervene to guide the development of the law in a manner consistent with: (a) robust protection for religious exercise to include in-person corporate worship and sacraments, (b) equal protection for religious exercise, not disadvantaging it in comparison with non-religious activities that raise similar public health risk, and (c) conceptual considerations which guide the s. 1 analysis.

[11] The respondents referred me to three decisions of Judges of the Court of Appeal, sitting in chambers, where applications for intervention in that Court were considered: *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 [*Equustek*], *Sqaumish Nation v. British Columbia (Environment)*, 2019, BCCA 65 [*Sqaumish Nation*], and *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 8 [*Trans Mountain*].

[12] In *Equustek*, Mr. Justice Groberman held that where prospective intervenors seek to present argument on the basis that they are particularly well-placed to assist the Court by providing a special perspective on an issue of public importance, the Court must be concerned with the advisability of permitting submissions that go beyond those that the parties can effectively make, while, at the same time attempting to ensure that important points of view are not overlooked. He found at para. 8 that intervenors who purport to offer a special perspective must demonstrate that it is in the Court's interest (or, more broadly, in the public interest), rather than their own, for them to be heard.

[13] At para. 9, Groberman J.A. wrote that:

> The scope for such interventions is very limited. While the intervenor must be able to present a perspective that is not already before the Court, it must not expand the litigation by raising matters that are not already part of it. Further, it must not attempt to take over or "hijack" the litigation by changing its focus to an issue that is peripheral to the case as it is presented. The niche that may be occupied by an intervenor is, therefore, necessarily a very narrow one. For that reason, intervenor status is not granted as a matter of course.

[14] At para. 11 Groberman J.A. emphasized that an order allowing intervention is discretionary, and the Court must be convinced that interventions will be of assistance.

[15] Mr. Justice Groberman and Mr. Justice Hunter in *Squamish Nation,* and Madam Justice Fenlon in *Trans Mountain*, of course, were dealing with applications for intervention in the Court of Appeal, where the record of the proceedings and the evidence have been settled in this Court. While their comments are of course to be carefully applied in this case, they must be tempered by the reality that until the submissions of the parties are known, it is difficult for the applicants to demonstrate that the submissions that they propose to offer will neither "hijack" the case nor simply duplicate the submissions of the party they support.

Discussion

[16] ARPA contends that the impact of the impugned Covid-19 restrictions on the practice of in-person public worship has been the top issue of concern for its constituency since March 2020, and that its constituency is profoundly impacted by the impugned orders; more so than certain other religious groups, because Reformed Christians sincerely hold to religious beliefs, that include the belief in the religious/moral/spiritual mandatory obligation to be a member of a local church and to gather physically, in-person, with that local church for worship and the administration of religious sacraments.

[17] ARPA adds that its constituents share a belief in the Reformed concept of sphere sovereignty, an outworking of the Reformed emphasis on the sovereignty of God, "which holds that all authority ultimately comes from God, who has given specific and limited authority and responsibility to distinct "spheres" of society, the most basic being the church, the family, and the state". ARPA contends that this divine "separation of powers" between the institutions of family, church, and state requires that each "sphere" fulfil its respective duties and honour its proper limits which place them between two conflicting moral obligations: their duties as church

leadership to hold in-person worship and administer the sacraments, and their duty as citizens to obey the civil government's orders at issue in this proceeding.

[18] ARPA further asserts that it can provide a unique perspective with respect to the essential nature of in-person gathered worship and participation in the sacraments, and assist the Court in understanding the severity of the deleterious effects of restrictions on in-person gathered worship for the purposes of the proportionality exercise, which must be undertaken in the s. 1 *Charter* analysis under either *Doré v. Barreau du Québec*, 2012 SCC 12 or *R. v. Oakes*, [1986] 1 S.C.R. 103.

[19] ARPA proposes to make submissions with respect to sections 1, 2, and 15 of the *Charter*; the sections under which the petitioners have based some of their submissions. It has provided little more than a thumbnail sketch of the submissions it wishes to make, but as I have mentioned above, unless and until the submissions of the parties are clear, it is difficult to determine if they are seeking to "hijack" the litigation or will simply duplicate the submissions of the party they support.

[20] The respondents argue that the perspective that can be offered by ARPA is no different than that of the petitioners, and that any submissions offered by ARPA will be irrelevant or duplicative of the submissions of the petitioners and thus of no assistance to the Court.

[21] In addition, the respondents contend that the arguments proposed by ARPA seek to expand the scope of the litigation by raising arguments which are no longer in issue between the parties and provide submissions that the petitioners are well-placed to make.

[22] The respondents argue that the first issue ARPA proposes to raise is a "full appraisal" of the infringements of s. 2 of the *Charter*, including the intersection of the various rights engaged by s. 2 and academic legal commentary on the infringement of multiple freedoms. The respondents contend that as they have conceded infringement of s. 2 of the *Charter*, there is no issue with respect to s. 2 as between

the parties and ARPA's submissions with respect to this provision would therefore be academic only and of no assistance to this Court.

[23] The respondents contend that the second issue ARPA proposes to raise is "religious equality" under s. 15 of the *Charter*. The respondents contend that the s. 15 argument proposed by ARPA is premised on the concept of "equivalent transmission risk" in religious and non-religious settings, but say that ARPA fails to identify how the concept of "equivalent transmission risk" would be determined by the Court within the context of a judicial review and on the available record. The respondents contend that in any event, the s. 15 argument proposed by ARPA appears to be functionally identical to the argument being advanced by the petitioners on s. 15, and therefore fails to articulate a distinctive position that would assist the Court.

[24] Insofar as the third area in which the applicants seek to offer submissions, the respondents say that ARPA's proposed submission with respect to the s. 1 analysis is unlikely to assist the court and represent submissions that can and ought to be made by the petitioners, who share ARPA's perspective.

[25] It may be that the respondents will prove to be correct with respect to the uniqueness and the utility of the applicant's proposed submissions, but unless and until the parties' submissions are filed, and those proposed by ARPA articulated in greater detail, I am unable to reach the conclusions urged upon me by the respondents.

[26] I had hoped to allow the parties to file their written submissions before the hearing of this petition beginning March 1, 2021, so that the applicant could demonstrate that its submissions offered a perspective that would be unavailable to me absent their submissions, and were neither irrelevant nor duplicative of the submissions of the petitioners. Counsel for the petitioners said he could not agree that he would be able to file written submissions until February 22, 2021, but that he would endeavour to do so by February 19, 2021.

[27] Counsel for the respondents declined to agree to a filing schedule for written submissions or to file written submissions before the hearing date for the petition.

[28] I am not prepared to decide the application on the basis of what might or might not be offered by the applicant in response to the written submissions yet to be filed by the parties. In the result, I will adjourn the applicant's application until March 1, 2021.

"The Honourable Chief Justice Hinkson"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Beaudoin v. British Columbia,* 2021 BCSC 248

Date: 20210217
Docket: S210209
Registry: Vancouver

Between:

Alain Beaudoin, Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church, and Free Reformed Church of Chilliwack

Petitioners

And

Her Majesty the Queen in Right of the Province of British Columbia and Dr. Bonnie Henry in her Capacity as Provincial Health Officer for the Province of British Columbia

Respondents

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Petitioners:	P. Jaffe M. Moore
Counsel for the Respondents:	G. Morley E. Lapper
Place and Date of Hearing:	Vancouver, B.C. February 12, 2021
Place and Date of Judgment:	Vancouver, B.C. February 17, 2021

Introduction

[1] We are in the midst of a terrible pandemic. Our provincial government, under the guidance of the respondent Dr. Bonnie Henry, is doing its best to protect us from the ravages of the pandemic.

[2] Many are finding solace and comfort in these troubled times in their religious views and practices, and gathering together with others who share their views and practices.

[3] The petitioners protest a Ministerial Order and certain orders made by the respondent Dr. Henry in response to the COVID-19 pandemic. The orders restrict gatherings and events, including religious gatherings. The petitioners seek to have them declared to be of no force and effect as unjustifiable infringements of their, or their parishioners' *Charter* rights. They seek to have the orders quashed, and interim and final injunctions granted to enjoin the respondents from further enforcement action that would interfere with religious services, as well as an order quashing certain violation tickets issued pursuant to the impugned orders.

The Parties

[4] The petitioner Alain Beaudoin was born and resides in British Columbia. He has worked here as a residential care worker, an animal control officer and as a medic in the oil and gas industry. He has involved himself in advocacy for both what he sees as his own rights and those of others.

[5] The petitioner Brent Smith is the Pastor of the Riverside Calvary Chapel, and the petitioner Mr. Van Muyen is the Chair of the Council of Immanuel Covenant Reformed Church. They seek the same relief as Mr. Beaudoin, as do the other petitioners, which are churches whose members are or may be affected by the impugned orders.

[6] The respondents are Her Majesty the Queen in Right of the Province of British Columbia, and Dr. Bonnie Henry, the Provincial Health Officer. I was advised by counsel for the respondents that Her Majesty the Queen in Right of the Province

of British Columbia is represented by the Attorney General of British Columbia, and that the style of cause should be amended to reflect that representation. I will allow such an amendment.

[7] Notwithstanding the orders impugned by the petitioners, the respondents seek an injunction from this Court to force compliance with those orders.

Orders Sought

[8] The petition is scheduled to be heard beginning March 1, 2021. It is at that time that the merits of the parties' respective positions will be heard. For now, the respondents seek an injunction in the following terms:

> 1. A prohibitory interlocutory injunction that no person may and, in particular, Brent Smith John Koopman, John Van Muyen and the members, directors, elders and clergy of the Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C. must not permit the following premises of the petitioner churches:
>
> a. 8-20178 96 Avenue, Langley, British Columbia;
>
> b. 35063 Page Road, Abbotsford, British Columbia; or
>
> c. 45471 Yale Road West, Chilliwack, British Columbia;
>
> or any other premises to be used for an in-person worship or other religious service, ceremony or celebration, or other "event" as defined in the January 8, 2021 Order of the Provincial Health Officer, Gatherings and Events ("the PHO Order), as amended or as repealed and replaced except:
>
> d. in accordance with the PHO Order;
>
> e. as permitted by further order of this Court; or

f. as permitted by an agreement under s. 38 of the *Public Health Act.*

2. A prohibitory interlocutory injunction ordering that no person may and, in particular, Brent Smith John Koopman, John Van Muyen and the members, directors, elders and clergy of the Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C. (collectively, "the Religious Petitioners") must not organize, host or in any way facilitate or participate in an in-person worship or other religious service, ceremony or celebration, wedding, baptism, funeral or other "event" as defined in an Order of the Provincial Health Officer, except:

a. in accordance with the PHO Order;

b. as permitted by the further order of this Court; or

c. as permitted by an agreement under s. 38 of the *Public Health Act.*

3. A prohibitory interlocutory injunction ordering that Brent Smith, John Koopman, John Van Muyen must not be present at an in-person worship or other religious service, ceremony or celebration, wedding, baptism, funeral or other "event" as defined in an Order of the Provincial Health Officer, except:

a. in accordance with the PHO Order;

b. as permitted by the further order of this Court; or

c. as permitted by an agreement under s. 38 of the *Public Health Act.*

4. An order authorizing any police officer with the appropriate authority in the jurisdiction in question ("the Police") to, in their discretion, detain a

person who has knowledge of this Order and of whom the Police have reasonable and probable grounds to believe that the person is intending to attend a worship or other religious service, ceremony or celebration prohibited by this Order in order to prevent the person from attending the worship or other religious service, ceremony or celebration.

5. An order that the parties to this proceeding and any other persons affected by this Order may apply to this Court for a variation of the Order and that, unless the court otherwise orders, any application to vary must be brought on notice to the parties in accordance with the *Supreme Court Civil Rules*. B.C. Reg. 168/2009.

6. The order is to remain in force until varied or until final determination of the Petition on the merits and expiry of all applicable appeal periods.

The Impugned Orders

[9] The Ministerial Order that is challenged by the petitioners was made under the *COVID-19 Related Measures Act,* SBC 2020, c. 8.

[10] The orders that are challenged by the petitioners have been made pursuant to ss. 30, 31, 32 and 39(3) of the *Public Health Act*, S.B.C. 2008, c. 28. Those sections provide that:

> **30**(1) A health officer may issue an order under this Division only if the health officer reasonably believes that
>
> (a) a health hazard exists,
>
> (b) a condition, a thing or an activity presents a significant risk of causing a health hazard,
>
> (c) a person has contravened a provision of the Act or a regulation made under it, or
>
> (d) a person has contravened a term or condition of a licence or permit held by the person under this Act.
>
> (2) For greater certainty, subsection (1) (a) to (c) applies even if the person subject to the order is complying with all terms and conditions of a licence, a permit, an approval or another authorization issued under this or any other enactment.

31(1) If the circumstances described in section 30 *[when orders respecting health hazards and contraventions may be made]* apply, a health officer may order a person to do anything that the health officer reasonably believes is necessary for any of the following purposes:

(a) to determine whether a health hazard exists;

(b) to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard;

(c) to bring the person into compliance with the Act or a regulation made under it;

(d) to bring the person into compliance with a term or condition of a licence or permit held by that person under this Act.

(2) A health officer may issue an order under subsection (1) to any of the following persons:

(a) a person whose action or omission

(i) is causing or has caused a health hazard, or

(ii) is not in compliance with the Act or a regulation made under it, or a term or condition of the person's licence or permit;

(b) a person who has custody or control of a thing, or control of a condition, that

(i) is a health hazard or is causing or has caused a health hazard, or

(ii) is not in compliance with the Act or a regulation made under it, or a term or condition of the person's licence or permit;

(c) the owner or occupier of a place where

(i) a health hazard is located, or

(ii) an activity is occurring that is not in compliance with the Act or a regulation made under it, or a term or condition of the licence or permit of the person doing the activity.

32(1) An order may be made under this section only

(a) if the circumstances described in section 30 *[when orders respecting health hazards and contraventions may be made]* apply, and

(b) for the purposes set out in section 31 (1) *[general powers respecting health hazards and contraventions]*.

(2) Without limiting section 31, a health officer may order a person to do one or more of the following:

(a) have a thing examined, disinfected, decontaminated, altered or destroyed, including

(i) by a specified person, or under the supervision or instructions of a specified person,

(ii) moving the thing to a specified place, and

(iii) taking samples of the thing, or permitting samples of the thing to be taken;

(b) in respect of a place,

(i) leave the place,

(ii) not enter the place,

(iii) do specific work, including removing or altering things found in the place, and altering or locking the place to restrict or prevent entry to the place,

(iv) neither deal with a thing in or on the place nor dispose of a thing from the place, or deal with or dispose of the thing only in accordance with a specified procedure, and

(v) if the person has control of the place, assist in evacuating the place or examining persons found in the place, or taking preventive measures in respect of the place or persons found in the place;

(c) stop operating, or not operate, a thing;

(d) keep a thing in a specified place or in accordance with a specified procedure;

(e) prevent persons from accessing a thing;

(f) not dispose of, alter or destroy a thing, or dispose of, alter or destroy a thing only in accordance with a specified procedure;

(g) provide to the health officer or a specified person information, records, samples or other matters relevant to a thing's possible infection with an infectious agent or contamination with a hazardous agent, including information respecting persons who may have been exposed to an infectious agent or hazardous agent by the thing;

(h) wear a type of clothing or personal protective equipment, or change, remove or alter clothing or personal protective equipment, to protect the health and safety of persons;

(i) use a type of equipment or implement a process, or remove equipment or alter equipment or processes, to protect the health and safety of persons;

(j) provide evidence of complying with the order, including

(i) getting a certificate of compliance from a medical practitioner, nurse practitioner or specified person, and

(ii) providing to a health officer any relevant record;

(k) take a prescribed action.

> (3) If a health officer orders a thing to be destroyed, the health officer must give the person having custody or control of the thing reasonable time to request reconsideration and review of the order under sections 43 and 44 unless
>
> (a) the person consents in writing to the destruction of the thing, or
>
> (b) Part 5 *[Emergency Powers]* applies.
>
> […]
>
> **39**(3) An order may be made in respect of a class of persons.

[11] Section 43 of the *Public Health Act* permits an affected party to apply for the reconsideration or variance of the order of a public health officer, and the petitioners began such an application with respect to the impugned orders on January 29, 2021, but that application remains unresolved.

[12] The January 8, 2021 Order of the Provincial Health Officer, regarding Gatherings and Events is simply a renewal and reiteration of a verbal order made on November 7, 2020. That Order prohibits certain "events":

> 1. No person may permit a place to be used for an event except as provided for in this Order.
>
> …
>
> 3. No person may organize or host an event except as provided for in this Order.
>
> 4. No person may be present at an event except as provided for in this Order.

[13] In the Order, ""event" refers to an in-person of gathering of people in any place whether private or public, inside or outside… including… a worship or other religious service, ceremony or celebration".

[14] Dr. Brian Emerson is the Acting Deputy Health Officer for the Province. In his affidavit sworn February 2, 2021, he summarized the order in these terms:

> The current January 8th Gathering and Events order maintains the prohibition on in-person religious services, but does permit drive-in events with more than 50 patrons present as long as people only attend in a vehicle, no more than 50 vehicles are present, people stay in their vehicles except to use

> washroom facilities, when outside their vehicles they must maintain a distance of two metres from any other attendees, and no food or drink is sold. The January 8th order also provides exceptions for weddings, baptisms, and funerals (to a maximum of 10 people) and permits private prayer/reflection in religious settings.

The Petitioner's Concerns

[15] Although phrased in various ways, the concerns of the petitioners are fairly summarized in a letter dated November 28, 2020 from the respondent Immanuel Covenant Reformed Church, which states, in part:

> The default position of the Christian church concerning civil government is to submit to its lawful authority in all civil matters. Throughout Scripture, but most directly in Romans 13:1-7 and 1 Peter 2:13-17, God commands Christians to be subject to the civil government as the civil government is appointed by God and exists for the good of all. We are called to submit to civil authority in all civil matters regardless of whether we personally agree or disagree with their directives or judgements.
>
> However, this duty to obey our civil authorities ends when they command that we engage in behavior contrary to God's Word or when they prohibit what God commands us to do. Ultimately, we must obey God rather than men (Acts 5:29).
>
> We firmly believe that this public health order violates God's Word for two biblical reasons. First, all Christians are called to assemble, in-person, for regular corporate worship services. Christians not only gather together for worship out of love toward God, but also because it is *essential* to our spiritual health and because we are *commanded* to do so (Psalm 65:4; Psalm 84:1; Psalm 95:1, 2; Psalm 111:1; Psalm 122:1; Acts 2:46; Ephesians 5:19; Colossians 3:16; 1 Timothy 4:13; Hebrews 10:23-25). We are called to worship God in the way that He has commanded in Scripture including, though not limited to, hearing the preaching of the Word, partaking of the sacraments of baptism and communion, singing His praises, praying together, confessing His name, exercising church discipline, and fellowship with other Christians. Although some of these aspects of worship can be performed online, many of them cannot.
>
> [Emphasis in the original]

[16] Cameron Pollard is the treasurer of the Valley Heights Community Church in Chilliwack, British Columbia. Although that church is not one of the petitioners, it is one of the objects of this injunction application. It is apparent from Mr. Pollard's affidavit of December 21, 2020, sworn in support of the petition, that his church has held in-person services since the November 7, 2020 order.

Background

[17] The respondents produced evidence that religious settings can lead to elevated risk of COVID-19 transmission because they:

(a) Generally occur in indoor settings;

(b) Often involve the assembly of a large number of people from different households;

(c) Usually last for an extended duration (defined as longer than 15 minutes) which results in greater duration of exposure and therefore a higher risk of infection and chance of viral spread;

(d) Often include individuals within high risk groups, including older adults and those with comorbidities; and

(e) Often involve loud talking and singing, which may represent greater risk for viral transmission.

[18] The petitioners contend that they have not ignored the risks of the transmission of COVID-19. Their responses are varied, but for the most part appear to be consistent with the practice followed at the Valley Heights Community Church in Chilliwack. Timothy Champ is the pastor of that church. In his affidavit sworn December 21, 2021 Pastor Champ stated:

> We were eager to meet in-person, but also eager to make sure those who attended would be kept as safe as possible. In light of this, we established and communicated the following protocols:
>
> - We encourage our members to give non-family members adequate space when arriving, during their time at the service and after the service.
> - Upon entry, hand sanitizer and masks are provided to members.
> - Every pew in the facility is separated at least 6 ft. from the next pew.
> - Physical distancing is required between each person or family group.

- Members are asked to limit the use of the washroom, and parents were urged to accompany their children. Sanitation wipes were provided in the bathroom for cleaning after each use.
- Families are asked to enter, stay together, and exit the building together.
- No childcare or Sunday school for children is provided.
- Those with any symptoms associated with Covid-19, are asked to remain home and join the service online.

[19] The petitioner, Robert Smith described the precautions instituted at the Riverside Calvary Chapel in his affidavit sworn December 5, 2020 as:

- Holding three services on Sunday mornings capped at 50 people;
- Maintaining a reservation link on our website in order for people to reserve a seat and provide contact information;
- Having hand sanitizer stations were [sic] set up throughout the Church buildings;
- Cleaning and wiping down the sanctuary between each service;
- Ensuring that attendees were provided with clean masks;
- Having elders direct orderly and socially distanced entry of persons to the sanctuary and also constantly sanitizing the entry door;
- Keeping our services to an hour so as to maintain a timely flow of people in and out of the building.

