SCC Court File No.:_

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

BETWEEN:

JASMIN GRANDEL AND DARRELL MILLS

APPLICANTS
(Appellants)

- and -

THE GOVERNMENT OF SASKATCHEWAN AND DR. SAQIB SHAHAB IN HIS CAPACITY AS CHIEF MEDICAL HEALTH OFFICER FOR THE PROVINCE OF SASKATCHEWAN

RESPONDENTS
(Respondents)

APPLICATION FOR LEAVE TO APPEAL
(JASMIN GRANDEL AND DARRELL MILLS, APPLICANTS)
(Pursuant to s. 40 of the *Supreme Court Act* and
Rule 25 of the *Rules of the Supreme Court of Canada*)

CHARTER ADVOCATES CANADA
[redacted]

Andre Memauri
[redacted]

Counsel for the Applicants

MINISTRY OF JUSTICE AND
ATTORNEY GENERAL
CONSTITUTIONAL LAW BRANCH
[redacted]

Theodore J. C. Litowski
Noah Wernikowski
[redacted]

Counsel for Respondents

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(JASMIN GRANDEL AND DARRELL MILLS, APPLICANTS)
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985, c S-26)

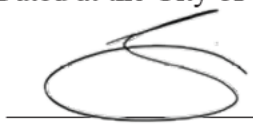
TAKE NOTICE that the Applicants, Jasmin Grandel and Darrell Mills, applies for leave to appeal to the Supreme Court of Canada under section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156 from the judgment of the Court of Appeal for Saskatchewan (File no. CACV4088) made on May 15, 2024, 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:

> **Issue No. 1:** Where the factual matrix underpinning multiple *Charter* claims is largely indistinguishable, may Courts appropriately subsume all *Charter* claims into a conceded violation, where the impugned law or government action strikes directly at the core of a subsumed claim?

Issue No. 2: Given the lack of a separate test for the guarantee of the freedom of peaceful assembly under s. 2(c) of the *Charter*, must Courts addressing s. 2(c) claims, either apply the test established under s. 2(b) or subsume such claims into s. 2(b)?

Dated at the City of Saskatoon, Province of Saskatchewan, this 14th day of August 2024.



CHARTER ADVOCATES CANADA
[redacted]

Andre Memauri
[redacted]

Counsel for the Applicants

TO:

MINISTRY OF JUSTICE AND ATTORNEY GENERAL CONSTITUTIONAL LAW BRANCH
[redacted]

Theodore J. C. Litowski
Noah Wernikowski
[redacted]

Counsel for Respondents

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. Reasons for Judgment in the Court of King's Bench for Saskatchewan dated September 20, 2022, *Grandel v. Saskatchewan,* 2022 SKKB 209

B. Consent Judgment in the Court of King's Bench for Saskatchewan, dated October 26, 2022

C. Reasons from the Court of Appeal for Saskatchewan dated May 15, 2024, *Grandel v. Government of Saskatchewan*, 2024 SKCA 53

D. Draft Judgment of the Court in the Court of Appeal for Saskatchewan, submitted for filing on August 7, 2024

KING'S BENCH FOR SASKATCHEWAN

Citation: **2022 SKKB 209**

Date: **2022 09 20**
Docket: QBG-SA-00395-2021
Judicial Centre: Saskatoon

BETWEEN:

JASMIN GRANDEL and DARRELL MILLS

APPLICANTS

- and -

THE GOVERNMENT OF SASKATCHEWAN and DR. SAQIB SHAHAB in his capacity as CHIEF MEDICAL HEALTH OFFICER FOR THE PROVINCE OF SASKATCHEWAN

RESPONDENTS

Counsel:

Marty Moore and Andre F. Memauri — for the applicants
Theodore J.C. Litowski, Laura M. Mazenc and Johnna M. Van Parys — for the respondents

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JUDGMENT — KONKIN J.
September 20, 2022

PARAGRAPHS

A. INTRODUCTION

[1] The applicants, Jasmin Grandel and Darrell Mills, seek a declaration pursuant to the *Canadian Charter of Rights and Freedoms* with respect to the restrictions on outdoor gatherings contained in Public Health Orders [PHOs] issued by Dr. Saqib Shahab, in his capacity as Chief Medical Officer for the Province of Saskatchewan. These restrictions limited public outdoor gatherings to 10 persons during the period of December 17, 2020 through May 30, 2021 [Outdoor Gathering Restrictions]. In argument the applicants sought to have the Court find the applicants to have standing for the PHO restricting outdoor gatherings to 10 persons as well as the previous order restricting outdoor gatherings to 30 persons. I accept that the applicants have standing to challenge only the 10-person outdoor gathering restrictions enforced between the period of December 17, 2020 through May 30, 2021. I conclude that the evidence shows that the applicants only were ticketed on activities during the 10-person PHOs. I find that even if I granted standing over the previous PHOs, the result of my decision would not change.

[2] Ms. Grandel is a resident of Regina, who recently graduated with a degree in kinesiology with a major in health promotion from the University of Regina. She became concerned when the government ordered all children, including her son who was six years old and in kindergarten at the time, to wear masks in school without sharing the information on which the decision was based. Propelled by her concern with the lack of transparency and consistency from the Government of Saskatchewan and the Saskatchewan Health Authority regarding the information on which they base their decisions, as well as the detrimental effects caused by the PHOs on small business and families, Ms. Grandel participated in peaceful outdoor protests to express her dissatisfaction with the restrictions imposed on residents of Saskatchewan.

[3] Ms. Grandel attended protests related to COVID-19 public health measures nearly every Saturday from January 2021 through July 2021. Police charged her for her alleged participation in each of these protests. She received nine summonses for the outdoor protests that she attended that had more than 10 persons in attendance. Ms. Grandel believes that the Outdoor Gathering Restrictions were being used to target her and her fellow protestors on the basis of their views, contrary to the fundamental principle of the Rule of Law.

[4] Mr. Mills is a resident of Saskatoon with 30 years' of experience in mechanical construction. He is certified in mask fit testing and trained in supplied air breathing systems. Motivated by his concern with the negative effects of improper mask wearing, unknown to the public, as well as the negative effects of limited exemptions to mask requirements available under the PHOs on people who cannot wear a mask due to psychological or physical health issues, he participated in peaceful outdoor protests against restrictions imposed by the PHOs, including the mandatory wearing of masks.

[5] Mr. Mills attended approximately five protests between December 2020 and May 2021.

[6] Ms. Grandel and Mr. Mills are two of a number of other Saskatchewan residents who have been issued summonses for exceeding the Outdoor Gathering Restrictions while gathering to protest COVID-19 related government restrictions.

[7] The remedies sought by the applicants are as outlined in the applicants' brief at para. 127:

> a. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* [Schedule B to the *Canada Act 1982* (UK), 1982, c 11] that the Outdoor Gathering Restrictions, in restricting the gathering of persons outdoors for peaceful, collective demonstrations or protests, unjustifiably infringe the freedoms of thought, opinion,

belief, expression, peaceful assembly and association as protected by sections 2(b), 2(c), and 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") respectively, and are therefore of no force or effect;

b. Further and in the alternative, a Declaration pursuant to section 24(1) of the *Charter* that the Outdoor Gathering Restrictions and their enforcement constitute unreasonable and unjustified infringements of the Applicants' freedoms of thought, belief, opinion and expression, peaceful assembly and association, as protected by sections 2(b), 2(c), and 2(d) of the *Charter* respectively; and

c. Costs.

[8] My role is not to settle scientific or medical debates presented by the experts. The question before me is whether the PHOs, which imposed the Outdoor Gathering Restrictions, violate any *Charter* freedoms and if so, whether the respondents, the Government of Saskatchewan and Dr. Saqib Shahab [Sask], have satisfied the burden in establishing that the PHOs in issue are reasonable and justified under s. 1 of the *Charter*.

B. PRELIMINARY ISSUES

[9] There are two preliminary issues:

1) Should the applicants' application to strike the affidavit evidence of Christine Rathwell [Rathwell Affidavit] be allowed?

2) Should Sask's application to strike the affidavit evidence of Dr. Thomas Warren [Warren Affidavit] be allowed?

1. Should the applicants' application to strike the Rathwell Affidavit be allowed?

[10] The applicants brought an application to strike the affidavit evidence of Christine Rathwell in its entirety on the basis that the evidence is not within the personal knowledge of the affiant and is scandalous in nature.

[11] Christine Rathwell is an employee of the Ministry of Health. The Rathwell Affidavit is comprised of numerous social media posts created by Ms. Grandel, as well as news articles containing information about Ms. Grandel.

[12] The applicants argued that information contained in the Rathwell Affidavit is not in the direct knowledge of the affiant herself contrary to Rule 13-20(1) of *The Queen's Bench Rules* for Saskatchewan. Moreover, it was argued that the Rathwell Affidavit relies on the information interpreted by third parties and is introduced for the purpose of the truth of its contents, amounting to hearsay evidence, contrary to Rule 13-30(4).

