File No: AJ06525763-1
Registry: Chilliwack

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REX

v.

JOHN KOOPMAN

WRITTEN SUBMISSIONS OF THE RESPONDENTS, THE PROVINCIAL HEALTH OFFICER and THE DEPUTY PROVINCIAL HEALTH OFFICER (Re: Subpoena Application)

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I. OVERVIEW

1. The applicant, Pastor John Koopman, held in-person worship services in contravention of the Gathering and Events Orders (the "**G&E Orders**") issued by Dr. Bonnie Henry, the Provincial Health Officer (the "**PHO**" or "**Dr. Henry**") in December 2020. The G&E Orders were made pursuant to ss. 30-32 and 39 of the *Public Health Act*, S.B.C. 2008, c. 28 (the "***Public Health Act***"). The G&E Orders enacted province-wide measures which temporarily banned all in-person gatherings, including religious worship services. Violation tickets were issued to Pastor Koopman on account of his contraventions of the G&E Orders.

2. In November 2022, Pastor Koopman was found guilty of offences under the *COVID-19 Related Measures Act*, S.B.C. 2020, c. 8, in respect of Violation Ticket AJ06525763.[1] A conviction was not entered at that time, pending Pastor Koopman's challenges to the constitutionality of the G&E Orders.[2] In April 2023, this Court dismissed Pastor Koopman's constitutional challenge.[3]

3. In a new application dated April 14, 2023, Pastor Koopman now raises allegations of abuse of process in relation to the PHO's conduct in issuing the G&E Orders and administering the reconsideration process provided for in s. 43 of the *Public Health Act*. In his notice of application, Pastor Koopman also makes allegations in respect of the PHO's litigation conduct and steps taken by her counsel in prior proceedings involving Pastor Koopman in the British Columbia Supreme Court[4] and Court of Appeal for British Columbia.[5]

4. In furtherance of his abuse of process application, Pastor Koopman seeks to subpoena the PHO, Dr. Bonnie Henry, and the Deputy PHO, Dr. Brian Emerson.

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[1] *R. v. Koopman*, 2022 BCPC 249 [***Koopman***]. Pastor's Koopman's prior application to quash Violation Ticket AJ06525763, pursuant to s. 100(1) of the *Offence Act,* was also dismissed: *R. v. Koopman*, 2022 BCPC 183.
[2] *Koopman* at para. 55.
[3] *R. v. Butler,* 2023 BCPC 74 [***Butler***].
[4] *Beaudoin v. British Columbia*, 2021 BCSC 512.
[5] *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 [***Beaudoin***].

5. The PHO and the Deputy PHO oppose the subpoena application on the following grounds:

   (i) the doctrine of deliberative privilege applies to the PHO and Deputy PHO. Pastor Koopman has failed to displace the presumption of regularity or demonstrate that deliberative privilege should be lifted in this case. This doctrine is a complete answer to the application.

   (ii) Further, and the in the alternative, Pastor Koopman has failed to meet his burden to show that the PHO or Deputy PHO are likely to provide material evidence with respect to the abuse of process application, including because:

      a) the majority of the evidence sought by Pastor Koopman from the PHO and Deputy PHO seeks to contradict findings made by the British Columbia Supreme Court and the Court of Appeal in the *Beaudoin* proceedings;

      b) a significant portion of the evidence sought by Pastor Koopman would be protected by solicitor-client privilege; and

      c) the PHO and Deputy PHO are not compellable to provide evidence on personal information collected pursuant to the *Public Health Act*.

   (iii) Finally, Pastor Koopman seeks disclosure of documents but has not complied with the well-established principles governing the production of third-party records set out in *R. v. O'Connor*.[6]

II. ARGUMENT

A. Overview

6. Pursuant to ss. 43-44 of the *Offence Act*, R.S.B.C. 1996, c. 388, a justice of the peace may issue a subpoena requiring a person to attend a proceeding if they are

[6] *R. v. O'Connor*, [1995] 4 S.C.R. 411 [***O'Connor***].

likely to provide material evidence. The party seeking the subpoena bears the onus of establishing that the necessary conditions have been met.[7]

7. In determining whether to issue a subpoena under ss. 43-44 of the *Offence Act,* the court must consider whether there is a privilege or other legal rule which would affect the compellability of the intended witness.[8]