[20] Notwithstanding similar precautions instituted by the respondent Chilliwack Free Reformed Church, Dr. Henry wrote to the Church on December 18, 2020, advising in part:

> I recognize the importance of religious freedom, and in particular the need for individuals to access the support within faith-based communities during this difficult time. I have had many discussions with religious leaders across the province about the current situation we face in BC and I am appreciative of the support I have received from most religious leaders for helping to achieve compliance with public health measures to reduce the spread of COVID-19 in our communities.
>
> 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.

> …
>
> 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 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.

[21] The Ministerial Order that is impugned by the petitioners in this case was granted on November 13, 2020, and an attempt to enforce it was apparently first made on November 29, 2020, now almost seven weeks ago.

Injunctive Relief

[22] Jurisdiction to grant relief by way of injunction is conferred on this Court by s. 39 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253. Various other statutes, including s. 48 the *Public Health Act* provide for injunctions in particular cases.

[23] In *British Columbia Practice*, 3rd ed. (Markham, Ont.: LexisNexis Canada Inc., 2006), the authors state that "injunctions may be granted in a variety of different situations, the basic principle being that an injunction will be granted to enforce or maintain a legal right: *Birmingham (Corp.) v. Allen* (1877), 6 Ch. D. 284 (Ch.); *Ballard v. Tomlinson* (1884), 26 Ch. D. 194 (Ch.); *Sports and General Press Agency Ltd. v. Our Dogs Publishing Co. Ltd.*, [1917] 2 K.B. 125 (C.A.); *Duplain v. Cameron (No. 2)*, [1960] S.J. No. 62, 33 W.W.R. 38 (Q.B.); and *Fluorescent Sales and Service Ltd. v. Bastien*, [1959] A.J. No. 32, 39 W.W.R. 659 (C.A.)."

[24] In *JTT Electronics Ltd. v. Farmer*, 2014 BCSC 2413 at para. 63, Mr. Justice Voith referred to the description by Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, (Toronto: Canada Law Book, 2013) at para. 2.10, of an interlocutory injunction as a "drastic" remedy.

The Test for Injunctive Relief

[25] The test to be applied when an injunction is sought is set out in the well-known case of *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*]. It requires the court to consider three factors:

1. Has the applicant demonstrated there is a fair question to be tried?
2. Will the applicant suffer irreparable harm if an injunction is not granted?
3. Does the balance of convenience favour the granting of an injunction?

[26] These factors were the subject of discussion by Mr. Justice Beetz, writing for the Court, in the earlier decision of the Supreme Court of Canada in *Manitoba (A.G.) v. Metropolitan Stores Ltd*., [1987] 1 S.C.R. 110 [*Metropolitan Stores*]. There the Court established the three-part test that was referred to in determining whether to grant an interlocutory injunction in *RJR-MacDonald*.

(a) Fair Question to be Tried

[27] Section 2(a) 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 (the "*Charter*") protects freedom of conscience and religion. Section 2(b) protects freedom of thought, belief, opinion and expression. Section 2(c) protects freedom of peaceful assembly, and section 2(d) protects freedom of association.

[28] Section 7 of the *Charter* protects the life, liberty and security of person.

[29] Section 15(1) of the *Charter* protects individuals from discrimination based on religion, among other grounds.

[30] The petitioners assert that each of these *Charter* rights are breached by the impugned orders.

[31] The respondents concede that at least the s. 2(a) rights of the individual petitioners, and those attending the petitioner churches are breached by the

impugned orders, but maintain that the impugned legislation is saved by s. 1 of the *Charter.*

[32] The ability of members or delegates of the Legislative Branch of Government to make the orders that affect the *Charter* rights of the individual petitioners and those who wish to attend the petitioner churches is a fair question to be tried.

(b) Irreparable Harm

[33] At this stage the only issue to be decided is whether refusal to grant the injunction could so adversely affect the respondents' own interests that the harm could not be remedied even if the eventual decision on the merits does not accord with the result of the interlocutory application: *RJR-MacDonald* at 341.

[34] The definition of irreparable harm was set out by the Supreme Court of Canada in *RJR-MacDonald* at 341:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other…

[35] If an injunction is not granted, the public, as represented by their elected officials and informed by the advice of Dr. Henry, will likely face what may be greater exposure to the virus.

[36] I am satisfied that members of the public could well suffer from the transmission of the virus by persons unsafely attending gatherings, and suffer from the effects of COVID-19, including death.

[37] I find that the enforcement of a validly enacted, but challenged law is an obligation of the Executive Branch of the provincial government. Failure to enforce the law could have the effect of depriving the public of the benefit of orders which have been duly enacted and which may in the end be held valid. That deprivation is, in my view, irreparable harm.

[38] But the harm that will arise from granting an injunction may deprive the petitioners of constitutional rights that may prove them to entitlement of the relief they seek in their petition, amounting to irreparable harm to them.

(c) The Balance of Convenience

[39] As the damages alleged by the respondents satisfy the criterion of irreparable harm, I must consider whether the balance of convenience favours granting the remedy that the respondents seek.

[40] In *Metropolitan Stores*, Mr. Justice Beetz discussed the balance of convenience at 129:

> The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

[41] In *Harper v. Canada (Attorney General)*, 2000 SCC 57, the majority of the Court commented that:

> 5 Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R. J. Sharpe, *Injunctions and Specific Performance* (loose-leaf ed.), at para. 3.1220.

[42] The majority added:

> 9 Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR--MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 348-49:
>
> > When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect.

> It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

[43] However, the Supreme Court of Canada cautioned in *RJR-Macdonald* at 333-334:

> … the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

[44] If an injunction is granted, the petitioners' s. 2 *Charter* rights will be sacrificed, for a time, even if they are ultimately successful with their petition.

[45] The petitioners liken the risk of such exposure to the virus during their religious activities to other activities permitted by Dr. Henry. The petitioners assert that the risks created by their continued religious activities can be reasonably addressed with the safety measures imposed on other activities that create comparable risks without safety measures.

[46] The respondents correctly point out that this step in the *RJR-MacDonald* analysis presumes that duly enacted laws are operable. At 346, the majority wrote:

> In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of

> promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

[47] Yet the respondents seek to invoke the authority of the Court to enforce the impugned orders.

[48] Both *Harper* and *RJR-Macdonald* are cases where applicants for a stay of the effect of legislation sought stays of the enforcement of that legislation pending the resolution of their claims that the legislation was *ultra vires* the enacting body. The applicants in those cases sought to delay the legal effect of regulations which had already been enacted and to prevent public authorities from enforcing them. Here, it is the enacting body that seeks injunctive relief to enforce its legislation. In the result, the lens through which the application before me is to be viewed commands the exercise of caution to the extent that the reasoning in those decisions are to be employed.

[49] The respondents also rely upon the decision of Madam Justice Kimmel in *Her Majesty the Queen in Right of Ontario v. Adamson Barbeque Limited*, 2020 ONSC 7679 [*Anderson Barbeque*] as support for their submission that injunctive relief should be granted in this case.

[50] In that case, the respondents were in breach of provincial legislation passed in response to the COVID-19 pandemic. That legislation specifically contemplated the granting of a restraining order by the Court for the breach of legislation, and Kimmel J. said that she had “no hesitation” in granting injunctive relief to the province.

[51] But in *Anderson Barbeque*, there was no *Charter* right engaged, nor was Kimmel J. apprised of the reasoning discussed in *British Columbia (Attorney General) v. Sager et al*, 2004 BCSC 720 [*Sager*], which I will address below.

[52] The respondents differ from many litigants who seek injunctive relief. In particular, they do not necessarily require the assistance of the Court to enforce their

legislation. The alternate remedies available to the respondents are a factor to be considered in the exercise of my discretion. The challenged orders remain extant unless and until set aside or overturned by this Court.

[53] When asked if the Attorney General is not more constrained than other litigants seeking injunctive relief, counsel for the respondents asserted that government actors are as entitled to such relief as non-government litigants.

[54] While a municipality was granted injunctive relief in *Vancouver (City) v. Zhang*, 2009 BCSC 84, that is not necessarily the case when such relief is sought by the Attorney General.

[55] In *Sager,* Madam Justice Quijano considered the extent of the Attorney General's entitlement to injunctive relief at common law where alternative statutory remedies were available. At paras. 21–23, Quijano J. summarized the Attorney General's ability to obtain injunctive relief:

> [21] … [I]n *British Columbia (Attorney General) v. Perry Ridge Waters Users Assn.*, [1997] B.C.J. No. 2348 (S.C.) … McEwan J. stated, in *obiter*, at paragraph 9:
>
> > I summarize a great deal of case law in saying that there appears to be considerable authority for the proposition that the Attorney General's resort to the courts for injunctive relief ought to be a final step and not merely a convenient alternative to the application of criminal or other available sanctions.
>
> [22] A number of cases follow in the footsteps of *Perry Ridge* and express concern regarding the use of an injunction as a first choice remedy. These cases are well summarized in *Alliford Bay Logging* by Williamson J. starting at paragraph 4:
>
> > [4] Mr. Ward, for one of the defendants, in a compelling submission argues that it is wrong to resort to court injunctions in these circumstances when the simple course is for the police to act to protect the plaintiff's legal rights by advising protesters that they will be charged pursuant to the *Criminal Code* if they do not cease to impede the way, and by arresting the protesters if they do not accede to that warning.
> >
> > [5] The police in this province, I understand with the knowledge of the Attorney General, do not adopt that course. This is evident from a review of three recent decisions of this court. I am going to refer to those decisions. The first is a

decision of Mr. Justice Vickers in *International Forest Products Limited v. Kern*, 2000 BCSC 888, a decision handed down on June 6, 2000, [2000] B.C.J. No. 1129. That learned judge dealt with the issue of whether the police should be enforcing the law. He said in paragraph 29:

> In the circumstances that were then ongoing the court concluded that a bubble zone of 500 metres was required in order to preserve peace and order. All three orders are also a result of a political decision by law enforcement officials that a criminal law will not be enforced in this type of dispute, rather it is considered to be a dispute that need only be responded to if the court grants an injunction. Thus it is the order of the court that becomes the subject of criticism and not the decision of law enforcement officials. In the discharge of its duty the court is drawn into a controversy that could have been resolved by more traditional and less costly law enforcement strategies.

[6] The second decision is that of Mr. Justice McEwan in *Slocan Forest Products Limited v. Doe*, a decision dated July 21, 2000, [2000] B.C.J. No. 1592 [which stated]:

> In sum, having had the benefit of explanations offered by the Attorney General and the police for the policies now in place, I am simply not convinced that the rule of law is enhanced by the present process which (a) forces innocent bystanders to seek their own protection by manufacturing ill-fitting civil suits; (b) places the court in a position where it must fashion some remedy at the expense of repeatedly putting its authority in issue; and (c) arguably deprives demonstrators of due process.

[7] The third decision handed down only about a week later which deals with this issue is *International Forest Products Limited v. Kern*, Mr. Justice Pitfield, 2000 BCSC 1141, [2000] B.C.J. No. 1533, so all of these decisions are just this past summer. Mr. Justice Pitfield, in a strongly worded judgment, was critical of the policies in place that the police do not enforce the law in these particular sorts of circumstances. Starting at paragraph 57 he said the following:

> Whatever decision has been made the result is regrettable. The court is placed in the unenviable position of being asked to respond in order to preserve the rule of law. It is the duty of the Attorney General to ensure respect for and the benefit of laws enacted by the legislature. In this case the law in question is the right to harvest timber from Crown land.

> There appear to be adequate provisions in the *Criminal Code* to permit the Attorney General to ensure the required protection. If the Attorney General doubts the adequacy of the criminal law then the legislature should search for other means to ensure that rights it has lawfully created are not abrogated by actions taken by members of the public. The responsibility to devise a means of ensuring that protection should not be delegated to the courts.

[23] Also of significance in the *Alliford Bay* decision is Williamson J.'s analysis of the obiter comments of Esson J.A. of the British Columbia Court of Appeal in *International Forest Products Ltd. v. Kern* (2000), 144 B.C.A.C. 141, 2000 BCCA 500, which provided some support for the government policy of seeking injunctions to restrain public protest where an alternate criminal law remedy was available. Williamson J. determined that the origin of the court's concern regarding this sort of injunctive relief was valid and based upon earlier case law including *Everywoman's Health Centre v. Bridges* (1990), 54 B.C.L.R. (2d) 273 (C.A.) in which Southin J.A. said at page 285:

> There is today the grave question of whether public order should be maintained by the granting of an injunction which often leads thereafter to an application to commit for contempt or should be maintained by the Attorney General insisting that the police who are under his control do their duty by enforcing the relevant provisions of the *Criminal Code*.

[56] In *Sager*, the province sought an injunction to prevent protestors from blocking construction of a parking lot on Crown land. Madam Justice Quijano observed that there was a statutory remedy that the Attorney General had chosen not to invoke. The *Land Act,* R.S.B.C. 1996, c. 245 contained a statutory penalty for trespass where notice is given. Notice could be given by posting it on the Crown land if the identity of the trespasser was unknown. The maximum penalty for non-compliance with the no trespassing notice was $1,000 and could be imposed multiple times. In addition, a public officer could initiate legal action against a trespasser, and under the *Land Act* penalties included fines of up to $20,000 and jail terms of up to six months. Instead of proceeding in that manner, the provincial Crown had not provided notice in the form set out in the *Land Act* and had not utilized the enforcement provisions of the *Land Act*.

[57] Madam Justice Quijano held that while it was clear that the Attorney General, as the representative of the public, had the right to seek redress in the courts

whenever a public right is infringed or threatened with infringement, the injunction application raised the issue of whether, in the circumstances of the case, the equitable jurisdiction of the court ought to be invoked to restrict the rights of members of the public to enter on Crown land through the use of a Jane/John Doe injunction where the Attorney General had chosen not to utilize the offence provisions of the *Land Act*. She concluded, on a consideration of *Ontario (Attorney General) v. Ontario Teachers' Federation*, [1997] O.J. No. 4361, 36 O.R. (3d) 367 (Gen. Div.), that the injunction should be refused.

[58] As counsel for the petitioners pointed out, there are means to enforce the impugned orders other than by way of injunctive relief. Section 47 of the *Public Health Act* provides:

> **47**(1) Without notice to any person, a health officer may apply, in the manner set out in the regulations, to a justice of the peace for an order under this section.
>
> (2) A justice of the peace may issue a warrant in the prescribed form authorizing a health officer, or a person acting on behalf of a health officer, to enter and search a place, including a private dwelling, and take any necessary action if satisfied by evidence on oath or affirmation that it is necessary for the purposes of
>
> (a) taking an action authorized under this Act, or
>
> (b) determining whether an action authorized under this Act should be taken.

[59] Sections 99, 100 and 108 of the *Public Health Act* provide, in part:

> **99**(1) A person who contravenes any of the following provisions commits an offence:
>
> […]
>
> (e) section 14 (3) *[failure to provide information]*;
>
> (f) section 16 *[failure to take or provide preventive measures, or being in a place or doing a thing without having taken preventive measures]*;
>
> (g) section 17 (2) *[failure to take steps to avoid transmission, seek advice or comply with instructions]*;
>
> […]
>
> (i) section 40 (4) *[failure to comply with instructions]*;
>
> […]

(k) section 42 *[failure to comply with an order of a health officer]*, except in respect of an order made under section 29 (2) (e) to (g) *[orders respecting examinations, diagnostic examinations or preventive measures]*;

(l) section 56 (2) or (3) *[failure to take emergency preventive measures or comply with instructions]*, except in respect of an order to do a thing described in section 29 (2) (e) to (g);

(2) A person who contravenes any of the following commits an offence:

(a) section 18 *[failure to prevent or respond to health hazards, train or equip employees, or comply with a requirement or duty]*;

[…]

(3) A person who contravenes either of the following commits an offence:

(a) section 15 *[causes a health hazard]*;

[…]

(4) A person who does either of the following commits an offence:

[…]

(b) wilfully interferes with, or obstructs, a person who is exercising a power or performing a duty under this Act, or a person acting under the order or direction of that person.

(5) A person who commits an offence under this Act may be liable for the offence whether or not an order is made under this Act in respect of the matter.

[...]

100(1) If a corporation commits an offence under this Act, an employee, an officer, a director or an agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence whether or not the corporation is convicted.

(2) If an employee commits an offence under this Act, an employer who authorized, permitted or acquiesced in the offence commits the offence whether or not the employee is identified or convicted.

[…]

108(1) In addition to a penalty imposed under section 107 *[alternative penalties]*, a person who commits an offence listed in

(a) section 99 (1) *[offences]* is liable on conviction to a fine not exceeding $25 000 or to imprisonment for a term not exceeding 6 months, or to both,

(b) section 99 (2) or (4) is liable on conviction to a fine not exceeding $200 000 or to imprisonment for a term not exceeding 6 months, or to both, or

> (c) section 99 (3) is liable on conviction to a fine not exceeding $3 000 000 or to imprisonment for a term not exceeding 36 months, or to both.

[60] In his affidavit, Mr. Pollard described the attendance of two members of the RCMP to his church on November 29, 2020 and says that one of the officers, Officer Peters, threatened those in attendance that day "with up to 6 months in jail and massive fines, upwards of $50,000".

[61] According to a statement attributed to the Chilliwack RCMP on December 12, 2020, a report of three churches holding in-person services "was actively investigated by the RCMP and the evidence gathered has resulted in the Chilliwack RCMP forwarding a report to the B.C. Prosecution Service for charge assessment of these violations".

[62] In *Vancouver Fraser Port Authority v. John Doe, Jane Doe et al,* 2020 BCSC 244, Mr. Justice Tammen issued an injunction to enjoin an organized protest activity in the form of a blockade attempting to prevent access to the Port of Vancouver.

[63] In his reasons for judgment, Tammen J. found:

> 15 Moreover, the current blockade is designed to be a direct attack on the rule of law. It amounts to organized, unlawful activity as a means of voicing disapproval of a court order. Obviously such conduct cannot be countenanced by the court. A police enforcement clause is clearly appropriate.

[64] When six individuals were arrested for their alleged refusal to comply with Tammen J.'s injunction, the matter was referred to the B.C. Prosecution Service for the consideration of criminal charges for contempt of court. The B.C. Prosecution Service acknowledged that "there have been other incidents" at the location that was the subject of the injunction order of Tammen J., but observed that those had not led to arrests.

[65] The B.C. Prosecution Service considered Tammen J.'s referral and concluded that the evidentiary standard for such prosecutions had been met, and that there was a substantial likelihood of conviction if such charges were initiated.

Notwithstanding these conclusions, the B.C. Prosecution Service declined to initiate criminal prosecutions on the basis that it was not required in the public interest "given the nature of the offences and the passage of time during the COVID pandemic".

[66] Despite the finding of Tammen J. that the blockade he had dealt with constituted a direct attack on the rule of law by an organized group voicing disapproval of a court order, the reputation of administration of justice was brought into disrepute because no consequences were pursued.

[67] If the statement attributed to the Chilliwack RCMP that they forwarded a report to the B.C. Prosecution Service for charge assessment of the violations alleged against three churches is correct, the B.C. Prosecution Service has already been made aware of the conduct of, or similar to that of the petitioners.

[68] I am left to wonder what would be achieved by the issuance of an injunction in this case. If it were granted and not adhered to, would the administration of justice yet again be brought into disrepute because the B.C. Prosecution Service considers that it would not be in the public interest to prosecute those who refused to adhere to the orders sought from this Court?

[69] When asked, counsel for the respondents said that the respondents accept that the petitioners' beliefs are deeply held, but in response to my question as to why an injunction was sought, responded that while the petitioners and others like them are not dissuaded from their beliefs and practices by the impugned orders, an order from this Court is more likely to accomplish their compliance.

[70] Given the other remedies available to the respondents, I have reservations that an injunction alone, without enforcement by the B.C. Prosecution Service, would overcome the deeply held beliefs of the petitioners and their devotees. Taking into account the decision in *Sager*, and the other means of enforcement open to the respondents, I find that the balance of convenience does not favour the respondents in this case, and dismiss their application for an injunction.

Conclusion

[71] To be clear, I am not condoning the petitioners' conduct in contravention of the orders that they challenge, but find that the injunctive relief sought by the respondents should not be granted.

"The Honourable Chief Justice Hinkson"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Beaudoin v. British Columbia,* 2021 BCSC 512

Date: 20210318
Docket: S210209
Registry: Vancouver

Between:

Alain Beaudoin, Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church, and Free Reformed Church of Chilliwack

Petitioners

And

Her Majesty the Queen in Right of the Province of British Columbia and Dr. Bonnie Henry in her Capacity as Provincial Health Officer for the Province of British Columbia

Respondents

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. March 1-3, and 5, 2021
Place and Date of Judgment:	Vancouver, B.C. March 18, 2021

Table of Contents

I. Introduction

[1] Subject to s. 1 thereof, the rights of Canadians are guaranteed by the *Canadian Charter of Rights and Freedoms* [*Charter*].

[2] The preamble to the *Charter* invokes “the supremacy of God and the rule of law” as principles upon which Canada is founded.

[3] The petitioners in this case assert that certain of their *Charter* rights have been unlawfully infringed and seek declaratory and other relief with respect to certain orders made by the Provincial Health Officer (PHO) Dr. Bonnie Henry that affect the petitioners’ ability to meet in person.

II. The Parties

[4] The petitioner Alain Beaudoin has involved himself in advocacy for both what he sees as his own rights and those of others. He could fairly be called an activist.