[13] The applicants rely on *Kish v Facebook Canada Ltd.*, 2021 SKQB 198 at para 49 [*Kish*], where the Court followed *Thorpe v Honda Canada. Inc.*, 2010 SKQB 39, 352 Sask R 78:

> [49] Just as in *Thorpe*; it is apparent that Ms. Kish, although she has sworn that she has personal knowledge of the facts, has not provided a basis for the belief or anything to suggest that the information in all the exhibits is true, accurate, reliable and unaltered. The grounds for such information and belief must be adequately disclosed and the information reliable: *Thorpe* at para 27.

[14] As well, the applicants rely on the decision of the Court in *Kish* at paras 50-55 where the media exhibits were inadmissible pursuant to Rule 13-30 of *The Queen's Bench Rules* on the grounds that the exhibits lacked verification for reliability and the failure of the affiant to state the grounds for their belief for each of the exhibits.

[15] I find Sask's argument more compelling in that the contents of the Rathwell Affidavit are within the affiant's knowledge. According to *Kamtech Services Inc. v Cargill Canada Ltd.*, 2010 SKQB 231 at para 15:

> [15] Care must be taken in the use and application of the phrase, "bald assertion". It will frequently happen that a witness or an affiant

> personally knows something. The knowledge may have been acquired through observing, hearing, feeling or examining. Such an individual is entitled to state what he saw, heard, felt, examined or learned as a result of the examination.

[16] Ms. Rathwell spoke to her review of and the process she undertook to review Ms. Grandel's social media posts and media reports, which she presented without embellishment. Sask does not submit the social media for the truth of their contents, but rather to establish that they were made and apparently believed by Ms. Grandel. With respect to the media reports, Sask purports that they contain statements that "permit an inference as to the speaker's state of mind", and therefore "are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred" (*R v Millard*, 2017 ONSC 5701 at para 13).

[17] The applicants argued that the contents of the Rathwell Affidavit are scandalous and have no probative value.

[18] In *Gurniak v Saskatchewan Government Insurance*, 2017 SKQB 199 at para 12, Smith J. stated:

> 12 The defendant's brief succinctly addresses the appropriate rules at paragraphs 5 through 10. The brief provides: …
> …
>
> > 10. A pleading which pleads argument or, expressions of opinion, or conclusions are objectionable on the basis that they are scandalous, frivolous, or vexatious. In *Rebillard v. Manitoba (Attorney General)*, 2014 MBQB 181, 2014 CarswellMan 574 (Man. Q.B.), Edmond J. stated at paragraph[s] 30 and 31:
> >
> > > [30] In *Bellan v. Curtis et al.*, 2007 MBQB 221 …, 219 Man. R. (2d) 175 at para. 37, the court considered the meaning of "scandalous", "frivolous" and "vexatious" in light of Queen's Bench Rule 25.11 as follows:
> > >
> > > > [37] Queen's Bench Rule 25.11 allows a court to strike a pleading that is "scandalous, frivolous or vexatious". Epstein, J., dealt with the meaning of "scandalous, frivolous or vexatious" in *George Estate v. Harris et al.*, [2000] O.T.C.

> Uned. 404 (Sup. Ct.); [2000] O.J. No. 1762. At para. 20, he stated:
>
> "The next step is to consider the meaning of 'scandalous', 'frivolous' or 'vexatious'. There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious. In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters, will be rejected in their entirety."
>
> [31] The plaintiff's claim is replete with conclusions, expressions of opinion, and evidence. Therefore, the statement of claim offends the rules of pleading and ought to be struck out pursuant to Queen's Bench Rule 25.11(b)." (underlining added) [Emphasis added by defence counsel]

[19] A matter will be struck out of an affidavit if it is both irrelevant and scandalous (*R v Bank of Nova Scotia* (1983), 24 Sask R 312 (QB) at paras 11-15; *Goodtrack v Rural Municipality of Waverly No. 44*, 2012 SKQB 413 at para 20, 408 Sask R 36, as cited in *CIBC Mortgages Inc. v Kjarsgaard*, 2015 SKQB 411 at para 5). I agree with Saskatchewan's position that the social media posts – inflammatory as they may be – were not created by Ms. Rathwell, but rather by Ms. Grandel. Moreover, as Sask outlines in their brief at para. 60, the posts are relevant to the analysis of the substantive issues as the Rathwell Affidavit shows:

> (a) That there are good reasons to suspect Ms. Grandel would not be (and was not) compliant with public health guidance at outdoor gatherings; and

(b) That there were other methods and mediums of expression that Ms. Grandel was able to avail herself of, in lieu of outdoor gatherings.

[20] Lastly, the applicants argued that the Rathwell Affidavit should be struck on the basis that it failed to provide the expiry date of the Commissioner's power to commission contrary to s. 5(2)(b) of *The Commissioners For Oaths Act, 2012*, SS 2012, c C-16.0001. I find that this is a minor technical error and therefore it does not impact the content of the affidavit. The affidavit is still proper save and except that detail.

[21] Given these reasons, I find that the contents of the Rathwell Affidavit are relevant and not scandalous and therefore should be allowed but given limited weight aside from the two assertions above.

2. Should Sask's application to strike the Warren Affidavit be allowed?

[22] Sask seeks to strike the Warren Affidavit based on the submission that Dr. Warren is not qualified to provide an expert opinion on matters of public health.

[23] The Warren Affidavit contains evidence to support Dr. Warren's assertion that "[t]he risk of outdoor transmission of SARS-CoV-2 at outdoor protests is negligible, particularly when physical distancing is maintained" (Warren Affidavit at 2, at para 4). Dr. Warren examines the evidence for outdoor transmission of other respiratory tract infections such as tuberculosis and influenza as well as SARS-CoV-2.

[24] Dr. Warren is an infectious disease consultant and medical microbiologist. He admits that he does not have any expertise or experience in public health or preventative medicine. It is evident that he has expertise but not necessarily in the area that he is opining on. For example, he does not have a residency or fellowship in public health or preventative medicine. Moreover, his current role as an infectious disease consultant, or in any previous position, did not involve monitoring and

assessing the health needs of a population; public health advice for governments or other public bodies; a leadership or management role on matters related to public health or in any public health capacity during the outbreak of any previous epidemic or pandemic; and planning, implementing, or evaluating programs and policies to promote public health.

[25] The Court in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 at para 23, [2015] 2 SCR 182, set out four threshold requirements of admissibility of evidence: relevance, necessity, absence of an exclusionary rule and a qualified expert. Sask submits that the evidence tendered by Dr. Warren in his affidavit fails the fourth stage of the threshold inquiry.

[26] The crux of this application pertains to whether the public health measures adopted by Sask were a proportionate response to the COVID-19 pandemic. This calls for expertise in public health.

[27] However, I am inclined to permit the Warren Affidavit excluding the public health purview. I will limit the ambit of the Warren Affidavit to include evidence on the transmission of SARS-CoV-2 but not within the context of public health.

C. BACKGROUND

1. The Public Health Crisis

[28] To answer the questions before me, it is important to canvass the gravity of the impact COVID-19 had on communities globally and more locally in Saskatchewan. Understanding the nature of the virus and its characteristics informs us that the world was dealing with a novel virus that we knew very little about. As this virus evolved, the accompanying threat to public health presented complex challenges for public health officials and government bodies.

[29] Consequently, Saskatchewan, similar to other provinces across Canada, was required to promptly adopt effective intervention and to introduce measures to reduce the risk of COVID-19 transmission.

[30] I rely on the materials presented to the Court to illustrate the characteristics of the COVID-19 virus and the effects of the COVID-19 pandemic.

a. The Nature of the COVID-19 Virus

[31] COVID-19 is the disease caused by a new coronavirus called SARS-CoV-2. The World Health Organization [WHO] first learned of this novel virus on December 31, 2019, following reports of a cluster of atypical pneumonia cases in Wuhan, People's Republic of China. On March 11, 2020, WHO, in assessing the severity and the worldwide spread of COVID-19, characterized it as a "pandemic". A WHO report shows that as of October 22, 2021, there were 242,348,657 cases confirmed globally and 4,927,723 deaths caused by COVID-19. As of the same date, in Saskatchewan, there had been 75,842 people diagnosed with COVID-19 and 812 deaths related to the disease. Cumulatively, 4.5% of all polymerase chain reaction PCR-confirmed COVID-19 cases in Saskatchewan have required hospitalization, and 1.1% PCR-confirmed COVID-19 patients have resulted in death.

[32] Experts for both parties agree that COVID-19 is a communicable disease and capable of exponential growth, which means that the number of cases grows by a multiplication factor rather than just addition. In other words, there may be one case one day that may lead to two cases, four cases, and sixteen, etc.

[33] Transmission of an infectious disease like COVID-19 results from the interactions between agent (SARS-CoV-2), its host (people infected or susceptible to infection), and the environment that convenes the host and agent. The environment

includes the physical characteristics of a space, which takes into account the size, layout, and ventilation, and the interaction amongst people within that space, which considers the density, duration, and nature of activities.

[34] SARS-CoV-2 is transmitted person to person through respiratory droplets and aerosols from an infected person. This can occur when a person coughs, talks, sneezes, shouts, or sings, and the droplets are inhaled or come into direct contact with mucous membranes in the mouth, nose, or eyes. It is uncontroverted fact that transmission is more likely to occur in indoor spaces as compared to outdoor settings, all other factors being considered. Outdoor transmission has been associated with gatherings that facilitate close interactions, take place over an extended duration, or occur in a mixed indoor-outdoor setting. Although outdoor transmission of SARS-CoV-2 at outdoor gathering is negligible, particularly when physical distancing is maintained, the risk of transmission, albeit small, is present.