8. There are three reasons the subpoenas sought by the applicant should not issue.

9. First, the PHO and Deputy PHO's decision-making process in issuing and administering the G&E Orders and responding to reconsideration requests under s. 43 of the *Public Health Act* is protected by deliberative privilege (also known as "deliberative secrecy"). For the same reason that individuals are not able to summon and question judicial officers about their deliberations (*e.g.*, issuing search warrant), they are also precluded from examining administrative decision makers on their deliberative process. Under the doctrine of deliberative privilege, administrative decision makers cannot be compelled to testify absent persuasive evidence of a clearly articulated and objectively reasonable concern that a relevant legal right may have been infringed and that the proposed discovery will afford evidence of it.[9]

10. The applicant has failed to meet both requirements: there is no evidence a legal right may have been infringed and no evidence the proposed discovery will afford evidence of such an infringement.

11. Second, and in the alternative, the applicant has not met his burden to establish that it is likely that the PHO or Deputy PHO will provide material evidence for his abuse of process application. As an administrative decision-maker, the decisions of the PHO (and her delegates, such as the Deputy PHO) speak for themselves. *Viva voce* testimony in support of their decisions is impermissible and irrelevant. In any event,

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[7] *Kelowna (City) v. Gregg Alfonso Law Corp.*, 2007 BCSC 1637; *Laboratoires Servier v. Apotex Inc.*, 2008 FC 321 at paras. 22-23.
[8] *R. v. Violette*, 2008 BCSC 1142 at para. 61, citing *Zündel, Re.*, 2004 FC 798 at paras. 5-10.
[9] *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37 at para. 36 [***Cherubini***]; see also, *Eastside Pharmacy Ltd. v. British Columbia (Minister of Health)*, 2019 BCCA 60 at para. 49 [***Eastside***].

Pastor Koopman relies solely on arguments and evidence that have already been rejected by the British Columbia Court of Appeal in *Beaudoin*, by the British Columbia Supreme Court in *R. v. Lucier*,[10] and by this Court in *Butler.*

12. Further, a significant portion of Pastor Koopman's application concerns matters which would be subject to solicitor-client privilege. The PHO and Deputy PHO cannot provide evidence with respect to the instructions provided to their counsel, the advice received from their counsel, or their counsel's litigation conduct and strategy in the *Beaudoin* proceedings.

13. Moreover, pursuant to s. 91 of the *Public Health Act*, the PHO and Deputy PHO are statutorily immune from providing evidence on personal information collected pursuant under the *Act*. To the extent Pastor Koopman seeks evidence that would include "personal information" within the meaning of s. 91, such evidence is not compellable.

14. Finally, even if the applicant could meet his burden to show the PHO and Deputy PHO should be compelled to provide *viva voce* testimony, the form of subpoena proposed by the applicant should not issue. The applicant has failed to comply with the well-established principles for the production of third-party documents set out in *O'Connor*.

B. The PHO's Decision Making is Protected by the Doctrine of Deliberative Privilege

15. The doctrine of deliberative privilege (also called "deliberative secrecy") protects the subjective deliberative process of both judicial and administrative decision-makers. Where the doctrine applies, a court cannot issue a subpoena and need not conduct an inquiry into the materiality of the evidence sought.[11] Accordingly, if this Court finds that deliberative privilege applies, the doctrine provides a complete answer to Pastor Koopman's application for a subpoena.

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[10] 2023 BCSC 669 [***Lucier***].
[11] *R. v. Plummer*, 2018 BCSC 513 at para. 53 [***Plummer***].

16. Pursuant to the doctrine of deliberative privilege, decision makers must not be ordered to provide evidence about their own decisions, absent persuasive evidence of a clearly articulated and objectively reasonable concern that a relevant legal right may have been infringed and that the proposed discovery will afford evidence of it.[12]

17. The doctrine recognizes that the deliberations of both judicial and administrative decision-makers are privileged. Just as a Judicial Justice (or a judge) cannot be compelled to reveal their subjective deliberative process, so, too, are the deliberations of administrative officials protected.[13] Protecting the internal deliberations of administrative decision makers preserves the independence of judicial and administrative decision-makers, promotes consistency and finality of decisions, and prevents decision-makers from having to expend valuable time and resources testifying about their decisions after the fact.[14]

18. Deliberative privilege recognizes that decision-makers speak through their decisions. *Viva voce* evidence from a decision-maker adds nothing to a reviewing court's analysis and does not properly form part of the record. Rather, the principles of finality, consistency, and expediency—all of which are of fundamental importance to the rule of law—require that judicial and administrative decisions must speak for themselves.