[5] The petitioner Brent Smith is the Pastor of the Riverside Calvary Chapel, and the petitioner John Van Muyen is the Chair of the Council of Immanuel Covenant Reformed Church. The other petitioners are churches, whose congregations and adherents believe they have an obligation to meet in person based upon their religious beliefs. As their counsel did, I will refer to these petitioners as “the religious petitioners”.

[6] The respondents are Her Majesty the Queen in Right of the Province of British Columbia, represented by the Attorney General of British Columbia and Dr. Bonnie Henry, the PHO. Under s. 64 of the *Public Health Act*, S.B.C. 2008, c. 28 [*PHA*], Dr. Henry is the senior public health official in the province.

[7] The intervenor, the Association for Reformed Political Action Canada, is a non-profit organization representing Reformed Christians. I granted them leave to make limited submissions that augmented, but did not duplicate the submissions of the religious petitioners.

III. Background

[8] We are in the midst of a global pandemic that threatens the health and lives of people throughout the world, including our fellow citizens.

[9] The first diagnosed case of COVID-19 in B.C. was discovered on January 27, 2020. By early March, public health officials understood that the SARS-CoV-2 virus (the "Virus") was the infectious agent causing outbreaks of COVID-19 and that gatherings of people in close contact could cause transmission.

[10] The Virus can be spread by people who do not have symptoms. As long as the reproduction rate (the average number of people to whom an infected person is likely to transmit the Virus) is greater than 1, the Virus will spread exponentially, with the capacity to overwhelm the health system.

[11] Public health monitoring looks for clusters (two or more cases associated with the same location, group or event), since these can evolve into outbreaks wherein transmission becomes sustained.

[12] On March 18, 2020, the Minister of Public Safety issued a declaration of a state of emergency in B.C., which has been extended and consistently kept in place to date. The recitals for Ministerial Order M073, issued under the *Emergency Program Act,* R.S.B.C. 1996, c. 111*,* state:

> WHEREAS the COVID-19 pandemic poses a significant threat to the health, safety and welfare of the residents of British Columbia, and threatens to disproportionately impact the most vulnerable segments of society;
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> AND WHEREAS prompt coordination of action and special regulation of persons or property is required to protect the health, safety and welfare of the residents of British Columbia, and to mitigate the social and economic impacts of the COVID-19 pandemic on residents, businesses, communities, organizations and institutions throughout the Province of British Columbia.
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> NOW THEREFORE I declare that a state of emergency exists throughout the whole of the Province of British Columbia.

[13] Dr. Henry is an expert in public health and preventive medicine. Her responsibilities are outlined in the *PHA*. She is informed by the public health

component of B.C.'s health system, which includes the B.C. Centre for Disease Control ("BCCDC") and regional medical health officers.

[14] One of the goals of public health is to prevent and manage outbreaks of disease within the population. Dr. Henry bears the formidable responsibility of making the decisions that are intended to protect us from the COVID-19 pandemic. Against the serious risks that are associated with the pandemic, she is obliged to balance a wide variety of competing rights and interests of British Columbians and visitors to our province.

(a) The Incidence of Transmission of the Virus in Religious Settings

[15] The data from the Fraser Health Region showed that, from March 15, 2020 to January 15, 2021, 7 places of worship were affected by the Virus, with 59 associated COVID-19 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, eight were associated with a religious setting in Maple Ridge in November 2020, and six were associated with a religious setting in Langley in November 2020.

[16] The data from the Interior Health Region showed that, 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).

[17] In the Northern Health Region, from March 15, 2020 to January 15, 2021, five religious settings were affected with 40 associated cases. In November 2020 alone, nine cases were associated with staff in a religious setting, and four cases were associated with a different religious setting in Prince George. In addition, the region saw 27 cases associated with one funeral in August and five cases associated with three weddings (held in Surrey, Toronto and Vernon) in October 2020. This region

also has a number of recent exposures from funerals that were not included in the numbers above as they are still under investigation.

[18] The data from the Vancouver Coastal Health Region showed that, from September 15, 2020 to January 15, 2021, 25 places of worship were affected with 61 associated cases in the region. Twenty-eight cases and one death were associated with an outbreak at a religious setting in Vancouver in November 2020. It is likely that two index cases from that religious setting sparked a large outbreak at another facility. In addition, five cases were linked to a religious setting in Richmond in November 2020, and three 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 prior to September is not available to the PHO.

(b) Dr. Henry's Authority

[19] Section 30 of the *PHA* provides that a health officer can issue an order if they reasonably believe that, inter alia, "a health hazard exists", or "a condition, a thing or an activity presents a significant risk of causing a health hazard".

[20] Section 31 of the *PHA* in turn 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".

[21] Section 32 of the *PHA* permits a health officer (or the PHO in an emergency) to make orders in respect of, inter alia, "a place", including that a person not enter a place. Section 39(3) permits an order to be made in respect of classes of persons.

[22] Part 5 of the *PHA* provides for "Emergency Powers". These powers can be exercised in an emergency. An "emergency" is defined as "a localized event or regional event that meets the conditions set out in section 51(1) or (2), respectively". "Regional event" is in turn defined to mean "an immediate and significant risk to public health throughout a region or the province".

[23] Section 52 of the *PHA* provides conditions to be met before the Part 5 emergency powers may be exercised. Section 52(2) states:

> (2) Subject to subsection (3), a person must not exercise powers under this Part in respect of a regional event unless the provincial health officer provides notice that the provincial health officer reasonably believes that at least 2 of the following criteria exist:
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> (a) the regional event could have a serious impact on public health;
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> (b) the regional event is unusual or unexpected;
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> (c) there is a significant risk of the spread of an infectious agent or a hazardous agent;
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> (d) there is a significant risk of travel or trade restrictions as a result of the regional event.
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> (3) If the provincial health officer is not immediately available to give notice under subsection (2), a person may exercise powers under this Part until the provincial health officer becomes available.

[24] Section 67(2) of the *PHA* permits the PHO to exercise a power or perform a duty of a "health officer" during an emergency.

[25] One of the powers of a health officer that the PHO can exercise in an emergency is the power to issue orders respecting health hazards under Part 4 of the *PHA.* The term "health hazard" is defined in s. 1 to mean:

> (a) a condition, a thing or an activity that
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> (i) endangers, or is likely to endanger, public health, or
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> (ii) interferes, or is likely to interfere, with the suppression of infectious agents or hazardous agents, or
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> (b) a prescribed condition, thing or activity, including a prescribed condition, thing or activity that
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> (i) is associated with injury or illness, or
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> (ii) fails to meet a prescribed standard in relation to health, injury or illness.

[26] Over the course of the past year, Gatherings and Events orders ("G&E Orders") were made by Dr. Henry pursuant to ss. 30, 31, 32 and 39(3) of Part 4 of the *PHA*.

(c) Dr. Henry's Progressive Orders

[27] Dr. Henry has used her powers under the *PHA* to restrict public gatherings and events in order to limit the risk of transmission of the Virus. On March 16, 2020, she issued the first G&E Order, prohibiting gatherings in excess of 50 people.

[28] On March 17, 2020, Dr. Henry declared the transmission of the Virus, to be a regional event, as defined by s. 51 of the *PHA*. In that notice, she indicated that, based on the information reported to her in her capacity as PHO, she believed the criteria in s. 52(2)(a), (b), (c) and (d) of the *PHA* were met.

[29] The issuance of the Notice of Regional Event triggered Dr. Henry's ability to exercise emergency powers under the Part 5 of the *PHA*, set out above.

[30] The BCCDC publishes COVID-19 Situation Repot bulletins on a weekly basis. These bulletins provide in-depth information about COVID-19 epidemiology, underscoring data and key trends in the province, including COVID-19 case counts, B.C.'s epidemic curve, test rates and percent positivity, hospitalization rates and deaths, and likely sources of infection.

[31] Dr. Henry and other public health officials have monitored surveillance data respecting the emergence and progression of the Virus in B.C. Reports summarizing that data are made available to the public on the BCCDC's website.

[32] The Situation Report bulletins started showing an increase in COVID-19 cases in September 2020.

[33] By mid-October 2020, diagnosed case numbers began to accelerate rapidly, rising from a seven-day moving average[1] of 130 cases on October 11, 2020 to 420 cases by November 6, 2020. Hospitalizations and admissions to intensive care units, which typically lag the increase in cases, had increased from 77 hospitalizations and

[1] The seven-day moving average represents the average number of cases per day, based on data from several days.

24 people in intensive care on October 11, 2020 to 104 people in hospital and 31 people in intensive care by November 6, 2020.

[34] On October 26, 2020, Dr. Henry stated:

> I'd like to remind everybody about our mass gathering order. That is, refers across the board to gatherings of no more than 50 people. But there are caveats to this order. It requires that every location must have sufficient space that people can maintain safe distancing between everyone. And we know that when these COVID safety plans are followed in settings like restaurants, event spaces, churches, temples, hotels, that we don't see transmission. But too often, over the last few weeks, we've been hearing stories where people are trying to put aside the safety plans, that feel it is okay to have a few additional people, or for people to mix and mingle. And, and unfortunately, we have seen spread in these environments.

[35] In a verbal report of November 7, 2020, Dr. Henry imposed further restrictions on gatherings in the Vancouver Coastal and Fraser Health regions. She provided reasons in the form of a media briefing when announcing the oral order, referring to "dangerously high and rapid increase" of COVID-19 cases and outbreaks in the two prior weeks, demonstrating exponential growth as opposed to what had previously been linear growth in the number of cases.

[36] At the same time, Dr. Henry stated that transmission of the Virus was not occurring in places like restaurants where COVID-19 safety plans were being followed, but the modelling available indicated exponential growth of COVID-19 incidence if social contacts were not reduced from the existing baseline, and that without more restrictive measures, the ability to continue contact tracing could be compromised.

[37] The November 7, 2020 verbal orders were region-specific because the data showed that transmission and serious adverse consequences were particularly substantial in Vancouver Coastal and Fraser regions, and public health systems in those health authorities were being significantly strained to keep up with the volume of cases and consequent large numbers of case contacts that needed follow up through contact tracing to break the chains of transmission.

[38] By November 19, 2020, the weekly COVID-19 Situation Reports showed that the surge of cases continued, with the data showing an average of 690 cases per day and 217 hospitalizations with 59 people in intensive care. That day, Dr. Henry extended the November 7, 2020 measures province-wide. She announced a temporary province-wide ban on all in-person gatherings, including religious services. The temporary ban continues, but does not apply to online religious services, drive-through services, individual meetings with religious leaders or to private prayer or contemplation.

[39] On that day, Dr. Henry explained that increased activity in terms of community transmission, outbreaks and effects on the health care system in every health authority in the province meant we “now need to do more” and to keep our essential services and our essential activities open and operating safely, including schools and workplaces.

[40] Dr. Henry also said that “we need to relieve stress on the health care system. If this does not occur, people with COVID-19 and with other urgent health issues will suffer”. She explained that measures would be reviewed every two weeks, given that that is the incubation period for a clear and notable difference and slowing of transmission, for “balance and control”.

[41] Dr. Henry stated that transactional gatherings were not prohibited, but masks were required. She said the information reported to her was that poorer ventilation and often loud music is where there was higher risk.

[42] Generally, the prohibited activities were narrowed down to those that were felt to be too high-risk, with all others required to adhere to new guidelines. Dr. Henry emphasized the importance of managing the pandemic by “flattening the curve” and keeping the economy functioning and schools open.

[43] In announcing her oral order of November 19, 2020, Dr. Henry stated the following:

> While places of worship are to have no in-person group services for this period of time - I've had the privilege of meeting with a number of faith leaders from around the province - and this is important and they understand we need our faith services more than ever right now but we need them to do them in a way that's safe. With the community transmission that we're seeing and the fact that we have seen transmission in some of our faith-based settings.
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> We need to suspend those and support each other and find those ways to care for each other remotely.
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> The exceptions will be those important events - funerals and weddings and ceremonies such as baptisms - which may proceed in a limited way with a maximum of ten people including the officiant.

[44] She also said that:

a) The Province was now facing 538 new cases of COVID-19 in a single day, compared with about 175 cases per day four weeks earlier. The Province was clearly in a "second wave";

b) Provincial hospitals and ICU capacity were "stretched";

c) With higher prevalence, the probability of a young person having severe illness or dying increased, illustrated by the fact that one person in his 30s had died recently from COVID-19;

d) Transmission at social events in communities had spilled over into long term care and hospitals, with British Columbia facing 50 active outbreaks in the health system;

e) Transmission of SARS-CoV-2 was increasing in every health authority;

f) While the health care system was still functioning, without intervention it would be overwhelmed and people with COVID-19 and with other urgent health issues would suffer;

g) There had been transmission in faith-based settings under the existing rules;

h) There had been notable levels of transmission and there were some activities that are higher risk;

i) Hair salons, spas and restaurants were not seeing transmission, except where it was clear rules were not being followed;

j) Transmission in schools had been low, but there had been more exposure events, and there was greater concern about the Lower Mainland;

k) The measures in the Lower Mainland since November 7, 2020 had resulted in a decrease in the number of people infected as a result of attending social gatherings, a category including religious-based events;

l) Rolling averages of daily cases was a particularly important indicator of whether the pandemic was under control, in conjunction with other

> indicators. Other important metrics were the percentage of cases that could not be linked to a known case or cluster;
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> m) Despite best efforts to comply with the existing rules and despite limits of 50 people, transmission was happening at religious gatherings; and
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> n) Services that were explicitly under the Gatherings and Event order, where people came together at specific times and it was up to 50 people in a space, depending on how large the space was, that we need those to be suspended for this short period of time, because we have seen that despite our best efforts, we have transmission happening in those events.

[45] On November 28, 2020, the Council of the Immanuel Covenant Reformed Church sent a letter to Premier John Horgan, Health Minister Adrian Dix and Dr. Henry explaining that their religious beliefs required that they gather in-person for worship, and requesting that the restriction on worship services be immediately rescinded. The letter advised that the church would continue to take safety precautions to limit the risk of COVID-19 transmission, stating:

> We will strongly encourage those who are feeling unwell not to attend, maintain social distancing, provide hand sanitizer at the entrance of the building, require masks to be worn at all times except while seated, and require all attendees to leave immediately after the service. We will also practice the Lord's Supper and the offering so that there is no communal touching of plates, cups, or bags.

[46] On November 30, 2020, Rev. Brent Smith sent a similar letter to Premier Horgan, Minister Dix and Dr. Henry requesting that the restriction on worship services be rescinded. In his letter, Rev. Smith agreed to continue to adhere to safety guidelines, including “specific protocols around the maximum number of worshippers at a service, the use of masks, the use of hand sanitizer, social distancing, contact tracing, the distribution of food and drink, and the use of shared items.”

[47] On December 2, 2020, Dr. Henry issued a written G&E Order that repealed and replaced her November 10, 2020 G&E Order and her November 13, 2020 order with respect to COVID-19 regional measures.

[48] The reasons given for the G&E Order issued on December 2, 2020, included:

> a) Social interactions are associated with significant increases in the transmission of SARS-CoV-2. These result from the gathering of people

and events, which therefore increase the risk of serious illness from COVID-19;

b) The opening of the schools and seasonal changes increased the risk of transmission of SARS-CoV-2 in the population and the incidence of serious illness from COVID-19;

c) Seasonal and other celebrations had resulted in transmission of SARS-CoV-2;

d) There had been a rapid and accelerating increase in COVID-19 cases in the province; and

e) There was an immediate and urgent need for more drastic ("focused") action to reduce the rate of transmission of COVID-19.

[49] On December 7, 2020, Dr. Henry extended her G&E Order on similar terms to January 7, 2021, stating:

a) While the new case count remained high, and had been increasing steeply, it was beginning to level off, especially in the Fraser Health and Vancouver Coastal Health regions;

b) Measures implemented a month earlier were "starting to have an effect and starting to work";

c) However, many other communities in the province, especially in the Interior and the North, showed increasing rates;

d) SARS-CoV-2 transmits especially through in-person interactions, especially indoors and especially in the colder months of the year;

e) There was not a large number of transmission events in schools;

f) The measures that had been in place for many months for religious gatherings and that were working earlier in 2020, "we are now seeing that those are not enough right now"; and

g) The risk of transmission at outside peaceful demonstrations is less than indoor meetings, even without a mask, but in December, it is more dangerous than it was earlier in the year.

[50] In relation to religious organizations objecting to the December 7, 2020, G&E Order, Dr. Henry stated:

> 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.

[51] In a further G&E Order dated December 9, 2020, Dr. Henry noted that seasonal and other celebrations and social gatherings in private residences and other places had resulted in the transmission of the Virus and increases in the number of people who developed COVID-19 and became seriously ill.

[52] On December 18, 2020, Dr. Bonnie Henry sent letters to Rev. Brent Smith and Rev. John Koopman. In the letters, she told them they had the option to submit a request for a case-specific variance to the G&E Orders under s. 43 of the *PHA.* She also encouraged them and their churches to "accept the importance of compliance with this Order and the need to respect the difficult decisions of public health officials."

[53] On December 22, 2020, Rev. Koopman responded to Dr. Henry, informing her that he was aware that many case-specific requests had been made for her to reconsider her G&E Order under s. 43 of the *PHA* without success. Rev. Koopman urged Dr. Henry to allow in-person worship services, and advised, among other things, that her "offer to consider a request from our church to reconsider our Order sadly rings hollow."

[54] Following G&E Orders on December 9, 15 and 24, 2020 that extended the prohibitions on in-person gatherings, the COVID-19 case rate declined, but remained elevated. It then began to increase again between December 28 and January 4, 2021, at which time the downward trend continued to a seven-day moving average of 449 cases by January 31, 2021.

[55] The January 8, 2021 G&E Order maintained the prohibition on in-person religious services, but permitted drive-in events with more than 50 patrons present as long as those attending only do so in a vehicle, no more than 50 vehicles are present, attendees stay in their vehicles except to use washroom facilities and maintain a distance of two metres from other attendees when outside their vehicles, and that no food or drink is sold. The order also provided exceptions for weddings, baptisms and funerals (to a maximum of 10 people) and permitted private prayer/reflection in religious settings.

[56] On February 5, 2021, a new G&E Order was issued adding the following recitals by Dr. Henry:

> 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;
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> 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.

[57] A further G&E Order of February 10, 2021 repeated the above recitals, and included the following:

> 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.

[58] On February 12, 2021, Dr. Henry was asked why safety protocols accepted in other circumstances, such as bars, restaurants and health clubs, were not sufficient for regular in-person religious services. She replied that the nature of the interaction, the social interaction within a faith group, was “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".

[59] Dr. Henry further explained 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.
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> 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.
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> ...
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> 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.
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> 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.
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> 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.

[60] On February 12, 2021, Dr. Henry also stated that:

a) At that point, there had been 46 confirmed cases of variants of concern in BC. 29 of the B117 variant originally discovered in the United Kingdom and 17 of the B1351 variant originally discovered in South Africa;

b) It was not yet clear whether these variants have increased transmissibility or cause more severe illness;

c) All but one of the B117 cases were travel related, but a majority of the B1351 cases were locally transmitted;

d) Both in the COVID pandemic and in other outbreaks, the nature of interactions at faith group gatherings is fundamentally different than in transactional relationships at the store or gym or at a restaurant;

e) The demographic of churchgoers skews older than the population in general and is at more risk;

f) In the "respiratory season", as the transmissibility of the virus increased, there was transmission in a number of faith settings despite having measures in place, so that measures previously thought to be good enough no longer were; and

g) Some deaths from COVID-19 were from people exposed in faith settings.

(d) Reconsideration under Section 43 of the PHA

[61] Section 43(1) of the *PHA* provides, in part, that:

> 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
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> (i) meet the objective of the order, and
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> (ii) be suitable as the basis of a written agreement under section 38, or
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> (c) requires more time to comply with the order.

[62] Although Dr. Henry has the power under s. 54(1)(h) of the *PHA* to "not reconsider an order under section 43", she has not exercised that power. Instead, she has encouraged various groups to seek variances under s. 43. Each of her G&E Orders have specifically included reference to the availability of reconsideration.

[63] On January 29, 2021, after filing the petition in this case, counsel for the religious petitioners provided a letter to counsel to for the respondents in the form of a request for reconsideration under s. 43(1) of the *PHA.* They apparently submitted over 1000 pages of evidence with their application, including reports from two doctors which they now also seek to have admitted on this petition.

[64] On Thursday, February 25, 2021, Dr. Henry provided a response to the religious petitioners' s. 43 application. She advised counsel for the religious petitioners that she was prepared to give a conditional variance to the G&E Order to the religious petitioners allowing outdoor weekly worship services, subject to the adherence to extensive and specific conditions.

[65] Following media reports that certain Jewish Orthodox Synagogues were being permitted to hold regular service in person, counsel for the religious petitioners raised this permission with counsel for the respondents.

[66] The religious petitioners contend that immediately after their counsel advised the respondents that they intended to rely on the exemption granted to the synagogues in argument, the respondents revised the exemption granted to the synagogues, requiring them to again to meet outdoors rather than indoors.

IV. Relief Sought

[67] The religious petitioners assert that their s. 2(a), (b), (c), and (d), s. 7 and s. 15 *Charter* rights are infringed by Dr. Henry's G&E Orders. They contend that those orders disregard the need for minimal impairment of those *Charter* rights, and are overbroad, arbitrary and disproportionate.