[35] Signs and symptoms of COVID-19 differ from person to person. Symptoms could include fever, cough, difficulty breathing, fatigue, loss of taste or smell, headache, abdominal pain, diarrhea or vomiting. Symptoms can persist for months following acute COVID-19, and the long-term effects of COVID-19 are not completely known. COVID-19 causes more severe symptoms, including death, in people with pre-existing medical conditions and in people over 60 years of age as people with these risk factors are more likely to be hospitalized and more likely to be admitted to intensive care units [ICUs]. That said, hospitalizations and deaths have been reported in Saskatchewan in all age groups. The virus can be spread by people who are pre-symptomatic, that is, have not yet developed symptoms, or asymptomatic, that is, never develop symptoms.

[36] SARS-CoV-2 mutates over time. As of August 24, 2021, the WHO had designated the following Variants of Concern [VOCs]: Alpha (B.1.1.7), Beta (B.1.351), Gamma (P.1), and Delta (B.1.617.2). These VOCs have higher transmissibility and cause more serious illness than the previously dominant strains. By late 2020, these had been reported globally and detected in Canada and Saskatchewan.

[37] Effective use of masks has been found to reduce the rate of infections and severe outcomes of COVID-19 in combination with other mitigation strategies that include hand hygiene and physical distancing. As there is no natural immunity to the disease in the population when it arrives, the development and administration of vaccines against SARS-CoV-2 has provided additional effective tools against COVID-19. Since December 2020, regulatory bodies around the world, including Health Canada, have authorized the use of newly developed vaccines.

b. COVID-19 in Saskatchewan

[38] The first presumptive case of COVID-19 in Saskatchewan was reported publicly on March 12, 2020. Dr. Julie Kryzanowski, the Deputy Chief Medical Health Officer with the Saskatchewan Ministry of Health, deposed that between January 8, 2020 to November 7, 2021, an epidemic curve of the COVID-19 pandemic can be described by four phases.

> The first phase of the COVID-19 pandemic in Saskatchewan was characterized by peaks due to travel and local outbreaks, specifically:
>
> (a) The first peak of the COVID-19 pandemic occurred about three weeks after the first cases of COVID-19 were reported in Saskatchewan. This peak was largely due to travel-associated cases.
>
> (b) The second peak was observed in the week of May 1, 2020. This surge in cases was likely due to outbreaks in acute and long-term care facilities in North and Far North zones. Also, persistent low-level incidence was likely due to community transmission.

(c) A smaller third peak occurred in the middle of June 2020.

(d) A fourth peak was associated mostly with outbreaks in communities in South and Central zones between the middle and end of July 2020.

Increased community transmission started in September 2020 leading into a second phase of more widespread growth of new cases, specifically:

(a) A peak in November 2020 driven by community transmission in the Saskatoon, Far North, and North zones, followed by a slight decline of new cases around the end of 2020.

(b) The number of new cases increased in early January leading to a peak in mid-January 2021 followed by slight decline through February and early March 2021.

(c) From mid-March to mid-April 2021, the numbers of new cases increased in the Regina and South-West zones driven by the emergence of VOCs in community transmission.

From mid-April to mid-August 2021, average daily numbers of new cases were lower, reflecting a third phase of slower growth of new cases.

From mid-August to early October 2021, numbers of new cases increased, reflecting a fourth phase of accelerated growth.

(Kryzanowski Affidavit at paras. 31-34, Exhibit 1 of Vol. I at R-0007 and R-0008)

2. The PHOs in Issue

[39] The PHOs challenged are no longer in effect.

[40] I will provide a summary of COVID-19 restrictions in Saskatchewan in a chronological order, which includes factors considered by Sask to determine which measures should be in place at which times during the pandemic. Then, I will discuss the PHOs that are in issue.

a. Summary of COVID-19 Restrictions in Saskatchewan

[41] On March 18, 2020, the Government of Saskatchewan declared a state of emergency in response to the COVID-19 public health emergency, pursuant to s. 18 of *The Emergency Planning Act*, SS 1989-90, c E-8.1. The following orders were made to all persons in the Province of Saskatchewan:

> (a) all persons are required to comply with any orders made by the Minister of Health pursuant to *The Public Act, 1994*, to the extent that the order does not conflict with this order or any other order pursuant to section 18 of *The Emergency Planning Act*;
>
> (b) all persons are required to comply with any orders issued by the Office of the Chief Medical Health Officer, to the extent that the order does not conflict with this order or any other order pursuant to section 18 of *The Emergency Planning Act*;
>
> (c) all persons are required to comply with any direction issued by the Saskatchewan Public Safety Agency in accordance with its powers and duties under *The Emergency Planning Act* and *The Saskatchewan Public Safety Agency Act* [SS 2019, c S-32.4], to the extent that the directive or order does not conflict with this order or any other order pursuant to section 18 of *The Emergency Planning Act*;
>
> (d) The Royal Canadian Mounted Police and all police services are authorized to take any reasonable action, including the power of arrest, to enforce this order, any other order pursuant to section 18 of *The Emergency Planning Act*, or any order pursuant to *The Public Health Act, 1994*.

[42] At no point between March 18, 2020 and July 11, 2021 were any gathering limits imposed by *The Emergency Planning Act*. Rather, gathering limits were imposed pursuant to *The Public Health Act, 1994*, SS 1994, c P-37.1 [*Act*] and *The Disease Control Regulations*, RRS c P-37.1 Reg 11 [*Regulations*]. Dr. Shahab authorized the issuance of a variety of orders, referred to as "public health orders", pursuant to the *Act* and the *Regulations*. On March 19, 2020, the first PHO related to COVID-19 came into force.

[43] In April 2020, COVID-19 was designated a "category I" communicable disease pursuant to the *Regulations*, rendering it subject to reporting and tracking obligations common to all major communicable diseases. Additionally, in December 2020, new sections were added to the *Regulations* to more explicitly address the Minister's powers to respond to COVID-19:

> **25.2** …
>
> **(2)** If, based on the opinion of the chief medical health officer that the increased rate of infection or the expectation of an increased risk of infection from SARS-CoV-2 is likely to cause a serious public health threat, the minister determines that it is in the public interest to do so, the minister may order that any or all of the measures set out in subsection (3) are to be taken for the purposes of preventing, reducing and controlling the transmission of SARS-CoV-2.
>
> **…**

[44] The size of gatherings was contemplated in ss. 25.2(3)(b) of the *Regulations*. Pursuant to s. 2-34 of *The Legislation Act*, SS 2019, c L-10.2, the Minister's order-making power was conferred on Dr. Shahab to make orders under s. 45 of the *Act* and s. 25.2(3) of the *Regulations* on behalf of the Minister. According to s. 61(a) of the *Act*, an individual who contravenes any provision of this *Act* or a regulation, bylaw or order made pursuant to this *Act* is subject to monetary fines.

[45] Section 25.2 of the *Regulations* expired on May 31, 2022 and was repealed after the final extension pursuant to *The Disease Control (Vaccination Programs) Amendment Regulations, 2021*, Sask Reg 118/2021, s 4.

[46] The PHOs contained measures and restrictions in hopes of mitigating the transmission of COVID-19 and were subject to regular updates to respond to current circumstances, such as regional transmission and healthcare needs.

[47] In addition to the PHOs, Sask also created and promulgated the *Re-Open Saskatchewan Plan: A plan to re-open the provincial economy* [ROSK] in an effort to supplement the PHOs with specific and detailed guidance for particular industries, businesses, and organizations. For example, as the applicants note in their brief at para. 31, ROSK permitted the following indoor gatherings while the Outdoor Gathering Restrictions were in place:

> (a) Personal services (hairdressers, barbers, massage therapy, acupuncture, tattooing and others) at 50 percent of fire-code capacity;
>
> (b) 30 people for event venues such as a [*sic*] arenas, museums, theatres and places of worship;
>
> (c) 50 percent capacity for retail services, 25 percent capacity for large retailers (restrictions that did not come into effect until December 25, 2020);
>
> (d) Attendance at a restaurant (four people allowed per table); and
>
> (e) Use of a gym.

[48] Section 25.1 of the *Regulations*, which authorized the creation and enforcement of the ROSK was repealed on September 1, 2021.

[49] Pursuant to the terms of each PHO, the general indoor or outdoor gathering limits of each PHO were inapplicable to a given facility or gathering where ROSK prescribed a more specific gathering limit. ROSK also imposed extensive public health measures for each facility or gathering it governed. These facilities or gatherings were subject to mandatory compliance of the public health measures imposed by ROSK.

b. Outdoor Gathering Restrictions

[50] At no point did the PHOs or ROSK create a specific gathering limit or impose specific health and safety requirements for outdoor protests. Rather, the

prevailing outdoor gathering limits on all unstructured outdoor gatherings in the PHOs applied to outdoor protests.