19. Closely related to deliberative privilege is the presumption of regularity. The presumption of regularity applies in both criminal and administrative proceedings and holds that it "must be presumed in the absence of any evidence to the contrary that public officers will act fairly and impartially in discharging adjudicative responsibilities".[15]

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[12] *Cherubini* at para. 36 (emphasis added).
[13] *R. v. Celmaster*, 1994 CanLII 3080 (B.C.S.C.).
[14] *Cherubini* at para. 14.
[15] *University of British Columbia v. University of British Columbia Faculty Assn.*, 2007 BCCA 201 at para. 84; see also, *Eastside* at para. 49; *R. v. Clark*, 2015 BCCA 488, at para. 45, aff'd 2017 SCC 3.

20. It is well-established that deliberative privilege protects the internal deliberations of administrative decision-makers, like the PHO and her delegates.[16] Both deliberative privilege and the presumption of regularity apply to the administrative decision-making process irrespective of the forum in which disclosure is being sought. Indeed, deliberative privilege "is concerned with the subject matter of the evidence which is sought, not the forum in which that evidence is to be used", and thus "applies regardless of the nature of the forum in which the information is sought".[17]

21. For example, the British Columbia Supreme Court relied on deliberative privilege to refuse a subpoena ordering a warden to testify in a *habeas corpus* proceeding in *Keiros-Meyer v. The Attorney General of Canada*.[18] The Court held that "where there are no more than speculative grounds that [they]… did not make their decision independently and impartially based upon their own review, and consideration of the record, an administrative decision-maker should not be cross-examined".[19] Rather, "the decision speaks for itself as a representation of the matters that were taken into account and the procedures by which they were received", and thus the applicant "would be in no better position to argue their significance by obtaining *viva voce* evidence from the [decision-maker]".[20]

22. In this case, Pastor Koopman clearly seeks to compel the PHO (and her delegate, the Deputy PHO) to reveal privileged information concerning her deliberative process in respect of both the G&E Orders and the reconsideration process under s. 43 of the *Public Health Act*.[21] The applicant's notice of application does not address the doctrine of deliberative privilege (or deliberative secrecy), despite being advised

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[16] *Eastside* at para. 49.
[17] *Cherubini* at paras. 20, 22.
[18] *Keiros-Meyer v. The Attorney General of Canada*, 2019 BCSC 2457 at paras. 40-42 [***Keiros-Meyer***].
[19] *Keiros-Meyer* at para. 40.
[20] *Keiros-Meyer* at para. 41.
[21] In *Beaudoin,* the Court of Appeal found that the G&E Orders are "administrative decisions made through a delegation of discretionary decision-making authority under the [*Public Health Act*]" (at para. 255).

by the PHO and Deputy PHO that they opposed the application on these grounds by letter on April 18, 2023.

23. The applicant has failed to meet his burden to clearly identify any objectively reasonable concern that a legal right may have been infringed and that the PHO and/or Deputy PHO's evidence will afford proof of it. To the contrary, the applicant sets out a variety of vague, unsupported assertions that the PHO was politically motivated and/or relied on inappropriate data in making the G&E Orders, and that the Orthodox Jewish synagogues received preferential treatment in the reconsideration process. The relevant decisions of the PHO (and her delegates) are already in the record. Both the G&E Orders and the reconsideration decisions provided to the Orthodox Jewish synagogues and to Pastor Koopman are before this Court, along with the "record" of those decisions provided in the *Beaudoin* proceedings.[22] Those decisions speak for themselves and neither the PHO nor the Deputy PHO can be compelled to give evidence of their decision-making process.

24. Accordingly, the PHO's right to deliberative privilege and the presumption of regularity have not been displaced and the request for a subpoena must be refused.