[68] Dr. Henry's G&E Orders are the principal source of concern to the petitioners. Pursuant to s. 2(1) and (2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], they seek relief with respect to the orders of November 19, 2020, December 2, 9, 15 and 24, 2020 and such further orders as may be pronounced. In particular, in their written petition they seek the following relief:

> 1. A Declaration pursuant to sections 24(1) and 52(1) of the *Constitution Act, 1982,* that:
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>> a. Ministerial Order No. M416 entitled "Food and Liquor Premises, Gatherings and Events (COVID-19) Order No. 2" issued by the Minister of Public Safety and Solicitor General of BC, dated November 13, 2020, under the authority of sections 10 of the *Emergency Program Act*, RSBC 1996, c. 111;

b. an order made under section 3 of the *Covid 19 Related Measures Act*, SBC 2020, c. 8, entitled "Food and Liquor Premises, Gatherings and Events", referred to as item 23.5 in Schedule 2 of that Act;

c. orders made by the Public Health Officer entitled "Gatherings and Events" and made pursuant to Sections 30, 31, 32 and 39(3) *Public Health Act*, SBC 2008, c. 28, including orders of November 19, 20202, December 2nd, 9th, 15th and 24th, 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;

(collectively referred to herein as the "Orders") are of no force and effect as they unjustifiably infringe the rights and freedoms of the Petitioners guaranteed by the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11 (the "*Charter*"), specifically:

a) *Charter* section 2(a) (freedom of conscience and religion);

b) *Charter* section 2(b) (freedom of thought, belief, opinion and expression);

c) *Charter* section 2(c) (freedom of peaceful assembly);

d) *Charter* section 2(d) (freedom of association);

e) *Charter* section 7 (life, liberty and security of the person); and

f) *Charter* section 15(1) (equality rights).

2. In addition or in the alternative, an order under sections 2(2) and 7 of the *JRPA* in the nature of or certiorari quashing and setting aside the Orders as unreasonable;

3. A Declaration that the Orders be set aside as their scope and effect exceed statutory authority of the respondents to impose and are, therefore *ultra vires*;

4. Interim and final injunction and/or prohibition pursuant to section 2(2) of the *JRPA* and Rule 10-4 enjoining the respondents from further

enforcement action which prohibit or interfere with the subject activities herein;

5. An order that Violation Tickets numbers AJ19780619, AJ06525763, AJ13323225, AJ13323259, AJ16458508, AH96863545, AJ17179822 and AJ16958269 issued as described herein be dismissed and an order enjoining issuance of further such tickets relating to matters herein.

[69] Of the list of orders challenged in para. 1, Part 1 of their written petition, the petitioners only pursued the G&E Orders issued by Dr. Henry under the *PHA* during the petition hearing.

V. Impact of the Reconsideration Decision on this Petition

[70] The petitioners have invoked s. 2 of the *JRPA* as the basis for the relief they seek. That section provides:

> 2(1) An application for judicial review must be brought by way of a petition proceeding.
>
> (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> (a) relief in the nature of mandamus, prohibition or certiorari;
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[71] The *JRPA* includes the following defined the terms:

> "record of the proceeding" includes the following:
>
> (a) a document by which the proceeding is commenced;
>
> …
>
> (f) the decision of the tribunal and any reasons given by it;
>
> "statutory power" means a power or right conferred by an enactment:
>
> (a) to make a regulation, rule, bylaw or order,
>
> (b) to exercise a statutory power of decision,
>
> (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,

> (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
>
> (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability…
>
> "tribunal" means one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred.

[72] Dr. Henry issued the religious petitioners a partial variance to the G&E Orders a few days before the hearing of this petition. In light of this, the respondents raised a preliminary objection that the religious petitioners must amend their petition to challenge Dr. Henry's reconsideration decision, rather than continue to challenge the G&E Orders.

[73] On an application for relief under s. 2 of the *JRPA*, the basic principle of judicial review is that an applicant must first exhaust all adequate statutory remedies and that review must be of a final decision. Where a party has taken advantage of a reconsideration process, only the reconsideration decision may be judicially reviewed: *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 [*Yellow Cab*] at para. 40; see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; and *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.

[74] The religious petitioners contend that in contrast to the present matter, none of these cases involved a constitutional challenge to a rule of general application to the entire population, which can be altered at any time by Dr. Henry.

[75] The religious petitioners contend that the respondents' reliance on *Yellow Cab* is untenable and unconstitutional, and a time-consuming distraction. They contend that s. 43 of the *PHA* was not intended to prevent constitutional challenges to overbroad public health orders that limit the *Charter* rights of the population at large, nor could it ever validly have such an effect.

[76] In response to this argument, the respondents say the rule in *Yellow Cab*—that judicial review must be of the reconsideration decision—is not a discretionary

one. They say it applies with equal force when the basis for review is an alleged failure of an administrative decision maker to proportionately balance their statutory mandate with *Charter* rights, including freedom of religion.

[77] The religious petitioners rely on the comment of Mr. Justice Groberman at para. 44 in *Yellow Cab* that a tribunal cannot be permitted "through procedural machinations, to oust the inherent, constitutionally-protected supervisory jurisdiction of the superior courts". That comment was made in the context of a discussion of a denial of leave for reconsideration:

> [43] In *Auyeung*, the applicant contended that the Board had failed to properly consider and apply its own jurisprudence. In denying leave for reconsideration, the Board rejected that assertion. This Court recognized that the Board, in denying leave, had effectively determined that the application was not meritorious. In the result, it held that any judicial review application had to challenge the denial of leave rather than the initial decision.
>
> [44] Where a denial of leave does not constitute a determination that the request for reconsideration lacks merit, it is my view that the initial administrative decision, and not the denial of leave, will be the appropriate target for judicial review. To hold otherwise would be to allow a tribunal, through procedural machinations, to oust the inherent, constitutionally-protected supervisory jurisdiction of the superior courts. In *Jozipovic v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 174, this Court emphasized that a tribunal cannot, by blocking access to administrative review of a decision, bar the courts from passing on the merits of judicial review.

[78] Read in the context in which it was made, the statement does not support the religious petitioners' assertion that it entitles them to simply ignore the alternate remedy afforded by s. 43 of the *PHA*.

[79] Moreover, as the religious petitioners have chosen not to amend their petition to seek judicial review of Dr. Henry's reconsideration decision, the main evidence they seek to rely on, namely the affidavits of Dr. Warren and Dr. Kettner, is not admissible on this petition because that evidence was not before Dr. Henry when she made the G&E Orders. I turn to this issue now.

VI. Record of Proceedings

[80] In B.C., with limited exceptions, the evidence on an application for judicial review is confined to the record before the decision maker.

[81] The "record of proceeding" is defined in s. 1 of the *JRPA* and includes a "document produced in evidence before the tribunal" and "the decision of the tribunal and any reasons given by it".

[82] In *Dane Developments Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations),* 2015 BCSC 1663*,* Mr. Justice Bracken conveniently summarized three categories of exceptions to the rule that all evidence on judicial review must have been in the record before the decision maker:

> [46] The court adopts a supervisory role on judicial review. Among other things, this means that the reviewing court must conduct the proceedings based on the record that was before the administrative decision maker: *Albu v. University of British Columbia*, 2015 BCCA 41, at paras. 35-36. Thus, a general rule precludes the receipt of new evidence on a judicial review, subject to certain exceptions respecting materials which tend to facilitate or enhance the court's supervisory task. Those exceptions contemplate evidence which:
>
> - provides "general background" information which will assist the reviewing court in understanding the issues on the judicial review;
> - brings to the court's attention procedural defects that cannot be found in the evidentiary record of the administrative decision maker; or,
> - identifies or reconstructs the record that was before the administrative decision maker. This includes materials which demonstrate the "complete absence of evidence" before the administrative decision maker with respect to a particular finding.

[83] While these categories provide useful guidance, the court must ultimately take a principled approach in determining whether evidence not before the decision maker is admissible on judicial review: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 [*Air Canada*], at para. 38.

[84] Just what constitutes the "record of proceeding" in this case is a matter of dispute between the petitioners and the respondents. The petitioners contend that the impugned G&E Orders are in the nature of subordinate legislation, issued at the

discretion of a statutory decision maker, without a hearing, so there is no identifiable record.

[85] It is my view that in the case of a non-adjudicative tribunal such as this, the record of proceedings must of necessity be reconstructed. It is not necessarily "static", but still consists either of general, or uncontroversial background information that will assist me in understanding the issues or information that was before Dr. Henry.

[86] In *Twenty Ten Timber Products Ltd. v. British Columbia (Finance)*, 2018 BCSC 751, the Minister of Finance sought to adduce affidavit evidence concerning the filing of a certificate under the *Forest Act*, R.S.B.C. 1996, c. 157, Madam Justice Adair reasoned:

> 26 However, the process leading to the filing of the Certificate is not at all similar or comparable to the administrative processes involved in either *Sobeys* or *Stein*, both of which involved hearings at which evidence was submitted and a record was created. I agree with the submissions of the Minister that this was not an adjudicative hearing process in any sense, and it was not required to be under the *Forest Act*. The Affidavit No. 1 of Kristina Jacklin in particular shows what the Ministry knew about Twenty Ten's role in TSL A93113 before the November 16, 2017 letter was sent. In addition, the Minister's affidavits provide additional information to assist the court in understanding the issues on the judicial review.
>
> 27 In short, the affidavits filed by the Minister in response to the application for judicial review bear on the arguments that the Minister is entitled to make on this judicial review, and are relevant to the grounds raised on judicial review.

[87] In *Crowder v. British Columbia (Attorney General)*, 2019 BCSC 1824, amendments to the Supreme Court Civil Rules by the Attorney General, on the advice of a committee constituted by him, were challenged as unconstitutional. There, I accepted that the evidence that may be adduced in support of an application for judicial review of an administrative hearing process is limited to the record that was before the decision maker and that constitutional questions are ideally resolved on the basis of as extensive a factual record as is reasonable.

[88] I found that:

> 42 … as in *Twenty Ten Timber* and *462284 B.C. Ltd.*, the process that led to the creation of the impugned Rule was not an adjudicative hearing process and I will therefore adopt the approach taken by Adair J. and rely on the non-hearsay evidence proffered by the petitioners.

[89] The non-hearsay evidence that I admitted in *Crowder* was limited to what was contained in news releases from the Attorney General's office explaining the rule change. I declined to admit emails from ICBC representatives, newspaper reports of statements by the Attorney General and “sampling” evidence of cases in which expert evidence was relied on.

[90] The respondents contend that the record for this petition is all of the information available to Dr. Henry when she made the impugned G&E Orders. For this, they tendered the evidence of Dr. Brian Emerson, the Acting Deputy Provincial Health Officer.

[91] The respondents assert that Dr. Emerson’s first affidavit provides the general background information and evidence reconstructing what was before Dr. Henry at the time she made the impugned G&E Orders under the *PHA*. They contend that with respect to their impact on political and religious assembly at issue in this proceeding, the other impugned orders follow on from Dr. Henry’s decisions.

[92] The respondents also assert that from the initial verbal November 7, 2020 G&E Order to date, the restrictions on in-person religious services have been essentially the same through a series of sequential verbal and written orders as follows:

a. Written orders of November 10 and 11, 2020 (written form of November 7 verbal order);
b. Verbal order of November 19, 2020 (broadened the restrictions to apply province-wide, extended them to December 8, 2020, and provided exemptions for weddings, baptisms and funerals to a maximum of 10 people, and private prayer or reflection in religious settings);
c. December 2, 2020 written order (repealed and replaced November 10 written order, no change *vis a vis* religious services);
d. December 4, 2020 written order (repealed and replaced December 4 written order, no change *vis a vis* religious services);

e. December 9, 2020 written order (extended restriction on gatherings and events to January 8, 2021);

f. December 15, 2020 (religious service can be provided to a person in their home);

g. December 24, 2020 written order (repealed and replaced December 15 order – no change *vis a vis* religious gatherings);

h. January 8, 2021 written order (extended restrictions to February 5, 2021, permits drive-in events with up to 50 vehicles); and

i. February 10, 2021 written order (indefinite extension of restrictions).

[93] The respondents further assert that the February 10, 2021 G&E Order is the one currently in effect, and the only order properly before me on this judicial review.

[94] The respondents submit that the restriction of the evidence properly admissible on judicial review is not discretionary. The principle, and the basis for any exceptions, was set out authoritatively by the Court of Appeal in *Air Canada* at paras. 32-44. In those passages, Mr. Justice Groberman said the following:

> [34] The function of a court on judicial review is supervisory. The court must ensure that a tribunal has operated within legal norms. Courts are, in a very strict sense, reviewing what went on before the tribunal. They are not undertaking a fresh examination of the substantive issues. For that reason, judicial review normally concerns itself only with evidence that was before the tribunal [cites omitted].
>
> …
>
> [35] It is important, however, to recognize that we cannot use the narrow traditional concept of a "record" as the standard; rather, a court must be allowed to look at the material that was considered by the tribunal, whether or not that material would, historically, have formed part of the tribunal's "record" [cites omitted].
>
> …
>
> [39] In determining whether an affidavit is admissible on judicial review, the key question is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court…

[95] In addition to the record as put forth by the respondents, the religious petitioners seek to rely on various additional evidence, which I address below.

[96] The petitioners contend that the concept of a formal "record of the proceeding" is inapplicable to this case. They say the primary focus of this proceeding is on a constitutional challenge to what amount to laws—rules of general

application—binding on everyone in B.C. Thus, they argue, this review requires a sufficient factual foundation and is required by the Supreme Court of Canada not be addressed in a factual vacuum.

[97] I am unable to accept the petitioners' submission 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. Evidence of constitutional issues that were not contested or that should have been put before the decision maker are not admissible if they were not put forward; see, for example, *Actton Transport Ltd. v. British Columbia (Employment Standards),* 2010 BCCA 272, where the underlying issue concerned division of powers and the Court of Appeal said that the record before the trial judge should have been confined to the record before the decision maker.

[98] In their oral submissions, the religious petitioners contend that it would be unfair for a person affected by an order not to be able to put in their own evidence if it has not been considered by the health officer.

[99] The respondents point out that s. 43(l)(a) of the *PHA* provides precisely such opportunity and requires the decision maker to give reasons if the information is not accepted.

[100] If I were to allow the evidence that the religious petitioners wish to rely on in this case, that would permit them to bypass the statutory decision maker and rely upon purportedly expert evidence, without affording deference to Dr. Henry's findings on the face of the record before her.

[101] The evidence of what was before Dr. Henry when she made the G&E Orders should not be conflated with the record that the religious petitioners wish to place before me in this petition hearing. That evidence includes information which can be relied on for determining standing or whether a petitioner has exhausted administrative remedies, but not for whether a decision (here the G&E Orders) is reasonable or compliant with the *Charter*.

[102] Had the religious petitioners amended their petition to seek judicial review of Dr. Henry's decision to grant them a variance to her G&E Orders, then the "record of proceeding" would include all of the information before Dr. Henry when she made her decision on the variance (but not before her when she issued the G&E Orders). But then the review would be of only her variance decision, not the G&E Orders.

[103] I am prepared to admit into evidence the communications between the religious petitioners and Dr. Henry or other representatives of the provincial government with respect to the impugned G&E Orders up to and including the date of the most recent order prior to the hearing of the petition herein, of February 10, 2021.

[104] As Dr. Emerson's second affidavit was relied upon only with respect to the respondents' injunction application, I will ignore it for the purposes of these reasons for judgment.

[105] The second affidavit of Valerie Christopherson made February 25, 2021, attaches Dr. Henry's variance decision on the religious petitioners' s. 43 application, to show the fact of the decision having been made. It is admissible for that purpose, but is irrelevant to the reasonableness of Dr. Henry's earlier G&E Orders.

[106] The first and third affidavits of Vanessa Lever, made February 2, 2021 and February 26, 2021 attach correspondence between counsel for the petitioners, Mr. Jaffe, and counsel for the respondents, Mr. Morley, regarding the religious petitioners' s. 43 application. That correspondence is also relevant to the respondents' preliminary objection that the petitioners should have sought judicial review of Dr. Henry's s. 43 decision, but is irrelevant to the reasonableness of Dr. Henry's earlier G&E Orders.

[107] At the request of the petitioners, the respondents submitted an affidavit attaching Dr. Henry's s. 43 *PHA* variance decision that was granted to Rabbi Meir Kaplan. Rabbi Kaplan submitted that request for reconsideration on behalf of Orthodox Jewish congregations, noting that his understanding of Jewish law

prohibited the use of electronic devices on the Sabbath. On February 23, 2021, Orthodox congregations in B.C. were granted a limited exemption to gather for the holiday of Purim in-doors, with specific safety conditions, including on the number of attendees. They were subsequently granted an exemption to hold weekly Sabbath services outdoors, with specific safety conditions.

[108] On March 1, 2021, Dr. Henry's advised Rabbi Kaplan that:

> Further to the variance granted I granted to the Orthodox Jewish congregations on February 23 to hold Purim and Sabbath services in-doors, this is to clarify that consistent with your original request, the variance only allowed indoor services for Sabbath of February 27, given that it followed immediately after the Purim gatherings on Thursday and Friday.
>
> We are noting that virus transmission remains elevated and there are indications of increased viral transmission in some areas of the province. In addition we are seeing increased reports of virus variants of concern (VOCs). Modelling suggests that if these VOCs were to become established or predominant in our province, case counts will rise quickly and significantly. The enclosed presentation from the Public Health Agency of Canada notes that "With spread of VOC, current public health measures will be insufficient, and epidemic resurgence is forecast" (see slide 12) and "In all provinces current controls may not be sufficient to fully control the variants of concern. The early lifting of public health measures could lead to a resurgence of the epidemic, including the community transmission of variants of concern" (slide 16).
>
> Furthermore, with the spring break season nearly upon us we anticipate that there will be additional people travelling, including people coming from other provinces where transmission is higher than in BC, in spite of our recommendation to limit travel to essential reasons. Also, with schools out of session we are concerned that additional socialization will also drive viral transmission to higher levels, potentially increasing hospitalizations, intensive care admissions and deaths.
>
> 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 than outdoor settings; and when people speak, and especially when they sing, chant or speak at higher than conversational volume. These are all conditions that are exist [sic] 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…

[109] In my view, the evidence of the variance granted to Jewish Orthodox synagogues does form part of the record before Dr. Henry. It is part of the monologue she engaged in to explain the G&E Orders. This evidence is relevant to my analysis under s. 1 of the *Charter,* in particular whether the orders minimally impair the rights in question.

[110] Notwithstanding these conclusions, I will address other additional evidence that the religious petitioners seek to rely upon.

[111] That evidence is from two doctors: Dr. Thomas A. Warren, a specialist in the diagnosis and treatment of infectious diseases, and Dr. Joel Kettner, an expert in public health, preventative medicine and general surgery, and former Chief Public Health Officer for the Province of Manitoba.

[112] Dr. Warren was asked to opine on the risk of transmission of the Virus at in-person worship services in B.C. relative to the transmission risk of other activities permitted under existing provincial health orders in B.C. Those other activities included in-person dining at restaurants and activities such as gyms, schools, public transit, pubs and the retail sector.

[113] Dr. Warren provided a number of estimates of risk, for example the risk of death in older individuals, the number of transmissions from social gatherings, office workplaces, recreational facilities, and religious meeting in the Canadian epidemiologic summary.

[114] Dr. Kettner was asked by the religious petitioners to respond to both of Dr. Emerson's affidavits sworn in these proceedings. He was also asked to provide his opinion as to the transmission risk of the religious petitioners' worship services

compared to other activities permitted under Dr. Henry's G&E Orders, including in-person dining at restaurants and pubs, and attendances in the retail sector, at gyms, and on public transportation.

[115] Dr. Kettner offered his opinions on the requirements of public health statutes in Canada, and how the standards and ethics of public health practice should be exercised.

[116] He queried whether Dr. Henry's G&E Orders were evidence-based, and deposed that based on the information provided in Dr. Emerson's first affidavit, 7/1,333, or .005 of all reported cases of COVID-19 in B.C. have been associated with places of worship.

[117] In comparing the risk of worship services compared to other permitted activities, Dr. Kettner extrapolated the frequency of church attendances in B.C. from a 2003 Statistics Canada report. In doing so, he incorrectly understood that one of the rules of the Free Reformed Church of Chilliwack was to exclude people over the age of 65 from attendance. He was also not apparently provided with, or alternatively chose not to comment on the practices of the other two religious petitioner churches.

[118] Dr. Henry did not have the reports of these two doctors available to her when she made the impugned G&E Orders. As I have indicated above, if I allowed the religious petitioners to rely upon this purportedly expert evidence, that would permit them to bypass the statutory decision maker without affording deference to Dr. Henry's findings on the face of the record before her.

VII. Standard of Review

[119] In *Trest v. British Columbia (Minister of Health)*, 2020 BCSC 1524, Mr. Justice Basran dealt with an application by parents of school-aged children who wanted mandatory mask or face-covering policy in classrooms during the pandemic. He wrote:

> [91] On the balance of convenience, in my view, the public interest is best served by continuing to rely on the PHO, her team of experts, and the Minister of Health to guide British Columbia's response to the ongoing COVID-19 pandemic. The evidence before me shows that their guidance, advice, and policies such as the Restart Plan are firmly rooted in current scientific knowledge and best practices. The fact that some of this advice is not universally accepted is insufficient to conclude that the government has clearly chosen the wrong approach in terms of the public interest. The petitioners have not adduced sufficient evidence to rebut the presumption that the Restart Plan serves the public interest. Therefore, they have not discharged their burden to show that the balance of convenience favours the granting of the injunctions they seek.