[51] The outdoor gathering limits in the PHOs issued by Dr. Shahab have changed several times:

Order	Coming into force	Outdoor gathering limit
March 17, 2020	March 17, 2020	50 people, if any of the attendees had travelled internationally in the last 14 days.
March 26, 2020	March 26, 2020	10 people
June 7, 2020	June 8, 2020	30 people
December 14, 2020	December 17, 2020	10 people
May 28, 2021	May 30, 2021	150 people
July 11, 2021	July 11, 2021	All previous limits rescinded.

(Kryzanowski affidavit at para. 47, Exhibit 1 of Vol. I at R-0012)

[52] As indicated in the chart, the last PHO with a gathering limit expired on July 11, 2021. However, the Outdoor Gathering Restrictions at issue concern those PHOs that allowed an outdoor gathering limit of 10 persons or less, between December 17, 2020 and May 30, 2021. Effective May 30, 2021, the limit of outdoor gatherings was raised to 150 persons and by July 11, 2021, all previous gathering limits were rescinded.

[53] Until COVID-19 vaccines were approved for use and widely available in Canada, other public health measures were the only available interventions to prevent or reduce the spread of the virus. Public health measures are interventions to prevent or limit the spread of the virus that include, but are not limited to:

> (a) Personal protective measures (e.g. vaccination, mask wearing, hand hygiene;

> (b) Environmental measures. For example, cleaning and disinfection of surfaces, ventilation;
>
> (c) Case investigation and management measures. For example, contact tracing, isolation, and quarantine;
>
> (d) Physical distancing measures. For example, gathering size and capacity limits; and
>
> (e) Movement control measures. For example, symptom screening, travel restrictions.

(Kryzanowski affidavit at para. 20, Exhibit 1 of Vol. I at R-0005)

[54] Limits on gathering sizes were an important public health measure as non-pharmaceutical measures. This measure was expected to help limit the spread of COVID-19, minimize the number of people with severe disease, and reduce the risk of overburdening the healthcare system. Sask relied on the following non-exhaustive factors associated with gatherings, including outdoor gatherings:

> First, gatherings that bring together members of more than one household contribute to the spread of virus among households. As noted above, the SAR [secondary attack rates] among household members is high, meaning that a person who becomes infected at a gathering is very likely to infect susceptible members of their household, even if those members did not attend the same gathering. Those household members may then infect their other contacts.
>
> Second, even small amounts of transmission at gatherings can have a significant impact on the overall spread of the virus across the province. While each individual gathering may result in a relatively small risk of additional cases, the cumulative impact of many such gatherings can result in a significant increase in transmission across the province.
>
> Third, the larger the gathering, the greater the likelihood that there will be individuals in that gathering who have COVID-19 and will transmit the virus to others.
>
> Fourth, limits on gathering size must be assessed within the context of the number of COVID-19 cases in the general population. The risk of transmission at a gathering is related to the likelihood that people who are present at a gathering will have COVID-19, which increases as the prevalence of COVID-19 in the general population increases.

> Fifth, the increase in the number of COVID-19 cases caused by VOCs further increased the risk of transmission, including the risk of transmission at gatherings. As noted above, the VOCs reported to be present in Saskatchewan are associated with increased transmissibility of COVID-19 and some are associated with increased disease severity. As the proportion of VOCs increases, so too does the risk of transmission, particularly when there is already a high number of COVID-19 cases in the general population.
>
> Sixth, when assessing the overall risk of COVID-19 transmission, it is important to consider not only the risk of transmission at the gathering itself, but also the risks of activities that may be connected to, or associated with, the gathering. For example, people may acquire or spread COVID-19 when they travel to and from gatherings. People may use a variety of travel methods, including public transportation where individuals may be in close in [*sic*] contact with each other or carpooling in a small, enclosed vehicle, possibly without masks.
>
> In addition, people may travel to a gathering from a variety of different communities, which risks spreading COVID-19 from one community to another. The larger the gathering, the more people that will travel to that gathering and the greater the risk that the gathering will contribute to the overall spread of COVID-19 across the province.

(Kryzanowski affidavit at paras. 51-57, Exhibit 1 of Vol. I at R-0013 and R-0014)

c. The Specific PHOs in Question

[55] I rely on uncontroverted facts outlined in the affidavit of Dr. Kryzanowski to describe the state of the Province of Saskatchewan at the time the PHOs containing the Outdoor Gathering Restrictions were introduced.

[56] In December 2020, the healthcare system was overwhelmed by a sudden increase in patients requiring care, many being admitted to the ICUs. This was described as the second “phase” of the pandemic.

[57] In January 2021, the continuing and escalating threat of COVID-19 in Saskatchewan was evidenced by the province having the highest case rate in Canada, at 143/100,000. The COVID-19 related mortality rate during the months of December

2020 and January 2021 was also the highest the province had experienced since the beginning of the pandemic, a total of 238 deaths occurring within those two months. Other surveillance monitoring indicators including the test positivity rate, effective reproductive rate, outbreaks and hospitalizations were also high. Additionally, it was evident that the risk of SARS-CoV-2 transmission in communities existed throughout the province. Modeling from December 2020 and January 2021 predicted that Canada could remain on a rapid growth trajectory, which indicated a stronger response, through a combination of measures, in order to prevent severe illness and death. The emergence of the more highly contagious VOC added to the growing risk of uncontrolled community transmission. Between November 8, 2020 and January 24, 2021, weekly records for deaths due to COVID-19 were broken ten times over in thirteen weeks.

[58] With minor exceptions, all monitoring indicators showed concerning trends. The virus' effective reproduction number (R_t) ranged between 1.5 and 1.9, indicating exponential growth. Test positivity ranged between 6.9% and 11.0%, nearly double the target of less than 5%, indicating a high proportion of undiagnosed positive cases.

[59] Vaccination remained largely unavailable and no anti-viral treatments were available.

[60] Most of the transmission was known to occur in indoor and crowded settings, and the research regarding outdoor transmission was limited. However, without restrictions to private and public gatherings, during periods of high community transmission and high incidence of COVID-19 cases, there was greater probability that people may attend gatherings while they are infectious, regardless of the presence of symptoms.

[61] The above-noted factors contributed to the risk that even small gatherings indoors or outdoors would have increased the spread of COVID-19 in Saskatchewan when the prevalence of COVID-19 (particularly VOCs) was high. Limits on gathering sizes helped to reduce the risk of overall COVID-19 transmission across Saskatchewan, even if any particular gathering might not necessarily have resulted in transmission.

[62] A holistic, multi-layered approach was introduced to reduce the risk of COVID-19 transmission. Individual and population level measures – including gathering restrictions – were implemented.

[63] The Outdoor Gathering Restrictions remained in force until May 28, 2021, when it was repealed as part of Step 1 of the *Re-Opening Roadmap*, which wound down other public health measures in response to thresholds in population-wide vaccination update. The PHOs had their intended effect. The infection rate plateaued and fell slowly over the spring, fueled by a surge in VOCs, particularly in the Regina area.

D. ISSUES

[64] This judgment will deal with the following substantive issues:

1. Did the PHOs violate the freedoms of thought, belief, opinion and expression, peaceful assembly, and association protected by ss. 2(b), 2(c), and 2(d) of the *Charter*?
2. Has Sask provided sufficient evidence to demonstrably justify its restrictions of outdoor gatherings, including protests, as reasonable in a free and democratic society?

E. STANDARD OF REVIEW

[65] Sask purports that the proper standard of review is reasonableness governed by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, informed by *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], in cases where the *Charter* is engaged. The Court in *Beaudoin v British Columbia*, 2021 BCSC 512 at para 216, [2021] 10 WWR 501 [*Beaudoin*], stated:

> [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.

[66] The PHOs, in and of themselves, are not enabling statute. Rather, they are an administrative decision made through a delegation of discretionary decision-making authority under the *Act*. Since the PHOs are a discretionary administrative decision of "general application", a clear-cut decision cannot be made with respect to the framework to be applied.

[67] In *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 40, [2015] 1 SCR 613, Abella J. explained the "analytical harmony" between the proportionality analyses required by the *Oakes*, [1986] 1 SCR 103 [*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 *R. v. Oakes*, [1986] 1 S.C.R. 103, 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 *Oakes* test: *Doré*, at para. 5.

[68] Given that both the *Oakes* and *Doré* tests work the "same justificatory muscles: balance and proportionality" (*Doré* at para 5), I conclude that either test should lead to the same substantive outcome regarding the constitutional challenges. Nevertheless, I will apply the *Oakes* test pursuant to *Oakes*, with correctness being the standard of review. If the review satisfies the *Oakes* test it should also satisfy *Doré* where the standard is "reasonableness".

[69] The court in *Oakes* at 139 noted:

> 70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".
>
> [Emphasis added in the original]

[70] In summary, there are four criteria to be satisfied by the PHOs that qualify them as a reasonable limit that can be demonstrably justified in a free and democratic society:

(1) Sufficiently important objective: the PHOs must pursue an objective that is sufficiently important to justify limiting a *Charter* right;

(2) Rational connection: the PHOs must be rationally connected to the objective;

(3) Minimal impairment: the PHOs must impair the right no more than is necessary; and

(4) Proportionate effect: the PHOs must not have a disproportionately severe effect on the persons to whom it applies.

[71] I will discuss each stage of the *Oakes* test in detail.