25. The doctrine of deliberative privilege is a complete answer to the applicant's subpoena application. If this court accepts that the doctrine of deliberative privilege applies, it need not conduct an inquiry into the materiality of the evidence the PHO and Deputy PHO would give.[23]

C. <u>The PHO and Deputy PHO Have No Material Evidence</u>

26. In the alternative, if this Court finds the doctrine of deliberative privilege does not apply, the applicant has failed to meet his burden to demonstrate that the PHO and Deputy PHO are likely to give material evidence.

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[22] Affidavit #1 of Megan Patterson [Vukelich Ex. 1].
[23] *Plummer* at para. 53.

27. Pursuant to s. 43 of *the Offence Act*, a subpoena may only be issued if the person "is likely to give material evidence to which the *Offence Act* applies". This provision requires an applicant to prove the following:

    (i) that it is likely or probable—not merely possible—that the person who is the subject of the subpoena will give material evidence; and

    (ii) the evidence must be material, that is, "pertinent to the issues in dispute", which must be assessed within the context of the specific case.[24]

28. The statutory language of "likely to provide material evidence" mirrors the statutory requirement found in s. 698 of the *Criminal Code* for the issuance of subpoenas in criminal proceedings. In *Trans Mountain Pipeline ULC v. Mivasair*, the British Columbia Supreme Court quoted approvingly from *R. v. Baltovich* [25] on the proper interpretation of "likely to give material evidence" as follows:

> [70] The statutory terms "is likely to give material evidence" refers to a probability, not a mere possibility or something that exists only in the fevered imaginings of the party seeking the subpoena. Something is likely if it is probable, not merely possible.
>
> [71] Materiality is a legal concept. It defines the status of the propositions that a party seeks to establish by evidence to the case at large. What is in issue in a case, hence what is material, is a function of:
>
> i. the applicable substantive law;
>
> ii. the allegations contained in the indictment; and
>
> iii. the applicable procedural law.
>
> Evidence is material if it is offered and tends to prove or disprove a fact in issue. Material evidence is evidence that is pertinent to the issue in dispute. [26]
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> [Emphasis in original.]

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[24] *R. v. Burke,* 2016 BCCA 402 at paras. 24-25 [***Burke***].
[25] *R. v. Baltovich*, [2007] O.J. No. 3506 (Ont. S.C.J.), (*sub nom. R. v. Finkle*).
[26] 2022 BCSC 2241 [***Mivasair***].

29. The subpoena power under the *Offence Act* does not permit an applicant to call a witness for the purposes of going on a "fishing expedition".[27] Rather, the onus is on the applicant to set out "some articulation of facts… supportive of the pleaded belief that the sought-after [evidence] will likely contain evidence material to the determination of an issue or issues arising" on the post-conviction application.[28]

30. The applicant has not established that either the PHO or the Deputy PHO are likely to provide material evidence on the abuse of process application for two reasons:

    (i) The evidence on this application does not support the applicant's allegations and does not establish that the PHO or the Deputy PHO are likely to provide material evidence with respect to the allegations.

    (ii) The reasons provided by the PHO (and her delegates) speak for themselves. *Viva voce* evidence from administrative decision-makers regarding their motivations or internal deliberations is not admissible or relevant.

31. To begin, the facts alleged by the applicant—and the evidence which he says supports these assertions—do not establish that it is probable that the PHO or Deputy PHO will provide evidence which is material to the abuse of process application.

32. The applicant's materials are difficult to interpret; however, it appears that Pastor Koopman is alleging that the PHO and Deputy PHO have material evidence to support the allegation that the PHO and her delegates gave Orthodox Jewish synagogues preferential treatment in the reconsideration process compared to Christian churches.[29]

33. These allegations have no basis in the facts or evidence. Rather, these allegations were advanced by Pastor Koopman and expressly rejected in the judicial review

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[27] *Mivasair* at paras. 68, 72.
[28] *Burke* at para. 25.
[29] See, for example, Applicant's Written Submissions dated May 1, 2023, at paras. 90-94.

proceedings before the British Columbia Supreme Court and Court of Appeal in *Beaudoin.* In particular, the Court of Appeal made the following findings:

(i) On December 18, 2021, the PHO wrote to Pastor Koopman explaining her decision-making process under the G&E Orders and expressly inviting his church to submit a written proposal in accordance with s. 43(1) of the *Public Health Act*. The PHO specifically advised Pastor Koopman that she had "considered and approved case-specific requests in the past" and "was open to a request from your church".[30]