[120] In *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, at para. 31, Madam Justice L'Heureux-Dubé referred, with approval, to the view expressed by André Nadeau in "*La responsabilité médicale*" (1946), 6 R. du B. 153, at p. 155:

> [TRANSLATION] The courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects...

[121] At para. 32, L'Heureux-Dubé J. continued:

> Or, as summarized by Brossard J. in *Nencioni v. Mailloux*, [1988] R.L. 532 (Sup. Ct.), at p. 548:
>
> > [TRANSLATION] ... it is not for the court to choose between two schools of scientific thought which seem to be equally reasonable and are founded on scientific writings and texts ...

[122] The petitioners contend that as their proceeding is primarily centered on what is in substance a *Charter* challenge to Dr. Henry's G&E Orders, as opposed to the judicial review of an administrative decision, no deference is owed to Dr. Henry in determining the constitutionality of her orders. They say that a standard of correctness should be applied.

[123] I am unable to accept this over-simplification. I accept that insofar as the *Charter* is concerned, Dr. Henry's orders must reflect and incorporate *Charter* values, but so long as they do, the impugned orders are in areas of science and medicine.

[124] In the areas of science and medicine, Dr. Henry is entitled to deference and the appropriate standard of review of such matters is that of reasonableness.

[125] Even if the opinions of Dr. Warren and Dr. Kettner were admissible, they represent, at best, an alternate view of the risks that have been considered and weighed by Dr. Henry. They do not persuade me that her conclusions and G&E Orders are unreasonable.

[126] I will discuss the standard of review necessary to consider s. 1 of the *Charter*, below, when I address dispute between the parties as to whether the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*] or that in *Doré v. Bureau du Quebec*, 2012 SCC 12 [*Doré*] should be applied.

VIII. Discussion

[127] The substance of the various G&E Orders in effect from November 7 to date have remained essentially the same in terms of restrictions on in-person gatherings and events, including religious services.

[128] The respondents contend that, in the result, the question for the Court on this judicial review is whether Dr. Henry reasonably balanced the restriction on religious freedom with protection of public health at the time she first imposed the regional restrictions and on an ongoing basis thereafter when extending them, thereby continuing the ban.

[129] Section 2 of the *Charter* states:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

[130] Section 7 of the *Charter* states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[131] Section 15 of the *Charter* states:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[132] In the petition response, the respondents conceded that the impugned G&E Orders engage the religious petitioners' rights under ss. 2(a), 2(b), 2(c) and 2(d) of the *Charter*, but in their oral submissions resiled from the admission with respect to s. 2(d).

[133] The respondents also accept that restrictions on gatherings engage freedom of association under s. 2(d) of the *Charter*, which, at minimum, would protect the ability of individuals to meet to pursue collective goals.

[134] With respect to s. 7 of the *Charter*, the respondents do not dispute that there are mental health benefits of in-person religious and other gatherings. They argue, however, that the religious petitioners have not established that their "life", "liberty" or "security of person" interests have been infringed or that this was done contrary to the principles of fundamental justice. They say the right to a written hearing for individual exemptions has been specifically preserved, and say that the kind of serious state-caused psychological harm required to establish a breach of "security of the person" has not been established.

[135] With respect to s. 15 of the *Charter,* the respondents contend that the religious petitioners have not shown that any of the impugned G&E Orders make a distinction based on an enumerated or analogous ground or that such a distinction creates a disadvantage. They say that gatherings are defined neutrally, and exempted activities such as support groups or counselling are exempted whether delivered in a secular or religious way. Thus, they contend that there is no evidence

that the religious petitioners' right to the equal protection and equal benefit of the law without discrimination has been infringed.

[136] The respondents contend that the real issue is whether the impugned G&E Orders are "reasonable limits" on these freedoms under s. 1 of the *Charter*.

(a) Mr. Beaudoin

[137] Mr. Beaudoin organized public protests against what he contends to be an abuse of government power in the present COVID-19 pandemic by imposing unnecessary and "draconian" restrictions in the name of "safety," contradicting what is permissible in a free and democratic society.

[138] Those protests took place on December 1, 5, and 12, 2020. On December 15, 2020, an RCMP officer issued Mr. Beaudoin violation ticket no. AJ17179822 for contravening the G&E Order that was in place at the time.

[139] Mr. Beaudoin contends that the protests he participated in were peaceful political events that occurred outdoors and prioritized the safety of attendees, including their physical distancing, and involved cooperation with police.

[140] He initially addressed any safety concerns, informing everyone that they should maintain social distance, but gave evidence that trying to comply with the safety plan requirements of Dr. Henry's orders was impossible, as he was unable to control the number of people who attend an outdoor public protest or gather contact information from each of them.

[141] The RCMP required Mr. Beaudoin to record personal information of the protestors attending the protests. He says that the RCMP threatened him with penalties for noncompliance.

[142] Mr. Beaudoin explained it was impossible to collect such information from a large group coming and going in an open area. He also expressed reluctance to divulge particulars about the protestors to the government.

[143] As he had nothing to offer by way of additional relevant information that was not reasonably available to the health officer when the G&E Order was issued or varied, nor any proposal that was not presented to the health officer when the order was issued, Mr. Beaudoin did not apply for a s. 43 *PHA* exemption to the impugned orders, and thus had no alternate remedy available to him.

[144] In any case, those parts of the G&E Orders that infringed the *Charter* rights asserted by Mr. Beaudoin no longer form a part of the orders.

[145] In her G&E Order of February 10, 2021, Dr. Henry included the following in the preamble to the order:

> 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. 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.

[146] This leaves only Mr. Beaudoin's application for a declaration as to the infringement of his *Charter* rights between November 7, 2020 and February 10, 2021.

[147] In oral submissions, counsel for the respondents conceded that Dr. Henry's orders made between November 19, 2020 and February 10, 2021, prohibiting outdoor gatherings for public protests were of no force and effect during that time. I therefore make the declaration sought by Mr. Beaudoin that the orders extant between those dates did infringe his s. 2(c) and (d) *Charter* rights and are of no force and effect.

(b) The Religious Petitioners

[148] A law or other government action engages freedom of religion if it interferes with a practice connected with religion in a manner that is more than trivial or insubstantial. It is conceded that the restrictions on in-person religious gatherings

meet this threshold. The respondents accept that in-person gatherings are a practice connected with religion and that the November 19, 2020 G&E Order in particular interferes in a manner that is more than trivial or insubstantial with religious practice.

[149] It is apparent that the religious petitioners accept that public health measures against the spread of the Virus are necessary for secular reasons. Indeed, two of the three churches discontinued in-person services before they were under no legal obligation to do so.

[150] However, the religious petitioners allege that Dr. Henry's decisions were motivated by "administrative ease and convenience" and say there is "no evidence" that she considered measures that would have limited religious communities' *Charter* rights in a less drastic and severe fashion. The religious petitioners say that there is "simply nothing to illustrate" a causal link between restrictions on religious services and a corresponding reduction in COVID-19 transmission. They claim there is "no evidence" that COVID-19 transmission could be expected from worship services adhering to the safety steps prescribed in the October 30, 2020 G&E Order relative to other forms of in-person gathering permitted from November 2020 forward, such as in schools or retail establishments.

[151] The respondents argue that in the fall of 2020, it became clear that the measures so far taken until then were insufficient to avoid an exponential increase in the prevalence of the Virus. They contend that a number of the clusters were linked to religious events, notwithstanding the measures that were in place at that time.

[152] The respondents argue that the epidemiological situation in B.C. changed in Fall 2020 when the number of new cases, hospitalizations and the reproduction rate all climbed. They say there was evidence of cases and clusters associated with social gatherings in homes, bars and restaurants and religious gatherings.

[153] The respondents say that this surge in cases and hospitalizations in the fall of 2020 resulted in the PHO making an oral order imposing region-specific restrictions for the Vancouver Coastal and Fraser Health regions on November 7, 2020.

[154] The religious petitioners have given evidence that gathering in-person for worship provides benefits in addition to the fulfillment of the religious beliefs described above. These benefits include:

i) accommodating members who do not have the means to use technology;

ii) identifying specific needs of vulnerable persons in the church community;

iii) providing physical, mental and emotional care; and

iv) providing comfort and encouragement and reducing loneliness, depression, anxiety, and fear.

[155] The respondents accept that the religious petitioners' practice of in-person worship is fundamental to their religious beliefs.

[156] The religious petitioners have continued to gather for in-person religious services, despite the G&E Orders, and have attempted to exercise various precautions to reduce the risk of transmission of the Virus.

[157] For example, the evidence with respect to services at the Immanuel Covenant Reformed Church is that it has:

a) allowed one of the six 'districts' (groupings of persons in our Church) to meet per service in order to keep the numbers attending below 50 persons;

b) put up official COVID-19 safety signage all around the Church, established hand sanitizing stations and contact tracing lists of attendees, informed their congregation about social distancing and worked to diligently encourage people to stay two meters apart and urged anyone with any symptoms of Illness to stay home until they recovered;

c) cancelled their after-service times of fellowship and coffee, urging people to remain socially distanced and go home soon after the service ended.

d) added an afternoon service on June 7, 2020;

e) marked off rows of chairs designating some for morning use, some for afternoon use, and some "Do Not Use," in order to make sure there were two meters between people at ail times;

f) added an eight-foot high thick transparent vinyl curtain bisecting our sanctuary allowing us to have two groups of 50 persons in those two areas. The divided sanctuary is serviced by separate entrance and exit

doors minimizing the chances of contact between the 50 people on one side of the sanctuary and the 50 people on the other side of the sanctuary;

g) established another group of 50 persons who met in our Fellowship Room and a location at a member's nearby shop which allowed another 50 people to meet;

h) had volunteers present detailed plans for this stage of renewing worship services, with proposals for grouping by families and floor plans of how people would sit;

i) Established groups of 50 persons who would become a 'bubble' and would meet together in these spaces, rotating weekly from space to space to allow everyone to have as uniform an experience as possible.

j) closed the nursery;

k) made masks mandatory when entering, moving about in, and exiting the building;

l) urged everyone to leave the service immediately after it ends and to head straight to their vehicles; and

m) arranged seating in order to preserve the 'bubbles' from the worship groupings we had previously been using.

[158] The evidence on behalf of the Free Reformed Church of Chilliwack, B.C. is that it has:

a) hired a professional cleaner to ensure that a complete and thorough cleaning happened as needed;

b) immediately increased the ventilation of their facility by leaving doors open during our services, with the result that no one touches the doors, expect for the one person who is designated to open them at the beginning of each Sunday;

c) Before March 2020, would pass a collection plate through the pews to collect free will offerings but have not done so since;

d) cancelled “coffee time” after morning services encouraged their members to immediately go to their vehicles and home after the services, and many socialize via phone, text or zoom in lieu of this time;

e) Cancelled most Church classes resuming them when they considered it safe to do so;

f) Consistently provided hand sanitizer and masks - and encouraged their use by those attending;

g) regularly reminded the congregation that If they are feeling unwell with even one symptom of COVID-19, they are requested to not come to church for any reason and to stay home until they have recovered;

h) developed procedures whereby the congregation would be notified within hours if someone tested positive for COVID from within our congregation; and

> i) often reminded its congregation through letter and verbal reminders of the various protocols that we have in place for their protection.

[159] The Riverside Calvary Church stopped holding in-person gatherings around March 15, 2020 and provided online services for its members and the general public.

[160] This church resumed services on May 31, 2020 with 50 people, holding three services on Sunday mornings at 50 people each. The church members removed chairs from the sanctuary in order to maintain physical distancing, set up hand sanitizer stations throughout the church buildings. Their sanctuary was cleaned and wiped down between each service. Masks were also provided, and they added a reservation link on their website in order for people to reserve a seat. When reservations reached 50, no more were accepted. The evidence before me is that this church's members have committed themselves to meeting and exceeding the prior health guidelines including:

> a) holding three services on Sunday mornings capped at 50 people;
> b) maintaining a reservation link on our website in order for people to reserve a seat and provide contact information;
> c) ensuring seating was spaced out to maintain and exceed physical distancing requirements;
> d) having hand sanitizer stations were set up throughout the Church buildings;
> e) cleaning and wiping down the sanctuary between each service;
> f) ensuring that attendees were provided with clean masks;
> g) having elders direct orderly and socially distanced entry of persons to the sanctuary and also constantly sanitizing the entry door; and
> h) keeping services to an hour so as to maintain a timely flow of people in and out of the building.

[161] Notwithstanding these precautions, the churches have been discouraged in various ways from holding in-person services by members of the RCMP. They have been issued at least 11 tickets totalling $299,900 for allegedly contravening the G&E Orders issued by Dr. Henry.

[162] The respondents assert that the Province's publication "COVID-19 Ethical Decision-Making Framework", the "key ethical principles and values" that are

asserted to underpin the framework, include a consideration of *Charter* rights. The principles and values identified in this publication include: Respect, defined as "to whatever extent possible, individual autonomy, individual liberties, and cultural safety must be respected; Least Coercive and Restrictive Means defined as "any infringements on personal rights and freedoms must be carefully considered, and the least restrictive or coercive means must be sought"; Proportionality, defined as "measures implemented, especially restrictive ones, should be proportionate to and commensurate with the level of threat and risk"; and Reasonableness, defined as "meaning that decisions should be rational, non-arbitrary nor based on emotional reactivity and based on the appropriate evidence available at the time".

(i) Section 2(a) of the Charter

[163] In *R v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 [*Big M Drug Mart*], at para. 94, the Supreme Court of Canada identified the "essence" of freedom of religion as protected by the *Charter* as encompassing the rights "to entertain such religious beliefs as a person chooses", "to declare religious belief openly without fear of hindrance or reprisal", and "to manifest religious belief by worship and practice or by teaching and dissemination."

[164] It is the third of these features that are engaged on the hearing of the petition.

[165] In *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [*Trinity Western*], the majority confirmed both the individual and communal aspects of freedom of religion:

> 64 Although this Court's interpretation of freedom of religion reflects the notion of personal choice and individual autonomy and freedom, religion is about both religious beliefs and religious relationships (*Amselem*, at para. 40; *Loyola*, at para. 59, quoting Justice LeBel in *Hutterian Brethren*, at para. 182). The protection of individual religious rights under s. 2(a) must therefore account for the socially embedded nature of religious belief, as well as the "deep linkages between this belief and its manifestation through communal institutions and traditions" (*Loyola*, at para. 60). In other words, religious freedom is individual, but also "profoundly communitarian" (*Hutterian Brethren*, at para. 89). The 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).

[166] The religious petitioners contend that Dr. Henry's G&E Orders are an outright forbidding of all British Columbians from the free exercise of the fundamental right to engage in sacred religious practices in a communal and collective setting.

[167] In my view, this assertion is greatly overstated.

[168] As I have indicated above, without necessarily accepting all of the religious petitioners' s. 2(a) arguments, the respondents concede that those rights have been infringed by Dr. Henry's G&E Orders, and I so find.

(ii) Section 2(b) of the Charter

[169] Freedom of expression is understood in Canadian law as all non-violent activity intended to communicate a meaning. Any law or government action that has the purpose or effect of interfering with such an activity is a *prima facie* breach of freedom of expression. Although it is usually referred to simply as "freedom of expression", s. 2(b) of the *Charter* guarantees freedom of thought, belief, opinion and expression. While restrictions on gatherings do not have the purpose of restricting communication of meaning, they can have that effect.

[170] Section 2(b) also protects the right to receive expression. It protects listeners as well as speakers: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para 41.

[171] The religious petitioners contend that the prohibition of in-person worship services infringes freedom of expression, which they say extends even to physical acts, such as the sacrament of communion, intended to convey a religious meaning of profound significance.

[172] As I have indicated above, without necessarily accepting all of the religious petitioners' s. 2(b) arguments, the respondents concede that those rights have been infringed by Dr. Henry's G&E Orders, and I so find.

(iii) Section 2(c) of the Charter

[173] The right of peaceful assembly is, by definition a group activity incapable of individual performance: *Mounted Police Association of Ontario v. Canada (Attorney General),* 2015 SCC 1, at para 64 [*Mounted Police Association*].

[174] As I have indicated above, without necessarily accepting all of the religious petitioners' s. 2(c) arguments, the respondents concede that those rights have been infringed by Dr. Henry's G&E Orders, and I so find.

(iv) Section 2(d) of the Charter

[175] In *Mounted Police Association*, the Supreme Court of Canada considered the guarantee of freedom of association in s. 2(d) of the *Charter.* The majority stated that freedom of association protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.

[176] *Mounted Police Association* involved the exclusion of RCMP members from the federal public service labour relations regime. After reviewing the existing jurisprudence, the majority held:

> 46 In summary, after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(d): *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344.

[177] I accept the religious petitioners' submission that infringement of s. 2(d) occurs when the impugned government action constitutes "a substantial interference with freedom of association" in either its purpose or effect, and find that the restrictions on gatherings in the G&E Orders infringes the religious petitioners' right to freedom of association under s. 2(d) of the *Charter*.

(v) Section 7 of the Charter

[178] There are two stages to an analysis under s. 7. First, the applicant must establish that the impugned governmental act imposes limits on a "life", "liberty" or "security of the person" interest, such that s. 7 is "engaged". If the first step is met, the applicant must then establish that this "deprivation" is contrary to the "principles of fundamental justice": *Canada (Attorney General) v. Bedford,* 2013 SCC 72 [*Bedford*] at para. 57.

[179] The principles of fundamental justice include the principles against arbitrariness, overbreadth and gross disproportionality. The deprivation of a right will be arbitrary and thus violate s. 7 if it bears no real connection to the law's purpose (in this case, public health). The deprivation of a right will be overbroad if it goes too far and interferes with some conduct that bears no connection to its objective. Finally, the deprivation of a right will be grossly disproportionate if the seriousness of the deprivation is so totally out of sync with the objective that it cannot be rationally supported: *Bedford*.

[180] The religious petitioners assert that in *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter*], the Court determined that the phrase "right to life" might be described as a depreciation in the value of the lived experience. They say that where state action imposes an increased risk of anxiety, loneliness, domestic violence, stress, depression, substance abuse or other factors which could directly or indirectly lead to death, the right to life is engaged.

[181] At the onset of the COVID-19 pandemic in the spring of 2020, the Riverside Calvary Chapel stopped in-person worship services, being unsure of the severity of the risk posed. The church asserts that the stoppage of the services resulted in negative effects on church members from a lack of in-person meetings including extreme loneliness, depression, anxiety, a sense of not belonging, and not receiving in-person prayer.

[182] There is similar evidence of the effects of being unable to attend in-person worship services from the Free Reformed Church of Chilliwack and the Immanuel Covenant Reformed Church.

[183] The respondents accept that in-person meetings afford psychological health benefits to members of religious communities, but say that there is no evidence of the kind of serious psychological harm required by *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, if they are unable to attend in-person meetings.

[184] I agree that the "right to life" protected by s. 7 of the *Charter* does not extend as far as the religious petitioners suggest. The respondents quite properly point to para. 62 in *Carter*, where the Court clarified the meaning of the right:

> This Court has most recently invoked the right to life in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, where evidence showed that the lack of timely health care could result in death (paras. 38 and 50, per Deschamps J.; para. 123, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.), and in *PHS*, where the clients of Insite were deprived of potentially lifesaving medical care (para. 91). In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Conversely, concerns about autonomy and quality of life have traditionally been treated as liberty and security rights. We see no reason to alter that approach in this case.

[185] In my view, there is no evidence of a threat to life in this case.

[186] Moreover, given the concessions of the respondents and my findings with respect to the religious petitioners' s. 2 *Charter* rights, I find that it is unnecessary to expand the jurisprudence relating to s. 7 of the *Charter*, and will make no finding with respect to s. 7. In *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*], Chief Justice McLachlin, for the majority, concluded that:

> 105 The s. 15 claim was not considered at any length by the courts below and addressed only summarily by the parties in this Court. In my view, it is weaker than the s. 2(a) claim and can easily be dispensed with. To the extent that the s. 15(1) argument has any merit, many of my reasons for dismissing the s. 2(a) claim apply to it as well.

[187] Likewise, here the religious petitioners focussed their submissions on their s. 2 *Charter* rights, and addressed their claim pursuant to s. 7 of the *Charter* in only a summary way.

(vi) Section 15(1) of the Charter

[188] Section 15(1) of the *Charter* protects the equality rights of, inter alia, religious individuals. Establishing a violation of s. 15(1) requires the claimant to pass the following two-stage analysis:

(a) Does the impugned law, on its face or in its impact, create a distinction on the basis of an enumerated or analogous ground?

(b) If it does draw a distinction, does the impugned law fail to respond to the actual capacities and needs of the members of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage?

[189] The religious petitioners and the intervenor assert that the impugned G&E Orders make a distinction between assemblies that are religious in nature, and assemblies whose nature is variously economic (business meetings), athletic (gyms and swimming pools), educational (schools are open for in-person learning), social (restaurant gatherings), mental health oriented (support group meetings), or aesthetic (art gallery viewings, the film industry, bands playing at a restaurant).

[190] The religious petitioners and the intervenor also contend that if the COVID-19 transmission risk in these permitted but regulated activities is similar to the COVID-19 transmission risk in prohibited in-person religious assemblies (while following similar public health precautions such as social distancing, masking, and contact tracing), then they constitute an appropriate comparator group.

[191] There is no evidence before me that the G&E Orders only disadvantage a group of people based on their religious beliefs. The same activities are allowed and restricted for secular and religious people, and whether in a secular or religious

setting. The respondents point out that religious schools are as open as secular ones. Funerals can be conducted by any religious or secular community. Unless they are covered by a specific exemption, non-religious people have no more ability to gather than religious ones.