F. ANALYSIS

1. Did the PHOs violate the freedoms of thought, belief, opinion and expression, peaceful assembly, and associated protected by ss. 2(b), 2(c), and 2(d) of the *Charter*?

[72] Before embarking on the *Oakes* analysis, I must determine whether there was a violation of any *Charter* rights.

a. Did the PHOs violate s. 2(b) of the *Charter*?

[73] Section 2(b) of the *Charter* reads as follows:

> 2. Everyone has the following fundamental freedoms: … *(b)* freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; …

[74] Sask concedes that the PHOs violate s. 2(b) of the *Charter*.

[75] The test in identifying s. 2(b) in *Irwin Toy Ltd. v Québec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*], is most recently restated in *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2 at paras 33 and 38, [2011] 1 SCR 19:

> [33] In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, Dickson C.J. and Lamer and Wilson JJ. proposed a

> two-step analysis for determining whether a given expressive activity is protected by the *Charter*. The court must first ask whether the activity falls within a sphere protected by freedom of expression, and if the answer is yes, it must then inquire into the purpose or effect of the government action in issue so as to determine whether freedom of expression has been restricted (pp. 967 and 971).
>
> …
>
> [38] In sum, to determine whether an expressive activity is protected by the *Charter*, we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(*b*) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action? (*Criminal Lawyers' Association*, at para. 32, summarizing the test developed in *City of Montréal*, at para. 56).

[76] Sask concedes that the applicants' protest activities meet the criteria in *Irwin Toy* in that the protests have expressive content and there is nothing to suggest the removal of the protection of this expression. Due to Sask's concession on s. 2(b) of the *Charter*, I will not engage the third stage of the *Irwin Toy* test as this alternate route to a *Charter* infringement is redundant.

b. Did the PHOs violate ss. 2(c) and 2(d) of the *Charter*

[77] Section 2(c) of the *Charter* protects the freedom of peaceful assembly whereas s. 2(d) guarantees freedom of association.

[78] Sask argues that given the concession on s. 2(b) of the *Charter*, ss. 2(c) and 2(d) do not require an independent analysis in this case. I agree with Sask, in the circumstances of this case, to have the interest protected in ss. 2(c) and 2(d) subsumed by the s. 2(b) analysis of the *Charter*.

[79] Moreover, this case is similar to recent COVID-19 related decisions. For example, the Court in *Ontario v Trinity Bible Chapel*, 2022 ONSC 1344 at para 115 [*Ontario Churches*], declined to conduct separate analyses under ss. 2(b), (c), and (d), but rather subsumed them under s. 2(a) analysis. In *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 at paras 212-213, [2022] 3 WWR 567, the Court stated that there is relatively little jurisprudence on interpreting s. 2(c) and that "[a]s the freedom of assembly can often be integral to freedom of expression, issues surrounding peaceful assembly are often subsumed under the freedom of expression and the infringement can be often resolved under s. 2(b)." The Court subsumed s. 2(c) into s. 2(b) analysis given Manitoba's concession to the *prima facie* violation of s. 2(b) in the specific context of protests. Section 2(d) was not pled in that case.

[80] Given that there is no established test for s. 2(c) analysis and so long as the freedom of expression analysis sufficiently accounts for the assemblage and associative rights engaged, I see no need to duplicate the analysis across multiple *Charter* rights as expressed in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 77, [2018] 2 SCR 293.

2. Has Sask provided sufficient evidence to demonstrably justify the PHOs under s. 1 of the *Charter*?

a. Context and Deference

[81] Section 1 of the *Charter* reads as follows:

> 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.

[82] Section 1 analysis calls for a highly context-sensitive analysis. Examining the context is central in determining whether deference is appropriate in the *Oakes* test

and where it is appropriate. The context will inform the level of deference incorporated at each stage of the s. 1 analysis, not at the outset (*M. v H.*, [1999] 2 SCR 3 at paras 80-81; *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at para 416).

[83] I agree with the Court in *Ontario Churches* at para 126 in that greater deference is owed where "public officials are dealing with a complex social problem, balancing the interests of competing groups, or seeking to protect a vulnerable segment of the population." Sask was charged with the task of protecting public health during an unprecedented public health emergency involving serious illness and death, which was disproportionately impacting the most vulnerable. As well, this task engaged the balancing act of curbing transmission of SARS-CoV-2 on one hand and managing the impact of COVID-19 on social and commercial activities all within the context of evolving knowledge about COVID-19 and newly emerging VOCs.

[84] Sask could not wait for scientific certainty in order to act in a situation where catastrophic loss of life was at risk. As such, I find the precautionary principle to be essential in this case. Dr. Khaketla's Report explains that "when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically" (Dr. Khaketla affidavit at 14, Exhibit B of Vol III at R-1372).

[85] I find that the enactment of the PHOs restricting outdoor gatherings was not politically driven as challenged by the applicants in argument. This is a government that, for the most part, have a proclivity to foster personal rights and freedoms. It is incongruous to conclude that the public health measures were politically fueled. In addition, other provinces had more stringent restrictions in outdoor gatherings, some allowed more. Accordingly, I am inclined to give more deference to Sask.

[86] With the benefit of hindsight to reflect on the public health measures enacted in the height of the pandemic, we can all see things which we would wish had been done differently or not at all. Even so, it is difficult to come to a consensus as to what the right balance is or should have been. Some feel the public health measures were too restrictive, whereas for others, they were lenient. Leaving aside the competing viewpoints, the essence of the analysis is to evaluate the public health measures at the time they were enacted without the retroactive lens through which we view the PHOs. I am guided by Pomerance J. in *Ontario Churches* at para 128:

> 128 … This mix of conflicting interests and perspectives, centered on a tangible threat to public health, is a textbook recipe for deferential review. As it was put by Joyal C.J. in *Gateway*, at para. 292, the court must "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."

[87] With that, I will turn to the integral elements of the *Oakes* test.

b. Was there a pressing and substantial objective to enact the PHOs?

[88] Sask asserts that the PHOs, including the Outdoor Gathering Restrictions, were enacted for the express purpose of "preventing, reducing and controlling the transmission of SARS-CoV-2" pursuant to s. 25.2(3) of the *Regulations*. The protection of Saskatchewan residents from a potentially fatal and novel virus amidst a pandemic of said virus is pressing and substantial. Given the context in December 2020 where Saskatchewan was in a dire state with respect to increasing deaths and ICU admissions related to COVID-19, it is difficult to argue the contrary.

[89] For these reasons I agree that there is a pressing and substantial objective to enact the Outdoor Gathering Restrictions.

c. Were the PHOs rationally connected to the objective?

[90] According to *Oakes* at 139, the measures adopted must not be "arbitrary, unfair or based on irrational considerations" and "must be carefully designed to achieve the objective in question". In order to show a rational connection, Sask must demonstrate a "causal connection between the infringement and the benefit sought on the basis of reason or logic. To put it another way, the government must show that the restriction on rights serves the intended purpose. This must be demonstrated on a balance of probabilities." (*RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 153 [*RJR-MacDonald*]).

[91] I accept Sask's position that COVID-19 is transmitted from person to person. Although the risk is lower in outdoor settings and as the applicants point out that Sask failed to identify a single transmission of SARS-CoV-2 that occurred at an outdoor protest, the risk of transmission remains. The logical nexus is reinforced by the type of activities that took place during unstructured outdoor gatherings, including at the protests the applicants attended, such as chanting, shouting, embracing, and carpooling. As well, the attitude of the protestors in their reluctance to disclose their attendance to contact tracers and to test for COVID-19 made it difficult to prove as a fact that transmission occurred at pandemic-related protests.

[92] Additionally, the applicants submit that restricting outdoor gatherings to 10 persons or less lacks rationality since Sask simultaneously permitted larger in-person gatherings in indoor settings with a higher transmission risk. Suffice to say, the restrictions pertaining to unstructured outdoor gatherings cannot be compared to in-person gatherings in indoor settings that were subject to mandatory compliance of public health measures under ROSK.

[93] Sask has demonstrated that "it is reasonable to suppose that the limit may further the goal, not that it will do so" (*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48, [2009] 2 SCR 567 [*Hutterian Brethren*]; *RJR-MacDonald* at para 153). Consequently, the Outdoor Gathering Restrictions were rationally connected to the objective of averting, diminishing, and managing the transmission of SARS-CoV-2.

d. Did the PHOs minimally impair the *Charter* freedoms they violate?

[94] The minimal impairment test is where deference comes into play in a significant manner. Courts are inclined to extend a healthy dose of deference to governments at this stage of the *Oakes* test. The question is whether, in pursuit of the objectives, the Outdoor Gathering Restrictions fall "within a range of reasonable alternatives" (*RJR-MacDonald* at para 160). In other words, are the Outdoor Gathering Restrictions proportionate in their overall impact in the context of public health measures in a pandemic.

[95] The test is a rigorous one in that the impugned measures must be "reasonably tailored to its objectives…having regard to the practical difficulties and conflicting tensions that must be taken into account" (*R v Sharpe*, 2001 SCC 2 at para 96, [2001] 1 SCR 45). Additionally, "in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure" (emphasis in the original) (*Hutterian Brethren* at para 55). In other words, minimal impairment "does not literally translate into the least intrusive choice imaginable" (*Ontario Churches* at para 139).