(ii) Despite the PHO's invitation in December, Pastor Koopman did not formally request reconsideration until January 29, 2021.[31]

(iii) Given the volume of material submitted in support of Pastor Koopman's reconsideration request, the PHO dealt with the matter in a timely way.[32]

(iv) Further, "the timing of the reconsideration request was entirely in [the applicant's] hands" and had "nothing to do with the conduct of the PHO or her counsel".[33]

34. Both the British Columbia Supreme Court and the Court of Appeal were aware of the PHO's reconsideration decisions in respect of Orthodox Jewish synagogues in British Columbia, including her decision on March 1, 2021, to require Orthodox Jewish congregations to follow the same conditions enumerated in Pastor Koopman's reconsideration decision.[34] The Court of Appeal concluded "the PHO's response to reconsideration requests made by non-parties are irrelevant".[35]

35. Pastor Koopman's complaints with respect to the adequacy and availability of the reconsideration process under s. 43 of the *PHA* were raised and adjudicated in the

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[30] *Beaudoin* at para. 92.
[31] *Beaudoin* at para. 217.
[32] *Beaudoin* at para. 217.
[33] *Beaudoin* at para. 218 (emphasis added).
[34] *Beaudoin* at paras. 80, 111, 112, 126.
[35] *Beaudoin* at para. 192.

judicial review proceedings. In particular, the Court of Appeal considered the applicant's assertion that his reconsideration request under the *PHA* was treated differently from Orthodox Jewish synagogues. The Court found the evidence demonstrated that—to the extent there was any difference—it was caused by his own failure to avail himself of the reconsideration process in a timely manner.[36] The Court of Appeal expressly found "the timing of the reconsideration of request was entirely in [the applicant's] hands" and had "nothing to do with the conduct of the PHO".[37] Rather, once his request was filed, it was "dealt with promptly and on its merits".[38] This Court reached the same conclusion in *Butler*.[39]

36. Moreover, whether the PHO responded to requests for reconsideration of her G&E Orders from other individuals across British Columbia is immaterial to the question of whether there was an abuse of process in the applicant's particular case. The PHO did respond to the applicant's request and reached a decision, providing the applicant with a variance of her G&E Orders. The Supreme Court and Court of Appeal have already considered whether the process under s. 43 provided an adequate remedy to Pastor Koopman and rejected the arguments he advances here.

37. Finally, the fact that the PHO considered and reached a decision on Pastor Koopman's own request for reconsideration under s. 43 in February 2021 belies his assertion that s. 43 requests for reconsideration were suspended for Christian churches as of December 2020. The British Columbia Supreme Court rejected a similar argument advanced by a different accused (represented by the same counsel as the applicant) in *Lucier*.[40]

38. The evidence therefore shows that the PHO and her delegates considered Pastor Koopman's request for a variance under the G&E Orders promptly and on the merits

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[36] *Beaudoin* at paras. 192, 217-218.
[37] *Beaudoin* at para. 218.
[38] *Beaudoin* at paras. 192, 217.
[39] *Butler* at paras. 30-34.
[40] *Lucier* at para. 57.

once it was received. The fact that Orthodox Jewish synagogues received variances before the applicant and his church was due to the applicant's failure to avail himself of the s. 43 reconsideration process under the *PHA* in a timely manner—not misconduct on the part of the PHO or her delegates.

39. The remaining allegations against the PHO, advanced by Pastor Koopman, focus on the substance of the PHO's decision making in the G&E Orders. The applicant alleges for example that "the PHO knew that COVID-19 transmission risk could not be affected simply by the subject of discussion or purpose of any particular gathering" and that the "PHO knew the impugned distinction (i.e. differential treatment as between religious and secular settings) caused injustice…".[41] Again, the Court of Appeal's decision in *Beaudoin* provides a complete answer to these allegations:

> [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.
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> [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.
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> [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.
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> [Emphasis added.]

[41] Applicant's Written Submissions at para. 17.

40. In both *Butler* and *Lucier,* this Court has held it is bound by the Court of Appeal's decision in *Beaudoin.* The applicant has sought leave to appeal the *Beaudoin* decision to the Supreme Court of Canada. That Court is the proper forum for seeking to overturn findings made by the Court of Appeal.