[192] The G&E Orders are also not an absolute prohibition on in-person religious gatherings. The current orders permit multiple forms of in-person religious gatherings:

a) Drive-in services of up to 50 vehicles;

b) Personal prayer or reflection; and

c) In-person baptisms, weddings and funerals with up to 10 people in attendance. (This is a less restrictive limitation than the original November 7th verbal order which limited funerals and weddings to immediate household members only.)

[193] In *Hutterian Brethren*, the Supreme Court of Canada dealt with the universal photo requirement to obtain a driver's licence in Alberta. Chief Justice McLachlin reasoned that:

> 108 Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(*a*). There is no breach of s. 15(1).

[194] The respondents contend that the same result should apply in this case, as the impugned G&E Orders are neutrally defined.

[195] In response, the intervenor commented that:

> Whereas the section 15(1) claim in *Hutterian Brethren* was based on a neutral policy choice concerning security measures, the impugned orders

> specifically ban all in-person worship gatherings on the basis of the religious purpose of the assembly, while permitting other non-religious gatherings to continue. This differential effect is imposed by the definition of "event" and the activities exempted from the impugned orders.

[196] The respondents contend that while s. 15 prohibits governments from disadvantaging a group of persons based on their religious beliefs, but should not be utilized to test neutrality among practices or beliefs, because that is addressed by s. 2(a) of the *Charter*.

[197] As with their s. 7 *Charter* submissions, 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.

(vii) Section 1 of the Charter

[198] Section 1 of the *Charter* constrains the ability of legislatures to enact laws that limit rights and freedoms guaranteed in the *Charter*:

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

[199] Religious bodies have a sphere of independent spiritual authority, at the core of which is the authority to determine their own membership, doctrines, and religious practices, including manner of worship.

[200] The intervenor observed that a church's ability to fulfil its responsibilities and religious duties may be legitimately inconvenienced by laws or regulations of general application, subject to the state's duty under the *Charter* to accommodate religious freedom under s. 2(a) and avoid adverse effect discrimination under s. 15. The intervenor argues, however, that by the same token, government's ability to fulfill its responsibilities may be legitimately 'inconvenienced' by its obligation to respect religious institutions and practices.

[201] The religious petitioners contend that this is not a case where “the contextual factors favour a deferential approach” in determining whether the infringements on fundamental rights and freedoms “are demonstrably justified in a free and democratic society.” They say that the risks and harms at issue are identifiable in the evidence before me, and that the impugned G&E Orders are of general application across the province amounting to subordinate legislation and that their enactment was not subject to debate or public scrutiny.

[202] As the G&E Orders infringe the religious petitioners’ s. 2(a), (b), (c), and (d) *Charter* rights, I must determine whether those infringements are justified under s. 1 of the *Charter*. The onus at this stage is on the respondents to prove that the infringements meet the requirements of s. 1.

[203] *Hutterian Brethren* is an example where an infringement of a s. 2 *Charter* right was found to be justified under s. 1 of the *Charter*. The Supreme Court of Canada considered whether the universal photo requirement for drivers’ licences in the Province of Alberta constituted a limit on the freedom of religion of Colony members who wished to obtain a driver's licence infringing their s. 2(a) *Charter* rights, and if so, whether that infringement was a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter.*

[204] At para. 101, Chief Justice McLachlin, for the majority, commented that the universal photo requirement addressed a pressing problem and would reduce the risk of identity-related fraud, when compared to a photo requirement that permits exceptions.

[205] At para. 102, McLachlin C.J.C. held, however, that that benefit had to be weighed against its impact on the limit on the Colony’s religious rights. She concluded that as the photo requirement did not deprive members of their ability to live in accordance with their beliefs, its deleterious effects, while not trivial, fell at the less serious end of the scale, and were justified under s. 1 of the *Charter*.

[206] The parties and the intervenor were unable to agree on the test to be applied in the application of s. 1 of the *Charter* itself in this case. The religious petitioners and the intervenor say the test established in *Oakes* should apply, because the G&E Orders are in substance laws of general application. The respondents say the test set out in *Doré* should apply*,* as it has been explained in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*], because the G&E Orders are an administrative decision.

[207] In *Oakes,* at paras. 69-71, Chief Justice Dickson set out the test to be applied on a s. 1 analysis. First, the objective which the measures responsible for a limit on a *Charter* right are designed to serve must be sufficiently important to warrant justifying limiting the right. Second, the party invoking s. 1 must establish that the means chosen are reasonable and demonstrably justified. This second requirement involves a form of proportionality test, where the court is required to "balance the interests of society with those of individuals and groups". There are three components to the proportionality inquiry. First, the measures adopted must be rationally connected to the objective. Second, the means chosen must impair as little as possible the right in question. Third, there must be proportionality between the effects of the measures and the objective.

[208] And at para. 71, Dickson C.J.C. elaborated on the third component:

> … Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[209] At paras. 66-68, Dickson C.J.C. discussed the onus and standard of proof on a section s. 1 analysis. The onus of proving that a limit on a right of freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and

democratic society rests upon the party seeking to uphold the limitation. The standard of proof is the civil standard, namely proof by a preponderance of probability.

[210] In *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario,* 2018 ONSC 579, the Ontario Divisional Court held that the *Oakes* test applied to the question of whether policies created by the Ontario College of Physicians and Surgeons that engaged the *Charter* rights of Ontario doctors were justified under s. 1.

[211] The *Oakes* test was also recently applied by the Supreme Court of Newfoundland and Labrador in *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125, in the context of a *Charter* challenge to orders of general application issued by that province's Chief Medical Officer of Health authorized by that jurisdiction's equivalent to the *PHA*. The impugned orders restricted entry into the province to prevent transmission of COVID-19.

[212] In *Doré*, Madam Justice Abella addressed whether the *Oakes* framework should be used when reviewing an administrative decision that is said to violate *Charter* rights. Writing for the Court, Abella J. wrote:

> 57 On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless 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 *Charte*r values against broader objectives.

[213] At para. 37, Abella J. referred to *Hutterian Brethren* to draw a distinction between the approach to be applied when "reviewing the constitutionality of a law" and that which should be applied when "reviewing an administrative decision that is said to violate the rights of a particular individual". In doing so, Abella J. effectively

affirmed the statement of McLachlin C.J.C. in *Hutterian Brethren* that "[w]here the validity of a law is at stake, the appropriate approach is a [s. 1] *Oakes* analysis."

[214] In *Loyola*, writing this time for the majority, Abella J. wrote at para. 3 that "the result in *Doré* was to eschew a literal s. 1 approach in favour of a robust proportionality analysis consistent with administrative law principles."

[215] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], the Court confirmed the applicability of the *Doré* framework when reviewing an administrative decision that is said to limit a *Charter* right:

> 57 Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 65). Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

[216] 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 it is within the range of acceptable alternatives once appropriate curial deference is given). An administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* right with the objective of the measures that limit the right.

[217] In *Loyola,* Abella J. explained the "analytical harmony" between the proportionality analyses required by the *Oakes* and *Doré* frameworks:

> [40] A *Doré* proportionality analysis 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. Both [*Oakes*] and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives: see *RJR-*

> *MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160. As such, *Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oake*s test: *Doré*, at para. 5.

[218] In this case, I have determined that the G&E Orders are more akin to an administrative decision than a law of general application, and that the *Doré* test is the appropriate test to apply. Although the G&E Orders are not a classical administrative adjudicative decision, they were made through a delegation of discretionary decision-making authority under the *PHA.*

[219] In *Trinity Western*, at para. 36, the Court explained that on a reasonableness review of an administrative decision, a "reviewing court must consider whether there were other reasonable possibilities that would give effect to the *Charter* protections more fully in light of the objectives [….] 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 objectives, the decision would not fall within a range of reasonable outcomes [….] the question is whether the administrative decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right."

[220] In *Trinity Western,* the majority found that the Law Society of British Columbia's decision not to approve the University's proposed law school infringed s. 2(a) of the *Charter*, but was justified under s. 1 of the *Charter*. With respect to the infringement, the majority found:

> 75 By interpreting the public interest in a way that precludes the approval of TWU's law school governed by the mandatory Covenant, the LSBC has interfered with TWU's ability to maintain an approved law school as a religious community defined by its own religious practices. The effect is a limitation on the right of TWU's community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct. Accordingly, their religious rights were engaged by the decision.

[221] But, applying the *Doré* framework, the majority concluded that the Law Society's decision was reasonable as it represented a proportionate balance

between the limitation on the religious protections under s. 2(a) of the *Charter* and the statutory objectives the Law Society sought to pursue:

> 104 Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue on the facts of this case, and given the absence of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU's proposed law school represents a proportionate balance. In other circumstances, a more serious limitation may be entitled to greater weight in the balance and change the outcome. But that is not this case.
>
> 105 In our view, the decision made by the LSBC "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Therefore, the decision amounted to a proportionate balancing and was reasonable.

[222] The religious petitioners concede that public health is a sufficiently important objective that it can justify limits on *Charter* rights. But they ask this Court to say that the measures Dr. Henry has taken are arbitrary, irrational and disproportionate, and therefore not reasonable limits demonstrably justified in a free and democratic society. They say that the Court does not owe deference to Dr. Henry in determining the constitutionality of her orders.

[223] The respondents disagree. They say, and I agree, that the question before this Court is not whether Dr. Henry reached the correct balance, but whether, on the information available to her, she acted within the reasonable range of alternatives. This assessment must be based on the record before Dr. Henry.

[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. The constitutional importance of combating the COVID-19 pandemic has been stated by courts across the country.

[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 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).

[227] The religious petitioners ask me to find that the measures Dr. Henry has taken are arbitrary, irrational and disproportionate, and therefore not reasonable limits demonstrably justified in a free and democratic society.

[228] The deprivation of a right is arbitrary if it "bears no connection to" the law's purpose". As the religious petitioners concede that public health is a sufficiently important objective that it can justify limits on *Charter* rights, I see no basis upon which to find that the impugned G&E Orders are arbitrary in the broad sense.

[229] The fact that some religious activities are restricted and some secular activities are not is not necessarily evidence of arbitrariness. There needs to be a comparison of comparables and a demonstration that there is no rational basis for the distinction. That is not present here.

[230] Overbreadth allows the courts to recognize that a law is rational in some cases, but that it overreaches in its effect in others. The impugned G&E Orders are as broad in scope as one might conceive of. However, they are intended to address a pandemic that affects all of us. In the result, they are, of necessity, and by design, broad enough to affect all British Columbians and those visiting our province. The G&E Orders do not overreach.

[231] Gross disproportionality targets laws that may be rationally connected to their objective, but whose effects are so disproportionate that they cannot be supported. Gross disproportionality applies only in extreme cases where “the seriousness of the deprivation is totally out of sync with the objective of the measure”. In my view, for the reasons I have expressed in the paragraph preceding this one, I find that they are not disproportionate.

[232] The religious petitioners assert that the respondents have failed to demonstrate a disproportionate risk of COVID-19 resulting from the *Charter*-protected gathering activities at issue in this proceeding, and thus cannot meet the requirements of s. 1 of the *Charter*.

[233] I disagree. 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* 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*.

IX. Conclusion

[249] Mr. Beaudoin has persuaded me that his s. 2(c) and (d) *Charter* rights were infringed by the G&E Orders that predated February 10, 2021, and that the infringement of those rights by those orders cannot be demonstrably justified in a free and democratic society.

[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*. This part of their petition is thus dismissed.

X. Remedy for Mr. Beaudoin

[251] Mr. Beaudoin is entitled to a part of the declaration he seeks, pursuant to ss. 24(1) and 52(1) of the *Constitution Act, 1982.* I declare that orders made by Dr. Henry entitled "Gatherings and Events" pursuant to ss. 30, 31, 32 and 39(3) of the *PHA*, including the orders of November 19, 2020, December 2, 9, 15 and 24, 2020 are of no force and effect as against Mr. Beaudoin as they unjustifiably infringe his rights and freedoms with respect to public protests pursuant to ss. 2(c) and (d) of the *Charter*.

[252] The respondents contend that neither they nor I have specific information about the violation ticket issued to Mr. Beaudoin, and that seeking judicial review of that ticket before it has been adjudicated would amount to a collateral attack, as the validity of the ticket does not necessarily depend upon the constitutionality of the impugned orders.

[253] I have therefore reluctantly come to the view that the respondents' submission with respect to the violation ticket issued to Mr. Beaudoin is correct, and

that I should not adjudicate on their validity without the factual background that resulted in their issuance.

"The Honourable Chief Justice Hinkson"

No. S210209
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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.

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

and

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

Intervenor

ORDER MADE AFTER APPLICATION

BEFORE) THE HONOURABLE CHIEF JUSTICE HINKSON) March 18, 2021

THIS PETITION coming on for hearing at Vancouver, B.C., on March 1, 2, 3, and 5, 2021 and on hearing Paul Jaffe and Marty Moore, counsel for the Petitioners, and Jacqueline Hughes, Q.C., Gareth Morley, and Emily Lapper, counsel for the Respondents, and Geoffrey Trotter and Andre Schutten, counsel for the Intervenor; AND JUDGMENT being reserved to this date

THIS COURT ORDERS that:

1. It is declared that the orders issued by the Provincial Health Officer entitled "Gatherings and Events" made 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 *Canadian Charter of Rights and Freedoms* and are of no force and effect to the extent of such infringement.

2. The remainder of the petition is dismissed.

3. By consent, each party shall bear their own costs.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Paul Jaffe, counsel for the Petitioners

Jacqueline Hughes, Q.C. counsel for the Respondents

Geoffrey Trotter, counsel for the Intervenor

By the Court

Registrar

CHECKED

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Beaudoin v. British Columbia (Attorney General),* 2022 BCCA 66

Date: 20220211
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)

Before: The Honourable Mr. Justice Marchand
(In Chambers)

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).

Oral Reasons for Judgment

Counsel for the Appellants (via videoconference):	M. Moore
Counsel for the Respondents (via videoconference):	E.C. Lapper S.A. Davis
Counsel for the Proposed Intervenor, The Association for Reformed Political Action (ARPA) Canada (via videoconference):	G. Trotter

Place and Date of Hearing:	Vancouver, British Columbia February 4, 2022
Place and Date of Judgment:	Vancouver, British Columbia February 11, 2022

Summary:

The applicant seeks intervenor status in an appeal from a judgment dismissing the appellants' Charter challenge to certain public health orders made by the Provincial Health Officer to combat the COVID-19 pandemic. The orders aimed to reduce the transmission of COVID-19 by prohibiting, among other things, in-person religious gatherings. Held: Application allowed in part and with conditions. The applicant has a broad representative base and the case legitimately engages its interests in the public law issues raised on appeal. Though the applicant shares a common theological conviction and mission with a number of the appellants, certain of its proposed arguments provide a unique and different perspective that will assist the Court without seeking to expand the scope of the appeal beyond the issues raised by the parties.

MARCHAND J.A.:

Introduction

[1] This is an application for intervenor status in an appeal from a judgment of Chief Justice Hinkson indexed at 2021 BCSC 512.

[2] The appellants are churches and their pastors. Two of the three churches identify as Reformed Churches. They appeal the dismissal of their *Charter* challenge to certain public health orders made by the Provincial Health Officer ("PHO") to combat the COVID-19 pandemic. The orders aimed to reduce the transmission of COVID-19 by prohibiting, among other things, in-person religious gatherings.

[3] The Chief Justice concluded that the appellants had not exhausted an available statutory reconsideration process and so were not entitled to pursue relief under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. The Chief Justice went on to find that the orders infringed s. 2 of the *Charter* but were justified under s. 1. In view of these findings and the fact that the appellants addressed their ss. 7 and 15 *Charter* issues in a summary way, the Chief Justice considered it was unnecessary to expand the jurisprudence relating to ss. 7 and 15. He therefore made no finding with respect to those sections.

[4] The applicant, the Association for Reformed Political Action (ARPA) Canada ("ARPA Canada"), seeks leave to intervene on public interest grounds. Although

ARPA Canada and a number of the appellants belong to the same faith group, ARPA Canada says they bring a different and useful perspective to the issues raised on appeal that will be of assistance to the Court.

[5] The Chief Justice granted ARPA Canada leave to intervene on specified issues in the proceedings before him. Trial courts in Ontario and Manitoba have also granted ARPA Canada leave to intervene in similar proceedings in those jurisdictions.

[6] The respondents oppose ARPA Canada's application. They argue ARPA Canada's perspective is "entirely aligned with, and duplicative of, that of the appellants." They characterize ARPA Canada's proposed intervention as a prohibited form of "me too" intervention.

[7] The appellants take no position on ARPA Canada's application, but, if ARPA Canada is granted leave to intervene, the appellants seek an extension of time so that their reply factum can address the issues raised by ARPA Canada.

Legal Framework

[8] The legal principles on ARPA Canada's application are not in dispute.

[9] Rule 36 of the *Court of Appeal Rules* governs applications for intervenor status. It provides, in part, as follows:

> 36(1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.
>
> ...
>
> (3) In any order granting leave to intervene, the justice
>
> (a) is to specify the date by which the factum of the intervenor must be filed, and
>
> (b) may make provisions as to additional disbursements incurred by the appellant or any respondent as a result of the intervention.
>
> ...
>
> (5) Unless a justice otherwise orders, an intervenor
>
> (a) must not file a factum that exceeds 20 pages,

(b) must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and

(c) is not to present oral argument.

[10] There are two routes to intervenor status: (1) the applicant has a direct interest in the matter; or (2) the applicant has a public interest in the public law issue in question and brings a different and useful perspective to the issue that will be of assistance to the Court: *R. v. Watson and Spratt*, 2006 BCCA 234 at para. 3 (Chambers); *Carter v. Canada*, 2012 BCCA 502 at paras. 12–13 (Chambers). ARPA Canada seeks leave only on the public interest ground.

[11] In *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 at para. 14 (Chambers), Justice Garson summarized the factors to consider when an applicant seeks intervenor status on the public interest ground:

a) Does the proposed intervenor have a broad representative base?

b) Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?

c) Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?

d) Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?

[12] When hearing an application to intervene on the public interest ground, courts are not concerned with the fairness to or the interests of the intervenor, but rather with ensuring important points are not overlooked: *A.B. v. C.D.*, 2019 BCCA 297 at para. 33 (Chambers); *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 at para. 8 (Chambers). Intervenors must therefore show that it is in the public interest (or the Court's interest) that they be heard: *Equustek* at para. 8.

[13] When *Charter* issues are raised for the first time, the courts are permitted to take a more generous approach in order to gain "the assistance of argument from all segments of the community": *Canadian Labour Congress v. Bhindi and London*

(1985), 61 B.C.L.R. 85 at 97, 1985 CanLII 384 (C.A.); *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 3 at para. 10 (Chambers).

[14] However, an intervenor in a *Charter* application is prohibited from raising entirely new issues, including making submissions on *Charter* grounds not raised by the parties: *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270 at para. 83, aff'd 2013 BCCA 147, rev'd in part on other grounds 2015 SCC 7.

[15] The role of intervenors is not to support the position of a party, but rather to make principled submissions on pertinent points of law. Although an intervenor's submissions may ultimately support one party's position, that is not their purpose: *Friedmann v. MacGarvie*, 2012 BCCA 109 at para. 28 (Chambers).

[16] An intervenor whose interests appear to align with one of the parties may still be granted intervenor status where the intervenor provides a unique perspective that might assist the court in resolving the appeal: *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 402 at para. 18 (Chambers). In such cases, the concern for partiality may be mitigated by a clear order limiting the scope of the intervenor's participation on appeal: *Araya* at para. 18.

[17] Typically, a court grants the right to intervene on discrete issues only: *Janzen v. British Columbia (Attorney General)* (1993), 38 B.C.A.C. 268 at 272, 1993 CanLII 1332 (Chambers), aff'd (1994), 45 B.C.A.C. 242, 1994 CanLII 2662, leave to appeal to SCC ref'd, 24213 (3 November 1994).

[18] Finally, an intervenor before the Supreme Court of British Columbia does not automatically gain intervenor status before this Court. Rather, the test must be met at each level: *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14 at paras. 11–12, leave to appeal to SCC ref'd, 35236 (19 September 2013); *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2021 BCCA 138 at para. 4 (Chambers).

Who is ARPA Canada?

[19] ARPA Canada is a federally incorporated not-for-profit organization that advocates for Reformed Christians in legal and political spheres. It has been active in Canada since the 1970s. None of its members are appellants and none of the appellants has any power to direct ARPA Canada in this or any other legal proceeding.

[20] ARPA Canada says it has two missions: (a) educating, equipping, and assisting members of Canada's Reformed churches and the broader Christian community as they seek to winsomely participate in politics and public life; and (b) bringing a Reformed Christian perspective to civil authorities in Canada, including the courts.

[21] ARPA Canada is an experienced intervenor. They have been granted intervenor status in 18 previous cases, including cases involving constitutional issues relating to religious matters: see, for example, *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423; *A.B. v. C.D.*, 2020 BCCA 11.

Proposed Submissions

[22] Broadly, ARPA Canada proposes to submit that:

1. Institutional pluralism is a foundational *Charter* principle that corresponds with the Reformed Christian concept of sphere sovereignty. Under both concepts, government authority is limited by other sources of authority in a citizen's life. State justification for limits on fundamental freedoms under s. 1 therefore requires consideration of the importance of, and deference to, non-state institutions.
2. Although the respondents have admitted infringements of s. 2 of the *Charter*, a full appraisal of the nature and severity of those infringements is necessary to ground the s. 1 analysis. The prohibitions of the public health orders strike at the core of the intersection of freedom of religion, freedom of expression and freedom of assembly. The s. 1 analysis must give due

weight to the impact of each infringement as well as the intersectional impact of the infringements collectively.