[96] As held in *Canada (Attorney General) v JTI-Macdonald Corp.*, 2007 SCC 30 at para 41, [2007] 2 SCR 610:

> 41 Deference may be appropriate in assessing whether the requirement of rational connection is made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.

Further, at para. 43, the Court noted:

> 43 … There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy*.

[97] The applicants' submission pertaining to this stage of the *Oakes* test relies heavily on the imposition of stricter numerical limits on outdoor gatherings, including outdoor protests, as compared to indoor events and activities. This is premised on the fact that Sask was knowledgeable about gathering outdoors being safer than indoor settings. As a result, the Outdoor Gathering Restrictions stand contrary to impairing the *Charter* rights "as little as possible" (*Irwin Toy* at para 79).

[98] In response, Sask presents four reasons why they disagree with the applicants' submission.

[99] First, the discrepancy in the limits between the two settings does not necessarily mean that the Outdoor Gathering Restrictions should have been higher. Sask did not have the luxury of debate in the context of a raging pandemic. They were

required to act promptly and effectively, applying the precautionary principle. Considering the overwhelming effect of the pandemic on Saskatchewan's population and healthcare system, the Outdoor Gathering Restrictions were within the range of reasonable alternatives.

[100] Second, the existence of ROSK allowed for outdoor gatherings to be unstructured whereas the indoor gatherings were subject to layered protocols and protections that were mandatory. Comparing the two types of gathering settings is outside the purview of "a comparison of comparables" (*Beaudoin* at para 229; *Ontario Churches* at para 153).

[101] Third, there were cogent reasons to have preferred a lower gathering limit as opposed to imposing ROSK-like protections on unstructured outdoor gatherings, particularly protests. Sask outlines these reasons at para. 141 of their brief:

> 141 …
>
> a) The Applicants, and others with them, failed to maintain mandatory social distancing or adopt even basic COVID-19 mitigation measures to offset their flagrant non-compliance with the Outdoor Gathering Limit. Non-compliance is a serious concern in COVID-19 public health regulation [*E.g. Ontario Churches*, at para 153; *Taylor*, at paras 472-475].
>
> b) This is borne out by other provinces' experiences with pandemic-related protests during this time. For instance, while Alberta might have exempted public protests from gathering limits, several injunction and contempt applications were required to address rally attendees' non-compliance with basic COVID-19 measures, such as masking, social distancing, and prohibitions on the service of food [See e.g. the injunctions addressed in the companion cases of *Alberta Health Services v Scott*, 2021 ABQB 490; *Alberta Health Services v Pawlowski*, 2021 ABQB 813; *Alberta Health Services v Johnston*, 2021 ABQB 508. See also *Canadian Civil Liberties Association v Nova Scotia (Attorney General)*, 2021 NSCA 65].
>
> c) The lack of structure at protests and other gatherings to which the Outdoor Gathering Limit applied is also serious concern. Unlike movie theatres, retail stores, or other indoor gatherings

> governed by the ROSK, there is no person or corporation who can be held accountable for misconduct, and no practical way for organizers to admit or exclude non-compliant attendees.
>
> d) In many facilities where the ROSK applied—particularly food distribution locations (*e.g.* grocery stores), public eating establishments (*e.g.* restaurants and bars), pools, hotels, and personal services (*e.g.* salons and tattoo parlors)—the facility is already regulated by public health [Each of which is licensed and regulated pursuant to *The Public Health Act, 1994*, particularly and respectively:
>
> > The Food Safety Regulations, RRS c P-37.1 Reg 12; *The Public Accommodation Regulations*, RRS c P-37.1 Reg 3, *The Swimming Pool Regulations*, 1999, RRS c P-37.1 Reg 7, and *The Health Hazard Regulations*, RRS c P-37.1 Reg 10. For the list of general categories of regulated businesses, see section 46(1)(l) of the Act]. These operators are generally both able and willing to comply with public health measures. This is not true of *ad hoc* or unstructured gatherings, including protests.
>
> e) Limiting the number of attendees at unstructured gatherings restricted the social mixing that could occur before and after such gatherings, including carpooling, set-up and take-down, and social visits, which could only partially be mitigated with controls at the event itself.

[102] Fourth, both primary and secondary transmission must be considered. Limiting outdoor gatherings could reasonably be expected to have indirect benefits on the rates of infection.

[103] Similar to the applicants in *Ontario Churches,* the applicants rely on evidence tendered by Dr. Warren in that risk of outdoor transmission is negligible at best. Operating on this basis, the Outdoor Gathering Restrictions they submitted were not minimally impairing. The Court in *Ontario Churches* did not see this as "a fair characterization of the evidence in this case" (*Ontario Churches* at para 149). I concur and find the same principle applies in this case.

[104] If all things were equal with participants in both settings fully adhering to the COVID-19 protocols and measures – physical distancing, absence of factors increasing risk of transmission – perhaps, it may be feasible to equate risk of outdoor transmission to risk in indoor settings. However, this is not the case. The applicants at outdoor protests did not adhere to the COVID-19 protocols such as physical distancing, testing for COVID-19 before and after attendance, registering participants. As well, they engaged in activities that increased the risk of transmission such as shouting or chanting, prolonged periods of contact, hugging, carpooling, travelling from different communities, and handing items back and forth.

[105] Similar to the experiences of Ontario as described in *Ontario Churches* at para 150, Sask:

> 150 … did not need to wait for definitive evidence on outdoor transmission before it imposed limits. At the time outdoor limits were imposed, the public health system was overburdened and approaching a breaking point. At times when community risk was elevated, the health care system was sufficiently fragile that even a small number of infections could have dire consequences. During those periods, even lower risk activities such as outdoor gatherings could increase pressure on the health care system.

[106] Given the rationale provided by Sask, coupled with the standard not being scientific certainty in relation to providing "proof" of transmission, I find the Outdoor Gathering Restrictions to be minimally impairing.

e. Did the PHOs proportionally balance their deleterious and salutary effects?

[107] The deleterious effects that emanate from the violation of the *Charter* must be proportionate to the salutary benefits that will result if its objective is achieved. This refers to the "impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good" (*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 122, [2015] 1 SCR 331).

[108] It was the applicants' position that Sask has failed to demonstrate that restricting outdoor protests led to reduced transmission as Sask was unable to point to a single transmission of SARS-CoV-2 at any outdoor protest that occurred in Saskatchewan. In addition, as noted at para. 111 of the applicants' brief, restricting a protest to 10 persons or less "can hardly be called a protest".

[109] Sask responded to this issue in that like all other activities during COVID-19, much collective action moved online during the pandemic. The Rathwell Affidavit speaks to how the applicants communicated, networked, and planned on online platforms. The applicants were able to express themselves online, communicate with each other online, and relay their opinions directly to government officials online. Granted, online gatherings are not the perfect substitute for in-person ones by any means, but the applicants did have alternative avenues available to express themselves.

[110] In addition, at no point was public protest prohibited. As long as there was physical distancing at protests, there was nothing hindering the applicants from organizing and participating in multiple outdoor gatherings of 10 persons or less, concurrently or consecutively.

[111] The applicants argued that the "jurisdictional scans" which compared Saskatchewan's gathering limits with those enacted in other provinces did not share the whole story as noted in the applicants' brief at para. 114:

> 114 [t]hese "jurisdictional scans" were particularly inaccurate or incomplete in representing other provinces' approach to outdoor protests. For example, the "jurisdictional scans" failed to note that BC had expressly exempted outdoor protests from its public health restrictions beginning on February 10, 2022 [Exhibit C, Kryzanowski Transcript, February 10, 2021 Gatherings and Events Order], or the fact that in March 2021, BC had consented to a Court order striking down its earlier prohibition on outdoor protests as of no force and effect [*Beaudoin* at para. 147]. The "jurisdictional scans" noted Alberta's prohibition on "outdoor social gatherings" [See

> Kryzanowski Affidavit, Exhibit P, R-1268] but did not consider that that restriction did not prohibit outdoor public protests.

[112] In a different perspective, Sask did not opt for the most draconian measure to combat the pandemic, such as complete lockdowns for extended periods. The measures as reflected in the PHOs were calibrated, reviewed, and readjusted on a regular basis and were informed by statistical data on VOCs, rates of vaccination, infection, hospitalization, and ICU capacity.

[113] In any case, the outcome bears some proof that the restrictions may have helped. It certainly would have been preferable to have information on the impact of each public health measure. However, that is not the case and we may never know the true impact of each public health measure.

[114] With regard to the final stage of the *Oakes* test, I find that the salutary effects of the Outdoor Gathering Restrictions outweighed the deleterious effects, and therefore Sask's decision to impose limits on outdoor gatherings is proportional.

[115] In a state of public health emergency wreaking severe havoc on the health of Saskatchewan residents, Sask was burdened with the immense task of balancing multiple interests.

[116] I find that Sask's PHOs which imposed the Outdoor Gathering Restrictions violated the *Charter* right of freedom of expression as articulated in s. 2(b). I also find that Sask has met its burden to establish that the Outdoor Gathering Restrictions are reasonable, demonstrably justifiable in a free and democratic society and are therefore saved pursuant to s. 1 of the *Charter*.