41. Lastly, and in any event, as an administrative decision-maker, the PHO (and her delegates) have no further relevant evidence to give with respect to her decisions. The voluminous record adduced in this proceeding fully represents her decision and she is not permitted to further bolster it with *viva voce* evidence.

42. In *Keiros-Meyer*, the Court held that the warden did not have any "material evidence to give on the actual matters in issue" as they were fully "represented by his decision".[42] In other words, an administrative decision-maker's "decision speaks for itself" as a complete representation and record of their considerations and supplementary *viva voce* evidence is irrelevant and impermissible.[43] Indeed, in *Commission scolaire de Laval v. Syndica de l'enseignement de la région de Laval*, the Court held that where a public body makes "legislative, regulatory, policy or purely discretionary" decisions, its motives are "unknowable" beyond the content of its decision.[44]

43. As in *Keiros-Meyer*, there is no evidence of any relevance or value to be added by the *viva voce* evidence. The record before the Court—insofar as it represents the PHOs decision-making process—is a complete representation of her considerations and further testimony is irrelevant.[45]

D. The PHO and Deputy PHO's Evidence Regarding Litigation Conduct is Protected by Solicitor-Client Privilege

44. Pastor Koopman's abuse of process application makes additional allegations regarding the conduct of the Provincial Crown and the Ministry of Attorney General

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[42] *Keiros-Meyer* at para. 42.
[43] *Keiros-Meyer* at para. 41.
[44] 2016 SCC 8 at paras. 44-47 (emphasis added).
[45] *Eastside* at para. 54.

counsel acting for the PHO in *Beaudoin.* In particular, the applicant alleges that the Attorney General for British Columbia, while acting for the PHO:

(i) Improperly sought an injunction as “retaliation to punish the defendant and others for asserting their legal rights”;[46]

(ii) Produced an “incomplete and misleading” record of proceeding “which misled the Court” in *Beaudoin*;[47]

(iii) Refused to concede the constitutional invalidity of prohibitions on outdoor protests until the hearing of the petition in *Beaudoin*;[48] and

(iv) Advanced "inconsistent positions at different levels of court as to how and where challenge to the constitutional validity” of the G&E Orders must take place.[49]

45. Pastor Koopman has not clearly stated that he wishes to subpoena the PHO and Deputy PHO to examine them on these allegations, but it is evident from the content of his written submission that this is his intention. To the extent Pastor Koopman does seek to rely on these allegations in support of his application for a subpoena, it is well-established that evidence regarding any communications between the PHO and her counsel, including her instructions to counsel, and all matters involving litigation conduct and strategy, would be subject to solicitor-client privilege.[50]

46. Finally, the PHO and Deputy PHO have no material evidence with respect to the conduct of the Provincial Crown, who act entirely independently in prosecution proceedings.

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[46] Applicant’s Written Submission at para. 17(vii).
[47] Applicant’s Written Submission at para. 17(x).
[48] Applicant’s Written Submission at para. 17(xii).
[49] Applicant’s Written Submission at para. 17(xiii).
[50] See *e.g.*, *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para 28.

E. Section 91 of the *Public Health Act* Protects "Personal Health Information" from Disclosure in these Proceedings

47. As a final point, no subpoena should be issued for the PHO and/or the Deputy PHO except in accordance with s. 91 of the *Public Health Act.* Section 91 prohibits the disclosure of personal information, except in a proceeding under the *Public Health Act*:

> 91 (1) A person who has custody of, access to or control over personal information under this Act must not disclose the personal information to any other person except as authorized under this or any other enactment.
>
> (2) A person referred to in subsection (1) is not, except in a proceeding under this Act, compellable to disclose or provide evidence about personal information the person has custody of, access to or control over.
>
> [Emphasis added.]

48. For the purposes of the *Public Health Act*, "personal information" is defined as "recorded information about an identifiable individual other than contact information": s. 1 definition of "personal information"; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, Sched. 1 definition of "personal information".