3. Section 15 of the *Charter* protects religious equality. Under s. 15, the correct comparison is between particular activities performed for a religious purpose that were prohibited and activities of a similar functional nature performed for a non-religious purpose that were not. Contrary to s. 15, the prohibitions at issue discriminated against all religious believers as compared to non-believers on the basis of religion. If this Court finds the Chief Justice erred in failing to find the orders breached s. 15, ARPA Canada will restrict its submissions to the legal implications of the breach.
4. The orders cannot be saved under s. 1 of the *Charter* because they were neither minimally impairing nor proportionate. In particular, the orders prohibited constitutionally protected activities instead of restricting them as was done for non-constitutionally protected activities with a similar risk profile. Particularly in view of the broad principle of respect for institutional pluralism, the prohibition against constitutionally protected activities was overbroad and disproportionate to the risk of transmission.

Discussion

[23] The respondents accept, and I agree, that ARPA Canada has a broad representative base and the case legitimately engages ARPA Canada's interests in the public law issues raised on appeal. I must decide only whether ARPA Canada has a unique and different perspective that will assist the Court and whether they seek to expand the scope of the appeal beyond the issues raised by the parties.

[24] I have reviewed the appellants' factum. It is focused on the specifics of the orders, the record before the PHO, the impact of the orders on the appellants and the findings of the Chief Justice. In my respectful view, certain aspects of ARPA Canada's proposed submissions rise well above these specific details of the case at hand and consider broader and important constitutional issues not addressed by the appellants.

[25] Though ARPA Canada shares a common theological conviction and mission with certain of the appellants, there is no hint that ARPA Canada is strategizing with them to skirt page limits on factums and make arguments that the appellants should make for themselves.

[26] I am satisfied that certain of ARPA Canada's proposed arguments are in the "Goldilocks" zone of providing a distinct and helpful perspective on the issues raised by the parties without introducing entirely new issues or hijacking the proceedings to serve their own ends.

[27] So, which of ARPA Canada's arguments lie within the "Goldilocks" zone? In my view, the Court stands to benefit from ARPA Canada's arguments regarding institutional pluralism and the need to consider the intersectional impact of the s. 2 *Charter* breaches. Respectfully, the balance of ARPA Canada's arguments (on s. 15, minimal impairment and proportionality) are duplicative of the arguments in the appellants' factum or represent arguments the appellants are well-placed to make during oral submissions.

Disposition

[28] I grant ARPA Canada's application for leave to intervene. ARPA Canada may only make submissions regarding institutional pluralism and the need to consider the intersectional impact of the s. 2 *Charter* breaches as summarized at subparas. 23(a) and (b) of its written submission filed on December 22, 2021. Its factum must not exceed ten pages and must be filed and served on the parties on or before March 1, 2022.

[29] ARPA Canada may not duplicate arguments made by the appellants and may not adduce new evidence or otherwise supplement the appeal record.

[30] I grant the respondents leave to file a factum in response to ARPA Canada's factum. The respondents' response factum must not exceed ten pages and must be filed and served on the appellants and intervenor by March 11, 2022.

[31] Given the obvious alignment of interests, I do not grant the appellants' request for an extension of time to file their reply factum. To be clear, the appellants' reply factum is due in accordance with the usual timelines and must be confined to matters raised in the respondents' factum.

[32] I leave the question of whether ARPA Canada may make oral submissions to the division hearing the appeal.

"The Honourable Mr. Justice Marchand"

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).

Counsel for the Appellants: R. Wiltshire
M. Moore
J. Wells, Articled Student

Counsel for the Respondents: K.A. Reilly
(via videoconference)
E.C. Lapper
S.A. Davis
(via videoconference)

Counsel for the Intervener:	G. Trotter A.M. Schutten T. Ewert
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
>
> (a) has additional relevant information that was not reasonably available to the health officer when the order was issued or varied,
>
> (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.
>
> (3) After considering a request for reconsideration, a health officer may do one or more of the following:
>
> (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:
>
> > 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.
>
> [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"

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This case is about the intersection of *Charter* rights, province-wide public health orders, and the application of administrative law review mechanisms. The central question to be addressed is whether legal protections for *Charter* rights may be weakened when the government chooses to utilize administrative—rather than legislative—processes to impose rules of general application.

2. The Chambers Judge and the British Columbia Court of Appeal (the **"BCCA"**) made determinations, set out below, which put the Applicants at a legal disadvantage in arguing their *Charter* challenge to British Columbia's months-long prohibition on in-person worship services:

- treating the provincial orders as "administrative decisions" as opposed to "laws of general application";
- finding the Applicants' expert evidence inadmissible because it was not before the decision maker when she made her decisions;
- imposing the burden of proof on the Applicants to show the unreasonableness of the decisions, despite British Columbia's admission that its provincial orders infringed *Charter* protections; and
- holding that the Applicants were not entitled to challenge the constitutionality of the provincial health orders but rather, were required to specifically request reconsideration of the impugned orders from the decision maker.

3. These determinations, each stemming from administrative rather than constitutional law, severely degrade the *Charter*'s strength in protecting citizens' rights and freedoms.

4. If permitted to stand, the lower court decisions represent a triumph of form over substance, resulting in not only different approaches but also different burdens and evidence for courts' section 1 consideration of whether government limits on *Charter* rights are justified, based not on the actual impact of the government rules, but rather based solely on the formal process—administrative or legislative—which the government chose to utilize in adopting the limits. This case presents an important opportunity for the Court to clarify a decade-old constitutional question about administrative law review: the burden of proving the reasonableness (or unreasonableness) of the decision limiting *Charter* protections. More broadly, this case invites the Court to provide

crucial guidance to governments, courts, and aggrieved citizens across Canada when administrative decisions broadly and generally affect citizens' *Charter* rights.

B. Factual Background

The Parties

British Columbia and the Provincial Health Officer

5. This case was brought against the Province of British Columbia ("**BC**"), represented by its Attorney General and BC's Provincial Health Officer ("**PHO**"), Dr. Bonnie Henry. During the COVID-19 pandemic, Dr. Henry issued a number of province-wide orders under BC's *Public Health Act*, S.B.C. 2008, c. 28 (the "***PHA***").[1] The orders at issue in these proceedings (the "**Gatherings and Events Orders,**" the "**G&E Orders**," or the "**Impugned Orders**") were made between November 19, 2020, and February 10, 2021, and prohibited—Province-wide—in-person gatherings for religious worship, indoors or outdoors, regardless of the size of the gathering or the safety protocols followed.

The Applicants

6. The Applicants are three Fraser Valley, BC churches and associated individuals: Riverside Calvary Chapel and its Pastor Brent Smith; Immanuel Covenant Reformed Church and its then-Chair John Van Muyen; and the Free Reformed Church of Chilliwack and its Pastor John Koopman (collectively the "**Applicants**").[2] It is a fundamental tenet of the Applicants' beliefs that in-person assembly for religious worship is commanded by God and forms an essential component of the observance of their faith.[3]

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[1] *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 ["*BCCA Decision"*], at para. 25

[2] Alain Beaudoin was party to this case, challenging BC's restrictions on outdoor protests before the Chambers Judge and the BCCA. Before the Chambers Judge, BC conceded and the Chambers Judges declared those prohibitions on outdoor protests in the G&E Orders were of no force and effect for violating section 2(c) and 2(d) of the *Charter*. *Beaudoin v British Columbia*, 2021 BCSC 512 ["*BCSC Decision"*], at paras. 137-147, 251-253. Mr. Beaudoin is no longer a party to these proceedings.

[3] *BCCA Decision*, at para. 24

The Legislative Framework

7. 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...".

8. 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." 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.

9. 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.

10. The manner and circumstances in which a person affected by an order may request reconsideration of the order are set out in s. 43 of the *PHA*. That section reads in part:

> 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
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> (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.

11. 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. 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.

12. The Gatherings and Events 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* between November 19, 2020, and February 10, 2021. None of the G&E Orders are currently in force. On March 10, 2022, the PHO removed all remaining restrictions on gatherings for in-person worship. Gatherings of fewer than 50 people were generally permitted throughout B.C. with prescribed safety restrictions until November 7, 2020, when the PHO made an oral order (the "**November 7 Order**") that prohibited "social gatherings" of any size in the Vancouver Coastal and the Fraser Health regions.[4]

13. In-person worship services were not treated as "social gatherings" under the November 7, 2020, Order. Religious services throughout the province remained subject to the 50-person capacity limit, and other prescribed COVID-19 safety protocols set out in previous PHO orders.[5]

The Gatherings and Events Orders

14. By oral order issued on November 19, 2020 (the "**November 19 Order**"), the PHO banned social gatherings of any size Province-wide. The order further prohibited all indoor and outdoor events, including in-person gatherings for religious worship. Funerals, weddings, and other religious ceremonies like baptisms could proceed with a maximum of 10 people present, but communal worship services were banned outright throughout the province. At the same time, restaurants, pubs, salons, spas, and retail stores were permitted to remain open. The November 19 Order was set to expire on December 8, 2020.[6] On December 2, 2020, the PHO issued a written order confirming the oral November 19 Order and providing that no person may allow a place to be used for an "event" (defined as any indoor or outdoor public or private gathering including worship and religious services) other than as specifically permitted in the order.[7]

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[4] *BCCA Decision*, at para. 65
[5] *BCCA Decision*, at para. 65
[6] *BCCA Decision*, at para. 78
[7] *BCCA Decision*, at para. 85

15. Further orders were issued by the PHO extending and sometimes amending the prohibition on December 4, 7 (permitted drive-in events (incl. religious services) of up to 50 vehicles), 9 (permitted individual attendance at a place of worship for prayer or quiet reflection), 12 (permitted attendance at a residence to provide religious ministrations to an occupant), January 8, 2021, February 5, and February 10.[8]

Requests for Reconsideration

16. On November 25, 2020, a Jewish Orthodox synagogue submitted a request to the PHO for reconsideration to allow in-person services on the Sabbath. The synagogue proposed services taking place entirely outdoors with an open tent with no more than 25 people in attendance and enforcement of masking and physical distancing. On November 26, 2020, the synagogue forwarded the request directly to Dr. Brian Emerson in the PHO's office, who provided the exemption shortly after 7 a.m. the next morning.[9] The exemption was extended on the same conditions to 12 additional synagogues in December.[10] On February 23, 2021, the PHO permitted the synagogues to host indoor services.[11]

17. Other faith communities were not as fortunate in seeking the PHO's reconsideration. For example, on December 7, 2020, Christ Covenant Church in Langley sent a detailed request to the PHO for reconsideration, citing section 43 of the *PHA* and attaching a detailed proposal under section 38. As its Pastor swore in a February 8, 2021, affidavit filed before the Chambers Judge, the Church had not received any response other than an autoreply.[12] Similarly, a group of 11

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[8] *BCCA Decision*, at paras. 86-99

[9] Affidavit #1 of Brian Emerson, made February 2, 2021, Exhibits 43-47

[10] *BCCA Decision*, at para. 80

[11] *BCCA Decision*, at para 111

[12] Affidavit #1 of Garry Vanderveen, sworn February 8, 2021, and Exhibits A and B. Fresh evidence not accepted by the BCCA showed Christ Covenant Church did not receive a response to its December 7, 2020, request until May 5, 2021. The PHO's office indicated that the PHO had "received a large volume of requests for reconsideration" and it had "become beyond her capacity to manage" and therefore, the PHO "is not accepting requests to reconsider Orders." *BCCA Decision*, at para 187, quoting May 5, 2021, email from Dr. Brian Emerson.

churches sought, through legal counsel, the PHO's reconsideration of the prohibition of in-person worship services on January 8, 14 and 25 and received no response other than auto-replies.[13]

18. Two of the Applicant churches also reached out to the PHO seeking revocation of the prohibition on in-person worship services. In a letter dated November 28, 2020 (emailed to the PHO on December 3), the Immanuel Covenant Reformed Church asked that the order made on November 19 prohibiting in-person worship services be rescinded.[14] On November 30, 2020, Pastor Smith sent a similar letter to the PHO on behalf of Riverside Calvary Chapel.[15] The letters set out the proposed safety measures the Churches would take and argued that the prohibition arbitrarily banned religious services while allowing retail and other establishments to operate without providing evidence that religious services carried an elevated risk of COVID-19 transmission. They explained that the churches were required by their faith to gather for in-person worship and gave notice that they intended to resume in-person worship services on November 29, whether the PHO repealed the prohibition or not.[16] The PHO did not respond to the letters.[17]

19. The third Applicant church, the Free Reformed Covenant Church of Chilliwack, was aware that other churches, including Christ Covenant Church (described above), had requested the PHO's reconsideration to allow in-person worship services without receiving a response and deemed the reconsideration process "hollow."[18] Each of the Applicant churches gathered for in-person religious services with extensive precautions in place to reduce the risk of COVID-19 transmission.[19] The Applicants continue to face prosecution on fines issued for holding in-person worship services at the three Applicant churches in alleged violation of the G&E Orders.[20]

Filing of the Petition to the Court

20. On January 7, 2021, the Applicants commenced this matter by filing a Petition to the Court challenging the prohibition on in-person worship services. The Applicants sought, *inter alia*: (1) a declaration pursuant to s. 24(1) and 52(1) of the *Constitution Act, 1982*, the G&E Orders are of

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[13] Affidavit #1 of John Sikkema, sworn February 8, 2021, and filed before the Chambers Judge
[14] Affidavit #1 of Brian Emerson, made February 2, 2021, Exhibit 48
[15] Affidavit #1 of Brent Smith, sworn January 5, 2021, Exhibit D
[16] *BCCA Decision*, at paras. 81-2
[17] *BCCA Decision*, at para. 83
[18] Affidavit #1 of John Koopman, sworn December 23, 2020, Exhibit J
[19] *BCCA Decision*, at para. 84
[20] *BCCA Decision*, at para 116

no force and effect as they unjustifiably infringe the petitioners' *Charter* ss. 2(a), 2(b), 2(c), 2(d), 7, and 15(1) rights; and (or in the alternative) (2) an order under ss. 2(2) and 7 of the *Judicial Review Procedure Act* (the "***JRPA***") quashing and setting aside the G&E Orders.[21]

The Applicants' Formal Request for Reconsideration and BC's Injunction Application

21. In letters emailed between counsel on January 29 and February 3, 2021, the Applicants formally requested that the PHO reconsider, pursuant to s. 43 of the *PHA*, the then in-place January 8, 2021, G&E Order prohibiting in-person worship services on religious gatherings.[22]

22. On February 5, 2021, the January 8, 2021, G&E Order was repealed and replaced by a new G&E Order,[23] which was subsequently repealed and replaced on February 10, 202,1 by another G&E Order.[24] During this time, BC unsuccessfully sought an injunction against the Applicant churches permitting police to detain anyone they believed intended to attend a religious service in violation of the Order.[25] In an email on February 15, 2021, in response to BC's inquiry, counsel for the Applicants confirmed that if required to grant section 43 exemptions, the Applicants would expect the PHO to consider the medical opinions of Drs. Kettner and Warren filed in support of their Petition.[26]

23. On February 25, 2021 (two business days before the commencement of the hearing of the petition), the PHO notified the Applicants that she would not grant the variance requested but that she would vary the February 10, 2021, G&E Order to allow the Applicants to hold outdoor in-person worship services of no more than 25 people provided certain conditions were met (the "Reconsideration Decision").[27] This stood in contrast to the permission granted two days before to synagogues to host indoor gatherings.

The Petition Hearing

24. The Petition was heard initially on March 1-3 and 5, 2021. The Applicants did not amend their petition to seek judicial review of the Reconsideration Decision issued by the PHO only two

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[21] *BCSC Decision*, at para. 68
[22] Affidavit #1 of Vanessa Lever, affirmed February 2, 2021, Exhibits D and E; Affidavit #1 of Megan Patterson, affirmed February 8, 2021, Exhibit D
[23] Affidavit #1 of Megan Patterson affirmed February 8, 2021, Exhibit A (excerpt pages 1-3)
[24] Affidavit #1 of Valerie Christopherson, sworn Feb. 11, 2021, Exhibit A (excerpt pages 1-4)
[25] *Beaudoin v British Columbia*, 2021 BCSC 248
[26] *BCCA Decision*, at para. 105; Affidavit #3 of Vanessa Lever, affirmed February 26, 2021, Ex. B
[27] *BCCA Decision*, at para. 108

business days before the start of the hearing. The orders prohibiting religious gatherings throughout the province were still in force when the petition was initially heard on March 1-3 and 5, 2021, and by that time, 14 tickets (with total penalties in excess of $34,000) had been issued to the Applicants for allegedly violating one of the numerous successive G&E Orders prohibiting in-person worship services.[28]

The BCSC Chambers Decision

25. The Chambers Judge issued his decision on March 18, 2021 (the "**Chambers Decision**"), finding in regard to the challenge on the G&E Orders prohibiting in-person worship services that:

1) the affidavits of Dr. Warren and Dr. Kettner were not admissible because they were not before Dr. Henry when she issued the G&E Orders[29];
2) based on *Yellow Cab Company Ltd. v. Passenger Transportation Board,* 2014 BCCA 329 ("***Yellow Cab***"), the Applicants were barred from pursuing judicial review of the G&E Orders because they had availed themselves of the reconsideration process under the *PHA*. The G&E Orders were, therefore, not a final decision, and only the reconsideration decision may be judicially reviewed[30]; and
3) even if they were not so barred, the infringement of their section 2 *Charter* rights was justified under section 1.[31]

The BCCA Decision

26. The BC Court of Appeal hearing took place on March 29-30, 2022, and a decision was issued on December 16, 2022 (the "**BCCA Decision**"). It found no errors in the Chambers Decision and dismissed the Applicants' appeal. The affidavits of Dr. Kettner and Dr. Warren and the 2nd affidavits of Pastor Vanderveen and Mr. Roy were found to be inadmissible and not part of the record.[32]

27. The Court of Appeal applied the *Yellow Cab* case to find that the Applicants were barred from seeking judicial review of the G&E Orders and should instead have challenged the

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[28] *BCSC Decision*, at para. 161
[29] *BCSC Decision*, at para. 118
[30] *BCSC Decision*, at para. 73
[31] *BCSC Decision*, at para. 250
[32] *BCCA Decision*, at para. 155

reconsideration decision. The Court noted that they could have disposed of the Applicants' appeal on that ground alone and declined to make any findings on constitutionality. Nonetheless, the Court of Appeal went on to find (as the Chambers Judge did) that *Doré* was the appropriate s. 1 analytical framework. Applying *Doré*, the Court found the pre-reconsideration G&E Orders reasonable, proportionate, and justified under s. 1.[33] The Court of Appeal also conducted an *Oakes* analysis, finding the Applicants would have been unsuccessful even if *Oakes* was the correct framework.[34]

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

28. This Application for Leave to Appeal raises the following issues of national and public importance:

No. 1. Is the constitutionality of provincial rules of general application that admittedly infringe *Charter* protections and that are imposed by order rather than regulation properly reviewed only under the strictures of administrative law?

No. 2. May citizens challenging the constitutionality of administrative decisions of general application provide evidence relevant to whether the decisions are "demonstrably justified in a free and democratic society."

No. 3. Do citizens challenging the constitutionality of decisions the government admits infringe *Charter* protections bear the burden of proving the unreasonableness and lack of justification for those decisions?

No. 4. Can a province prevent judicial review of the constitutionality of orders applicable to everyone in the province solely on the basis that individuals can apply (or have applied) to the government decision maker for reconsideration?

PART III – STATEMENT OF ARGUMENT

Issue No. 1: Is the constitutionality of provincial rules of general application that admittedly infringe *Charter* protections and that are imposed by order rather than regulation properly reviewed only under the strictures of administrative law?

29. The Applicants submit that the G&E Orders challenged are properly considered laws of general application to all British Columbians. They did not apply to one person or place of worship but were applicable to all people, including all places of worship, in British Columbia.

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[33] *BCCA Decision,* at paras. 222-226 and 257
[34] *BCCA Decision*, at paras. 285-310

30. The Chambers Judge treated the Orders as administrative decisions rather than laws of general application. He found: "I have determined that the G&E Orders are more akin to an administrative decision than a law of general application and that the *Doré* test is the appropriate test to apply. Although the G&E Orders are not a classical administrative adjudicative decision, they were made through a delegation of discretionary decision-making authority under the *PHA*."[35]

31. The British Columbia Court of Appeal determined that "…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*."[36] The only analysis given by the British Columbia Court of Appeal for this finding is that "…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."[37]

32. If granted leave to appeal, the Applicants will argue that there is an error within that analysis. They will argue that whether the PHO had legislative authority to make the G&E Orders, or whether any provisions in the *PHA* were unconstitutional is irrelevant to the question of whether the G&E Orders are laws of general application.