G. CONCLUSION

[117] My answers to the substantial issues before me are as follows:

1. **Did the PHOs violate s. 2(b) of the *Charter*?**

   Yes.

2. **Did the PHOs violate ss. 2(c) and 2(d) of the *Charter*?**

   Sections 2(c) and 2(d) are subsumed into the analysis of section 2(b).

3. **Has Sask provided sufficient evidence to demonstrably justify the PHOs under s. 1 of the *Charter*?**

   Yes.

[118] For the foregoing reasons, I find that I must dismiss this application.

H. COSTS

[119] Given the fact that the applicants have raised reasonable issues for this review, I decline to award costs against them.

J.
D.B. KONKIN

DUPLICATE ORIGINAL

Form 10-3

(Rule 10-3)

COURT FILE NUMBER	QBG 395 of 2021
COURT OF QUEEN'S BENCH FOR SASKATCHEWAN	
JUDICIAL CENTRE	SASKATOON
PLAINTIFF(S)/ APPLICANT(S)	JASMIN GRANDEL and DARRELL MILLS
DEFENDANT(S) RESPONDENT(S)	THE GOVERNMENT OF SASKATCHEWAN and DR. SAQIB SHAHAB in his capacity as CHIEF MEDICAL HEALTH OFFICIER FOR THE PROVINCE OF SASKATCHEWAN

JUDGMENT

Before the Honourable Mr. Justice D.B. Konkin in chambers the 20th day of September 2022.

On the application of Marty Moore and Andre F. Memauri, lawyers on behalf of the Plaintiffs and on hearing Theodore J.C. Litowski, Laura M. Mazenc and Johnna M. Van Parys, lawyers on behalf of the Respondents and on reading all materials filed,

THE COURT ORDERS THAT:

1. The application is dismissed; and
2. There is no order as to costs.

ISSUED at Court of King's Bench Saskatoon Centre, Saskatchewan, this 26th day of October, 2022.

Court Seal

per: _____
(Local Registrar)

THIS ORDER consented to in its form and substance by the Applicants, Jasmin Grandel and Darrell Mills, this 25th day of October 2022.

JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS

Per: _____
Solicitors for the Applicant

[redacted]

THIS ORDER consented to in its form and substance by the Respondents, Government of Saskatchewan and Dr. Saqib Shahab, this 25th day of October, 2022.

MINISTRY OF JUSTICE AND ATTORNEY GENERAL CONSTITUTIONAL LAW

Per: _____
Solicitors for the Respondents

Court of Appeal for Saskatchewan
Docket: CACV4088

Citation: *Grandel v Government of Saskatchewan*, 2024 SKCA 53
Date: 2024-05-15

Between:

Jasmin Grandel and Darrell Mills

Appellants
(Applicants)

And

The Government of Saskatchewan and Dr. Saqib Shahab in his capacity as Chief Medical Health Officer for the Province of Saskatchewan

Respondents
(Respondents)

Before:	Caldwell, Tholl and Kalmakoff JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Mr. Justice Kalmakoff
In concurrence:	The Honourable Mr. Justice Caldwell The Honourable Mr. Justice Tholl
On appeal from:	2022 SKKB 209, Saskatoon
Appeal heard:	February 6, 2024
Counsel:	Andre Memauri for the Appellants Theodore Litowski, Noah Wernikowski and Laura Mazenc for the Respondents

Kalmakoff J.A.

I. INTRODUCTION

[1] As part of the efforts of the Government of Saskatchewan [the Government] to combat the COVID-19 pandemic, Dr. Saqib Shahab issued a number of public health orders [PHOs] in his capacity as the province's Chief Medical Health Officer. Among other things, the PHOs, including the one at issue in this appeal, contained provisions that restricted the number of people who could be present at outdoor gatherings.

[2] While the outdoor gathering restrictions were in effect, Jasmin Grandel and Darrell Mills [the appellants] attended outdoor demonstrations that had been organized to protest against other measures imposed under the PHOs, including the requirement that persons wear face coverings in certain indoor spaces. Between December 19, 2020, and May 15, 2021, the appellants were each issued summary offence tickets charging them with offences under *The Public Health Act, 1994*, SS 1994, c P-37.1 [*Act*], for violating the outdoor gathering restriction provisions of a PHO in connection with those demonstrations. Ms. Grandel, who played a prominent role in organizing and by speaking at the protests, was ticketed a total of eight times. Mr. Mills, who attended at five of the protests, was issued a single violation ticket.

[3] The appellants filed an originating application in which they sought, among other relief, a declaration that the outdoor gathering restrictions imposed under the PHOs were of no force and effect because they violated ss. 2(b), (c) and (d) of the *Charter of Rights and Freedoms*. A Court of King's Bench judge, sitting in Chambers, dismissed their application. He agreed that the outdoor gathering restrictions contained in the PHO the appellants had allegedly violated infringed their rights but found that the infringement was justified under s. 1 (*Grandel v Saskatchewan,* 2022 SKKB 209 [*Chambers Decision*]).

[4] The appellants appeal against the *Chambers Decision*. They say the Chambers judge erred in various ways, including by: (i) failing to grant them standing to challenge outdoor gathering restrictions imposed under PHOs other than the ones they were alleged to have violated; (ii) not striking an affidavit filed by the Government; (iii) dealing improperly with the evidence of an expert witness; (iv) treating the violations of ss. 2(b), (c), and (d) of the *Charter* as though they

were the violation of a single right rather than conducting a cumulative analysis; and (v) improperly conducting the analysis required under s. 1 of the *Charter*.

[5] I am not persuaded that the Chambers judge erred in any of these ways. I would dismiss the appeal. My reasons follow.

II. BACKGROUND

A. The statutory framework and the impugned PHOs

[6] In Saskatchewan, the management of communicable diseases is governed by the *Act* and *The Disease Control Regulations*, RRS c P-37.1, Reg 11 [*Regulations*]. At the relevant time, the *Act* and the *Regulations* authorized the Minister of Health or a designated public health officer to issue PHOs to decrease or eliminate the threat to public health caused by communicable diseases. In that vein, ss. 38 and 45 of the *Act* provided, in part, as follows:

> **38**(1) A designated public health officer may order a person to take or refrain from taking any action specified in the order that the designated public health officer considers necessary to decrease or eliminate a risk to health presented by a communicable disease.
>
> (2) Without limiting the generality of subsection (1), an order pursuant to subsection (1) may:
>
> …
>
> (d) require a person who is or who is probably infected to isolate himself or herself immediately and to remain in isolation from other persons;
>
> …
>
> (g) require a person to conduct himself or herself in a manner that will not expose another person to infection;
>
> …
>
> (k) require an infected person to desist from any occupation or activity that may spread the disease;
>
> …
>
> (m) require a person who is the subject of an order pursuant to this section to do anything that is reasonably necessary to give effect to that order.
>
> …
>
> **45**(1) The minister may make an order described in subsection (2) where the minister believes, on reasonable and probable grounds, that:
>
> (a) a communicable disease exists in Saskatchewan or that there is an immediate risk of an outbreak of a communicable disease in Saskatchewan;

(b) the communicable disease presents a risk to the health of many persons; and

(c) the requirements set out in the order are necessary to decrease or eliminate the risk to health presented by the communicable disease.

(2) An order pursuant to this section may:

(a) direct the closing of a public place;

(b) restrict travel to or from a specified area of Saskatchewan;

(c) prohibit public gatherings in a specified area of Saskatchewan;

(d) require any person who is not known to be protected against the communicable disease:

(i) to be immunized where the disease is one for which immunization is available; or

(ii) to be excluded from school until the danger of infection is past where the person is a pupil;

(e) establish temporary hospitals.

[7] In December of 2020, s. 25.2 of the *Regulations* was enacted. It vested the Minister of Health with the authority to take more specific measures to combat the spread of COVID-19, including: making orders requiring persons to wear face coverings, making orders limiting the size of gatherings, and making orders requiring businesses to take mitigating steps. In that regard, the relevant parts of s. 25.2 read as follows:

25.2(1) In this section:

(a) **'face covering'** means a medical or non-medical mask or other face covering that fully covers the nose, mouth and chin, but does not include a face shield or visor;

(b) **'SARS-CoV-2'** means severe acute respiratory syndrome coronavirus 2, the virus that causes COVID-19.

(2) If, based on the opinion of the chief medical health officer that the increased rate of infection or the expectation of an increased risk of infection from SARS-CoV-2 is likely to cause a serious public health threat, the minister determines that it is in the public interest to do so, the minister may order that any or all of the measures set out in subsection (3) are to be taken for the purposes of preventing, reducing and controlling the transmission of SARS-CoV-2.