49. Subsection 91(2) therefore provides that "a custodian is not compellable in legal proceedings either to give evidence about personal information or to disclose it in documents that the custodian holds pursuant to the [*Public Health Act*]".[51]

50. To the extent some of the evidence sought by the applicant meets the criteria in s. 91(2) of the *PHA*, the PHO and Deputy PHO cannot be compelled to provide it. For example, evidence regarding correspondence to and from the PHO's office as part of s. 43 of the reconsideration process may include "personal information" adduced by members of the public in confidence under the protection of the *Public Health Act.* The PHO and her delegates have a statutory duty to maintain the confidentiality of

[51] *Svangtun v. Pacific National Exhibition*, 2019 BCSC 121 at para. 67.

parties who provide personal information to them under the *Public Health Act* and may not be compelled to disclose or provide evidence on such information.

F. The Applicant has Failed to Bring an *O'Connor* Application for Disclosure of Third-Party Records

51. Pastor Koopman faces an additional problem with the proposed subpoenas. In his submissions, the applicant seeks "production of documents relevant to the misconduct of the PHO" but he has failed to bring an application under *O'Connor* for the production of third-party records.[52] Specifically, the subpoenas provided by the applicant seek:

> all documents you have in your possession or control relating to the subject matter of the proceedings including all documents reflecting communications to and from the office of the PHO relating to requests for and the granting of variances of Gathering and Events orders pursuant to section 43 of the *Provincial Health Act* made between November 19, 2020 and August 1, 2021 including all communications related to religious institutions including orthodox Jewish synagogues and Christian churches.
>
> [Emphasis added.]

52. A subpoena cannot be used to obtain disclosure of documents.[53] The two-stage framework for production of third party records, set out by the Supreme Court of Canada in *O'Connor* applies to the applicant's request for document production from the PHO and Deputy PHO.[54] In *O'Connor,* the Court drew a distinction between the function of a subpoena, "to summon the witness—in this case, the guardian of the records—to court and to require the witness to bring the documents described in the subpoena" and the requirement that the witness actually "produce the records to the court or to the defence".[55]

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[52] Applicant's Written Submissions at para. 107.
[53] *Ontario (Provincial Police) v. Mosher*, 2015 ONCA 722 at para. 116.
[54] In *R. v. Carriere*, 2005 SKQB 471, the applicant sought third party records in the context of both the ability to make full answer and defence to the charges and also in support of a motion to stay proceedings on the grounds of abuse of process. The Court applied the *O'Connor* framework to the request for third party records in both the trial and abuse of process proceedings.
[55] *O'Connor* at para. 135.

53. The applicant's materials address only the former—the issuance of a subpoena. The applicant has not brought an application for third party records, nor do his submissions address the requirements set out by the Supreme Court of Canada in *O'Connor* for production of records by the PHO or Deputy PHO to the court or the defence.

54. Under the two-stage approach in *O'Connor,* the applicant must first demonstrate that the information contained in the records is likely to be relevant either to an issue in the proceedings or to the competence to testify of the person who is the subject of the records.[56]

55. An application for an order for production of private records held by a third party must be accompanied by affidavit evidence which establishes that the information sought is likely to be relevant.[57] The applicant's demonstration that information is likely to be relevant must be based on evidence, not on speculative assertions or on discriminatory or stereotypical reasoning.[58] The application must be served on the Crown, the person who is the subject of the records, the record holder and anyone else who may have a privacy interest in the record.[59] If the information does not meet this threshold of relevance, then no order will issue.

56. However, if the information is likely relevant to an issue at trial or to the competence of the subject to testify, the court must move to the second stage of the *O'Connor* framework and weigh the positive and negative consequences of production, with a view to determining whether, and to what extent, production should be ordered.[60]

57. If production is ordered, the judge must first examine the records to determine whether, and to what extent, they should be disclosed to the accused. The court

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[56] *O'Connor* at para. 137.
[57] *O'Connor* at para. 140.
[58] *O'Connor* at para. 140.
[59] *R. v. McNeil*, 2009 SCC 3 at para. 27.
[60] *O'Connor* at para. 137.

must conduct the balancing inquiry at the second stage of the test again, but with the benefit of viewing the records and with disclosure to the applicant in mind.[61]

58. At each stage of the *O'Connor* framework, counsel for all interested parties should be permitted to make submissions.

59. Pastor Koopman's failure to bring a proper application for the production of third-party records is fatal to his request for document production from the PHO and Deputy PHO.

III. CONCLUSION

60. The application to authorize subpoenas against the PHO and Deputy PHO should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of May, 2023 at Vancouver, British Columbia.

emily lapper

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[61] *O'Connor* at para. 153.