33. Whether a limitation of *Charter* protections by a law of general application is justified under section 1 is determined by an *Oakes* analysis. In *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, the Ontario Superior Court applied the *Oakes* test rather than the *Doré* reasonableness analysis, where the issue was the constitutionality of particular provisions in administrative policies of general application. The court cited *Doré* and found:

> First, in *Doré*, the Court confirmed that the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual. **When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts.** *Dunsmuir* tells us this should attract deference. **When a particular "law" is being assessed for *Charter***

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[35] *BCSC Decision*, at para. 218
[36] *BCCA Decision*, at para. 255
[37] *BCCA Decision*, at para. 256

> **compliance, on the other hand, a court is dealing with principles of general application: see *Doré* at paras. 36 and 38.**[38]

The Ontario Court of Appeal applied the same approach without deciding the issue.[39]

34. The *JRPA* itself defines "statutory power" and "statutory power of decision" differently:

> **"statutory power"** means a power or right conferred by an enactment
>
> (a) **to make a regulation, rule, bylaw or order**,
>
> (b) **to exercise a statutory power of decision**,
>
> (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
>
> (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
>
> (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;
>
> **"statutory power of decision"** means a power or right conferred by an enactment to make a decision deciding or prescribing
>
> (a) **the legal rights, powers, privileges, immunities, duties or liabilities of a person**, or
>
> (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it, and includes the powers of the Provincial Court;[40]

35. The definition of "statutory power of decision" above does not include the power to make an "order." It is in relation to making a decision about the rights of an individual. This distinction suggests that the G&E Orders were not just "administrative decisions" but decisions that created "laws of general application."

36. The British Columbia Court of Appeal wrote that "decisions across the country addressing the justificatory framework to be applied in this context are not easily reconciled," which would seem to imply that there were conflicting decisions before it when it made its determination that the orders were administrative decisions but not laws of general application. To the contrary, the

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[38] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario,* 2018 ONSC 579, paras. 51-69 [emphasis added], which applied *Oakes* rather than *Doré* in respect of the constitutionality of administrative policies of general application to all physicians

[39] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 at paras. 58-60

[40] *Judicial Review Procedure Act,* RSBC 1996, c. 241, at s. 1 ["*JRPA*"] [emphasis added]

only three cases it cited in this respect actually found that in the context of Covid, the appropriate justificatory framework to be applied was the *Oakes* test.[41] They are discussed below.

37. In *Taylor v. Newfoundland and Labrador,* the applicant brought a constitutional challenge to Covid-related travel restrictions made by Newfoundland and Labrador's Chief Medical Officer of Health based on the *Charter* section 6 mobility right and section 7 right to liberty.[42] The court applied the *Oakes* test in that case.

38. In *Gateway Bible Baptist Church et al. v Manitoba et al*, the court found that the Covid restrictions imposed on public and private gatherings by Manitoba's Chief Public Health Officer were akin to legislative instruments of general application, rather than an administrative decision which affected only certain people.[43] The court applied the *Oakes* test.

39. The court in the *Trinity Bible Chapel v. Ontario (Attorney General)* case found that *Oakes* was the appropriate justificatory framework for a constitutional challenge to Covid restrictions on religious gatherings in Ontario because the public health orders were issued by the government.[44]

40. The Saskatchewan Court of King's Bench decision in *Grandel v Saskatchewan* (not cited by the BCCA Decision) also applied the *Oakes* framework, rather than the *Doré* framework, to review the constitutionality of health orders issued by Saskatchewan's Chief Medical Officer.[45]

41. It is notable that the British Columbia Court of Appeal decision stands alone in terms of its findings on the proper justificatory framework in a constitutional challenge to public health orders, as compared to these similar Canadian cases. Whether or not broad provincial health orders are reviewable as "laws of general application" rather than merely as "administrative decisions made through a delegation of discretionary decision-making authority" under provincial health legislation is a significant issue in Canada, which warrants this Court's intervention. The amount of power and discretion afforded by legislation to provincial health officials across the country is immense, and this Court's guidance is needed on how to properly characterize such provincial health orders. That determination will affect the level of deference afforded to provincial health officials in legal review of their decisions issued during public health emergencies.

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[41] *BCCA Decision*, at paras. 252-254
[42] *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125
[43] *Gateway Bible Baptist Church et al. v. Manitoba et al*., 2021 MBQB 219
[44] *Trinity Bible Chapel Ontario (Attorney General)*, 2022 ONSC 1344
[45] *Grandel v Saskatchewan*, 2022 SKKB 209, at paras. 68-70

Issue No. 2: May citizens challenging the constitutionality of administrative decisions of general application provide evidence relevant to whether the decisions are "demonstrably justified in a free and democratic society."

42. As noted above, the British Columbia Court of Appeal chose not to consider the affidavit evidence of the Applicants' medical experts Drs. Warren and Kettner on the following reasoning:

- 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;[46]
- Their affidavits were not before the PHO when she made the G&E orders at issue;[47]
- It would be "inconsistent with the limited supervisory jurisdiction of the court;[48] and
- It would place the reviewing court in the position of an "armchair epidemiologist."[49]

43. The Applicants submit that it is of vital importance for this Court to decide whether citizens who bring a *Charter* challenge to an administrative decision of general application within a judicial review context can rely on evidence relevant to the proportionality of that decision under section 1 of the *Charter*, even if it was not before the decision maker at the time of the decision. Courts ought not to be called upon to determine constitutional issues in an evidentiary vacuum, or based on one-sided evidence. As this Court observed in *Hill v. Church of Scientology of Toronto*, "[t]his Court has stated on a number of occasions that it will not determine alleged *Charter* violations in the absence of a proper evidentiary record."[50] In that case, this Court dismissed an appeal in a defamation case that raised a *Charter* freedom of expression issue and found that the appellants "failed to provide any evidentiary basis upon which to adjudicate their constitutional attack."[51]

44. As noted by the Chambers Judge in this case, this is not a typical judicial review.[52] The lower court was asked to judicially review a series of decisions to issue orders which affected all British Columbians and places of worship in the province to determine whether those orders were *Charter*-compliant. To deprive the challenging party of the opportunity to present expert evidence

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[46] *BCCA Decision*, at para. 154
[47] *BCCA Decision*, at para. 155
[48] *BCCA Decision*, at para. 156
[49] *BCCA Decision*, at para. 156
[50] *Hill v. Church of Scientology of Toronto*, ("*Hill*") [1995] 2 S.C.R. 1130 at para. 80; See also: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at para. 8 and following
[51] *Hill*, at para. 80
[52] *BCSC Decision*, at para. 218

in a *Charter* challenge to bolster its argument that government orders were unreasonable and disproportionate is contrary to the above-noted Supreme Court of Canada *Charter* jurisprudence.

45. The Applicant submits that this Court should provide its guidance in respect of the intersection between administrative law and the *Charter* when it comes to the evidentiary record on a judicial review of an administrative decision of general application. Without it the precedent that has been set will severely limit future applicants' *Charter* challenges in judicial reviews because they will not be able to adduce any expert reports to support their *Charter* claims. It is noteworthy that expert evidence, including cross-examination, was permitted and considered in the *Grandel*, *Gateway*, and *Trinity Bible* cases challenging public health restrictions.

Issue No. 3: Do citizens challenging the constitutionality of decisions the government admits infringe *Charter* protections bear the burden of proving the unreasonableness and lack of justification for those decisions?

46. A foundational constitutional issue that the Applicants submit this Court should provide its guidance on is whether citizens seeking judicial review of the constitutionality of administrative decisions that limit *Charter* rights and freedoms bear the burden of proving the lack of reasonableness and justification for those decisions. This issue in the context of this particular case reveals a gap in the caselaw that is important for this Court to resolve.

47. The British Columbia Court of Appeal, in this case, placed the burden of proof on the Applicants to show that the G&E Orders were unreasonable and cited *Canada (Minister of Citizenship and Immigration) v. Vavilov* as the source of that legal determination.[53] *Vavilov*, however, was not a *Charter* case, and this Court did not make a new determination on the burden of proof in a judicial review of a *Charter* infringing administrative decision in that case.

48. If granted leave in this case, the Applicants intend to argue that the British Columbia Court of Appeal erred in placing the burden of proof for the lack of reasonableness and justification of the decision under section 1 of the *Charter* upon them. The Applicants will argue based on *Loyola High School v. Quebec (Attorney General)*[54] and on the judgments in *Law Society of British Columbia v. Trinity Western University*[55] quoted below, that the burden to establish the

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[53] *BCCA Decision*, at para. 145, citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 100 and 102

[54] *Loyola High School v. Quebec (Attorney General),* [*"Loyola"*], 2015 SCC 12

[55] *Law Society of B.C. v. Trinity Western University* [*"Trinity Western"*], 2018 SCC 32

reasonableness of limits on *Charter* rights in a review of an administrative decision remains on the government, as it does when a traditional *Oakes* framework is utilized. Are *Charter* rights weakened simply because of the choice of government to utilize an order rather than a regulation to limit those *Charter* rights?

49. In the 2015 *Loyola* decision, this Court applied the *Doré* framework to a judicial review of the Quebec Minister of Education's decision to deny an exemption to a Catholic high school from the required program which teaches about the beliefs and ethics of different world religions. Loyola High School argued that this decision was a denial of its *Charter*-protected freedom of religion. In their concurring decision, the Chief Justice, Justice Rothstein, and Justice Moldaver found that "[t]he government bears the burden of showing…" that "…the Minister's insistence on a purely secular program of study to qualify for an exemption limited Loyola's right to religious freedom no more than reasonably necessary to achieve the ERC Program's goals."[56] The majority decision, while it did not address the burden of proof directly, did state relevantly that "[t]he *Charter* enumerates a series of guarantees that can only be limited if **the government can justify those limitations as proportionate**."[57]

50. In the 2018 *Trinity Western* decision, this Court built upon its previous decisions in *Doré* and *Loyola* and addressed some of the gaps and omissions in the framework of those decisions. The majority did not, however, address the issue of the burden of proof in an administrative judicial review that engaged *Charter* principles.

51. In her concurring decision, Chief Justice McLachlin wrote:

> I agree with the majority that on judicial review of a rights-infringing administrative decision, the analysis usually comes down to proportionality…
> …
> However, I would add four comments…
> …
> Third, since this is a matter of justification of a rights infringement under s.1 of the *Charter*, **the onus is on the state actor that made the rights-infringing decision … to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society**.[58]

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[56] *Loyola*, at para. 146
[57] *Loyola*, at para 38 [emphasis added]
[58] *Trinity Western*, at paras. 114-117 [emphasis added]

52. Further in the *Trinity Western* decision, Mr. Justice Brown wrote in his dissenting judgment about his concern about the "burden of proof in *Charter* adjudication and what that burden entails." He wrote:

> Under the usual rules of judicial review, it falls to the applicant to demonstrate that the impugned decision should be overturned. By contrast, under the approach set out in *Oakes*, it is the government that bears the burden of justification once the claimant has demonstrated an infringement of his or her *Charter* rights. The *Doré/Loyola* framework lies at the intersection of administrative and constitutional law but it has remained conspicuously silent on where the burden of proof lies.
>
> It is difficult to conclude that *Doré* changed the burden of proof for the adjudication of *Charter* claims in the administrative context in the absence of an explicit discussion to that effect. Thus, **once the claimant has demonstrated that an administrative decision infringes his or her *Charter* rights, it remains incumbent on the state actor to demonstrate that the infringement is justified…**
>
> The majority states that "*Charter* rights are no less robustly protected under an administrative law framework": M.R., at para. 57. As discussed, however, the usual rules of administrative law require *the applicant* to demonstrate that an impugned decision should be overturned. It is unclear whether this burden persists under an administrative law framework once *Charter* rights are at stake. The majority is silent on this issue. One could infer from this that an impugned decision should be treated as presumptively reasonable *unless* the claimant demonstrates that the decision is not the result of proportionate balancing. This would provide for less robust protection of *Charter* rights. **For the administrative law framework to provide for the *same* protection of *Charter* rights as the *Oakes* framework, the justificatory burden must remain on the government once an infringement of rights is demonstrated**.[59]

53. The Applicants submit that there is a pressing need for this Court to intervene and fill in the remaining gap post-*Doré*, *Loyola, Trinity Western* and *Vavilov* on where the issue of the burden of proof lies administrative *Charter* litigation. If this British Columbia Court of Appeal decision stands, it will set a precedent whereby *Charter* applicants will be expected to bear the burden of proof under section 1 of the *Charter* in an administrative context, which the Applicants submit is not only wrong at law but against the spirit of the purpose of the *Charter* and the language of section 1 itself.

54. In this matter, the burden of proof issue is determinative in the Applicants' view. The Applicants submit that BC and the PHO cannot meet their burden of justifying the Orders' admitted infringement of *Charter* protections for the following reasons:

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[59] *Trinity Western*, at paras. 195-208 [emphasis added]

a) the prohibition on in-person worship services was based on bare assertions that were not supported in the evidentiary record provided;

b) other gathering settings with significantly greater transmission of Covid were permitted to simultaneously continue in-person operations;

c) the PHO deemed in-person worship services held outside on the conditions provided to the synagogues as "safe" while simultaneously prohibiting such gatherings unless faith communities secured such authorization through the unreliable reconsideration process;

d) in-person worship services were categorically prohibited on the alleged basis that some religious settings did not comply with safety rules, while the PHO's approach to other in-person settings was to enforce safety protocols against non-compliant venues while permitting compliant venues in that category to remain operational.

Issue No, 4: Can a province prevent judicial review of the constitutionality of orders applicable to everyone in the province solely on the basis that individuals can apply (or have applied) to the government decision maker for reconsideration?

55. The Chambers Judge relied on *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 ("***Yellow Cab***") for the principle that "an applicant [for judicial review] must first exhaust all adequate statutory remedies and that review must be of a final decision. Where a party has taken advantage of a reconsideration process, only the reconsideration decision may be judicially reviewed." The Chambers' Judge dismissed the Applicants' petition on the grounds that, having availed themselves of the reconsideration process under *PHA* s. 43, judicial review of the issuance of the G&E Orders was unavailable to them.[60] The British Columbia Court of Appeal agreed, writing: "it is my view that the chambers judge did not err in his understanding of *Yellow Cab*."[61]

56. If the Applicants are granted leave, they will argue that both lower courts are incorrect. The court in *Yellow Cab* held that judicial review of a tribunal decision was available to the petitioner notwithstanding that the tribunal had denied leave on a reconsideration application, because "Where a party has attempted to invoke the reconsideration power, the court must also consider whether the tribunal – either in undertaking reconsideration or in deciding that it will not do so –

[60] *BCSC Decision*, at paras. 73 and 250; *Yellow Cab* at para. 40
[61] *BCCA Decision*, at para. 222

has made a determination that the allegation of error lacks foundation."[62] In other words, if a reconsideration process cannot or did not consider the errors that are later raised on judicial review, then review of the underlying decision is not barred. This more nuanced interpretation is consistent with judicial review decisions in other provinces and the Federal Court.[63]

57. *Yellow Cab* does not articulate a general rule that "where a party has taken advantage of a reconsideration process, only the reconsideration decision may be judicially reviewed" and *Yellow Cab* has never been cited outside of British Columbia on this point. Nonetheless, British Columbia courts regularly cite and apply this purported general rule in *Yellow Cab*.[64] The Applicants urge this Court to correct this erroneous interpretation of *Yellow Cab,* to prevent governments from inappropriately insulating its actions and decisions from the inherent supervisory jurisdiction of the courts, especially where constitutional protections have admittedly been infringed, and to ensure that petitioners for judicial review in British Columbia receive treatment under the law equal to that available to petitioners in other parts of Canada.

PHA s. 43 reconsideration was not an adequate remedy

58. *PHA* s. 43 was not designed to handle constitutional challenges and is particularly incapable of doing so in relation to orders of general application to every person in the Province, such as the provincial G&E Orders. Reconsideration under that section can only be requested if a person (1) has new relevant information that was not reasonably available to the PHO when the impugned order was made; (2) puts forward a new proposal that meets the objectives of the original order and is suitable as the basis of a s. 38 written agreement between the PHO and the person requesting reconsideration; or (3) simply requires more time to comply with the order.

59. A claim for a declaration that the G&E Orders are unconstitutional and of no force or effect cannot be a "proposal that... meet[s] the objective of the order," nor is a remedy of such general application "suitable as the basis of a [s. 38] written agreement". Constitutional arguments are not "information that was not reasonably available" to the PHO. The s. 43 process is not available to

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[62] *Yellow Cab*, *supra.* [emphasis added]; See also *Yellow Cab* at paras. 38 and 45

[63] *Allergan Inc v. Alberta (Justice and Solicitor General)*, 2021 ABCA 32; *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 446; *Fairhurst v. Unifor Local 114*, 2017 FCA 152; *Vidéotron Télécom Ltée v. Communications, Energy and Paperworkers Union of Canada*, 2005 FCA 90

[64] See, for example, *Eliason v. British Columbia (Attorney General)*, 2022 BCSC 1604, at para. 92; *Este v. District of West Vancouver*, 2022 BCSC 584, at para. 80; *Grewal v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2022 BCSC 594, at para. 60

a person wishing only to challenge the constitutionality of an order, and there is no mechanism in s. 43 by which an applicant who could meet the requirements of s. 43(1)(a), (b), or (c) could require the PHO's reconsideration decision to include a conclusion on a constitutional question.

60. The case at hand is illustrative. In her February 25 letter, the PHO describes the grounds for the Applicants' reconsideration request as being only: (1) a proposal under *PHA* s. 43(1)(b), which she rejects; and (2) the provision under s. 43(1)(b) of two affidavits, which she declares do not contain any information that was unavailable to her that would alter her decisions. While her reasons make passing reference to a need for restrictions on *Charter* rights to be proportional, she comes to no conclusion as to whether they are in fact proportionate. The reconsideration decision answers the question "will the PHO vary the G&E Orders to allow these particular Churches to gather for worship", but it doesn't address question whether the G&E Orders are constitutional.

61. Reconsideration of a later order could not address the constitutional issues engaged by the fact that the Applicants had already been charged for allegedly gathering for in-person worship services in violation of previous G&E Orders, both before and after seeking reconsideration. Simply put: the reconsideration decision does not and could not consider or address any of the issues raised on judicial review, nor does it consider the G&E Orders on their merits. The Applicants are asking this Court to examine whether the lower courts were wrong to find that they were required to review the reconsideration decision and barred from review of the G&E Orders themselves, and whether British Columbia is permitted to use the *PHA* s. 43 reconsideration process to oust the courts' inherent jurisdiction to review the constitutionality of public health orders of broad and general application.

The reconsideration decision was not in the nature of an appeal

62. The issuance of the G&E Orders was an exercise of statutory power (a power to make a regulation, rule, bylaw or order[65]) which affected everyone in British Columbia, but it was not a statutory power of decision (a power to make a decision regarding the legal rights, etc. of a person[66]). The reconsideration decision, by contrast, was an exercise of a statutory power of decision which considered the rights of the Applicants as individual persons. The reconsideration process in this case is a standalone proceeding, wherein the PHO considered whether to exempt

[65] *JRPA at* s. 1
[66] *Ibid.*

the Applicants from an order of general application in the Province. The reconsideration decision did not consider the G&E Orders on their merits or address any of the constitutional questions raised on judicial review. *Yellow Cab* and all of the cases it cites dealt with a reconsideration of underlying decisions, which were exercises of a statutory power of decision – in other words, cases where the reconsideration process was analogous to an appeal of the underlying decision. In those cases, reconsideration could become the final decision which becomes the proper target of judicial review because it is essentially an appeal of the underlying decision. This was not the case here.

63. The Applicants submit that this Court ought to intervene as the concerns set out in *Yellow Cab* are not engaged in the case at hand. If granted leave to appeal, they will argue that it was open to them to apply for judicial review of the reconsideration decision had they wished to have a court review the PHO's refusal to grant the variance they requested, but they were not required to do so, nor was there any basis for the lower courts to find that judicial review of the G&E Orders themselves was barred.

The national importance of these arguments

64. As discussed above, this case raises fundamental questions about the state of the *Charter* in an administrative context in Canada and whether *Charter* rights are weakened simply because of the government's choice to utilize an order rather than a regulation. Some of these questions have even been raised by justices of this Honourable Court in *Loyola* and *Trinity Western* as noted above. The outcome of this case will shape the way aggrieved citizens choose to bring their *Charter* challenges to government measures and whether there is a clear advantage to proceeding outside of that administrative forum.

PART IV – SUBMISSIONS ON COSTS

65. The Applicants do not seek costs on this leave to appeal.

PART V – ORDER SOUGHT

66. The Applicants submit that leave should be granted.

CALGARY, this 14th day of February 2023.

A.K. Pejovic

Allison Pejovic and Marty Moore
Counsel for the Applicants

PART VI – TABLE OF AUTHORITIES

Authorities	Cited at Paragraph(s) No.
Cases	
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Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65	47, 53
Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario, 2018 ONSC 579	33
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Doré v. Barreau du Québec, 2012 SCC 12	27, 30, 33, 50, 53
Eliason v. British Columbia (Attorney General), 2022 BCSC 1604	57
Este v. District of West Vancouver, 2022 BCSC 584	57
Fairhurst v. Unifor Local 114, 2017 FCA 152	56
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Grewal v. British Columbia (Workers' Compensation Appeal Tribunal), 2022 BCSC 594	57
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MacKay v. Manitoba, [1989] 2 S.C.R. 357	43
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Taylor v. Newfoundland and Labrador, 2020 NLSC 125	37
Trinity Bible Chapel Ontario (Attorney General), 2022 ONSC 1344	39, 45
Vidéotron Télécom Ltée v. Communications, Energy and Paperworkers Union of Canada, 2005 FCA 90	56
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Canadian Charter of Rights and Freedoms *Charte canadienne des droits et libertés*	1, 2, 6, 7, 15 1, 2, 6, 7, 15
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