(3) An order made pursuant to subsection (2) may impose all or any of the following measures that are set out in the guidelines or that the minister considers necessary for the purposes of the order:

(a) a requirement that persons wear a face covering in the manner set out in the order;

(b) a requirement to limit the size of gatherings in the manner set out in the order;

(c) a requirement that persons who own, operate or have control over indoor premises or areas:

> (i) advise persons entering those premises or areas of the applicable measures aimed at preventing, reducing and controlling the transmission of SARS-CoV-2; and
>
> (ii) ensure that the persons mentioned in subclause (i) take the measures mentioned in that subclause;
>
> (d) a requirement to implement screening measures, except testing, for persons entering or leaving a workplace or other premises that are open to the public in the manner set out in the order;
>
> (e) a requirement that businesses, corporations, institutions as defined in section 31.1 of the Act, owners and operators of facilities, associations and other organizations have a SARS-CoV-2 mitigation plan that is satisfactory to the minister;
>
> (f) a requirement that businesses, corporations, institutions as defined in section 31.1 of the Act, owners and operators of facilities, associations and other organizations operate in a manner that prevents, reduces, or control the spread of SARS-CoV-2;
>
> (g) a requirement that a type of equipment be used, a process be implemented, equipment be removed or equipment or processes be altered to prevent, reduce, or control the transmission of SARS-CoV-2 in the manner set out in the order.
>
> (4) The minister may, if the minister considers it necessary, make different orders pursuant to subsection (2) with respect to different areas of Saskatchewan.
>
> (5) Every person, business, institution, association and other organization to whom or to which an order made pursuant to subsection (2) is directed must comply with that order.

[8] As Chief Medical Health Officer for the Province of Saskatchewan, Dr. Shahab is a "designated public health officer" within the meaning of s. 38(1) of the *Act*. The Minister's order-making powers under s. 45 of the *Act* and s. 25.2(3) of the *Regulations* were also delegated to Dr. Shahab pursuant to s. 2-34(2)(a) of *The Legislation Act*, SS 2019, c L-10.2.

[9] In the early days of the pandemic, acting under the authority of s. 38 of the *Act*, Dr. Shahab issued PHOs that imposed limits on the number of persons who could be present at outdoor gatherings. From March 17, 2020, until March 26, 2020, the limit was 50 people, if any of the attendees had travelled internationally within the prior 14 days. From March 26, 2020, until June 8, 2020, the limit was 10 people and, from June 8, 2020, until December 17, 2020, the limit for outdoor gatherings was 30 people.

[10] The PHOs in place at the time relevant to the appellants' application were issued pursuant to s. 45 of the *Act* and s. 25.2 of the *Regulations*. Dr. Shahab issued the first 10-person gathering limit PHO [PHO-10] on December 14, 2020, it came into force on December 17, 2020, and it

prohibited outdoor private and public gatherings of more than 10 people, replacing a 30-person limit. The first PHO-10 was rescinded by another PHO-10, and successive PHOs maintained the 10-person gathering limit until May 30, 2021, when Dr. Shahab issued a PHO that increased the outdoor gathering limit to 150 persons.

[11] Germane to the circumstances at hand, s. 25.1 of the *Regulations*, which was also enacted in December of 2020, authorized the creation and enforcement of the *Re-Open Saskatchewan Plan* [*ROSK*], which supplemented the PHOs with specific guidance for industries, businesses and organizations. It read as follows:

> **25.1**(1) In this section and in section 25.2:
>
> (a) **'business'** means a person or association that carries on an enterprise or provides a service with the expectation of profit;
>
> (b) **'guidelines'** means the guidelines, as set out in the plan, as amended from time to time;
>
> (c) **'person'** includes partnership;
>
> (d) **'plan'** means *Re-Open Saskatchewan: A plan to re-open the provincial economy*, as published by the Government of Saskatchewan on April 23, 2020, as amended from time to time.
>
> (2) For the purposes of these regulations, the plan and the guidelines are adopted.
>
> (3) Every person, business, institution, association and other organization to whom or to which the plan and the guidelines apply must comply with the plan and the guidelines.

[12] The purpose of *ROSK* was to supplement the PHOs with specific and detailed guidance for particular industries, businesses and organizations. In that regard, the PHOs provided that the general indoor or outdoor gathering limits they imposed were inapplicable to any facility or gathering for which *ROSK* prescribed a more specific gathering limit. As examples, businesses that provided personal services, such as hairdressing, barbering, massage therapy, acupuncture treatment and tattooing, were permitted to have in attendance the number of persons that was 50 per cent of their respective fire-code capacities. Event venues, such as arenas, museums, theatres and places of worship, were limited to maximum gatherings of 30 people. Certain other retail stores were also limited to 50 per cent of their fire-code capacity, while large retailers were restricted to 25 per cent. *ROSK* also permitted people to dine in restaurants (with a limit of four people per table) and to attend gyms and fitness facilities. For all of these facilities, gatherings, organizations or businesses, however, *ROSK* also imposed specific and extensive public health measures that had to be complied with.

[13] Neither the PHOs nor *ROSK* specifically addressed public protests. Protests were broadly subject to the general gathering limits prescribed in the PHOs for all unstructured outdoor gatherings.

[14] Effective July 11, 2021, all limits on the number of persons who could gather outdoors in Saskatchewan were lifted. Section 25.1 of the *Regulations*, which, as noted, authorized the creation and enforcement of *ROSK*, was repealed on September 1, 2021.

B. The *Chambers Decision*

[15] As set out above, the appellants were both issued tickets for contravening the 10-person limit imposed by a PHO-10. The tickets resulted from their attendance at and participation in outdoor gatherings that had been organized primarily to protest provisions of PHOs that required the wearing of face coverings in schools, businesses and other public spaces.

[16] The appellants each had their own reasons for protesting the mandated wearing of face coverings. On her evidence, Ms. Grandel was concerned about what she viewed as a "lack of transparency and consistency" from the Government and the Saskatchewan Health Authority regarding the information on which they had based their decisions and about the "detrimental psychological, economic and sociological effects" of the PHOs. Mr. Mills, who described himself as being well-versed in the proper use and fitting of face coverings, based on his "30 years of experience in mechanical construction", stated that he was concerned about the "negative effects of improper mask-wearing" that the public may not know about. He also contended that the "limited exceptions provided [under the PHOs] puts a tremendous strain on people who cannot wear a mask due to emotional, psychological and physical health issues".

[17] In their originating application, the appellants asserted that outdoor gatherings, including the protests they attended, created a minimal risk for the transmission of COVID-19, and that the restrictions imposed under the PHOs were an unjustified infringement on their *Charter*-protected rights to freedom of expression (s. 2(b)); freedom of peaceful assembly (s. 2(c)); and freedom of association (s. 2(d)). They argued that they should have standing to challenge the constitutionality of not only the 10-person limit of the PHO-10s but also the 30-person limit imposed by the PHOs that had been in place from June 8, 2020, to December 17, 2020 [PHO-30s].

[18] As noted above, their application was dismissed.

[19] In the *Chambers Decision*, the Chambers judge dealt first with the question of standing. He found that the appellants had standing to challenge only the 10-person outdoor gathering limit in force between December 17, 2020, and May 30, 2021, as that was the limit imposed by the PHO-10s under which they had been ticketed. He stated that even if he had granted the appellants standing to challenge the restrictions contained in the PHO-30s "the result of [the] decision would not change" (at para 1).

[20] Next, after reviewing some basic facts, the Chambers judge dealt with the appellants' application to strike the affidavit of Christine Rathwell, and with the Government's application to strike the affidavit of Dr. Thomas Warren.

[21] Ms. Rathwell's affidavit, which had been filed by the Government, contained a catalog of anti-vaccine and anti-mask-requirement social media posts that Ms. Grandel had made. The appellants argued that the affidavit should be struck because it contained hearsay and because it was irrelevant and scandalous. The Chambers judge rejected those arguments. He held that, because Ms. Rathwell had gathered the posts herself, the fact that they existed in the form they did *was* within her knowledge. He also found that the social media posts attributed to Ms. Grandel were relevant because they were evidence that she had made the statements contained in the posts, which showed her state of mind. Accordingly, he declined to strike Ms. Rathwell's affidavit but determined that it was entitled to limited weight.

[22] Dr. Warren is an infections disease consultant and microbiologist, and the appellants had filed his affidavit in support of their application. He deposed that the risk of transmission of COVID-19 at outdoor protests was negligible, particularly where physical distancing is maintained. The Government took the view that Dr. Warren's affidavit should be struck because he was not properly qualified to opine on such matters. The Chambers judge denied the Government's application to strike Dr. Warren's affidavit but agreed to limit the scope of his qualifications as an expert witness. In that regard, applying the test set out in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 [*White Burgess*], the Chambers judge concluded that Dr. Warren was qualified to offer opinion evidence on virus transmission, but held that he was not qualified to opine on whether the public health measures

adopted by the Government were a proportionate response, because that called for expertise in public health, which Dr. Warren did not have.

[23] The Chambers judge reviewed the evidence and the history of the PHOs and the reasons why they were made. After doing that, the Chambers judge went on to address the questions at the heart of the application, which were: (i) whether the PHO-10s violated the appellants' rights under ss. 2(b), (c) and (d) of the *Charter*; and if so, (ii) whether the Government had demonstrated that the infringement of the appellants rights was reasonable and demonstrably justified under s. 1.

[24] The Chambers judge noted that the Government had conceded that the PHO-10s violated the appellant's s. 2(b) right to freedom of expression, in that "the protests have expressive content and there is nothing to suggest the removal of the protection of this expression" (at para 76). Given that concession, he found that it was unnecessary to conduct a separate analysis of whether the appellants' rights under ss. 2(c) and (d) had been violated because he viewed those violations, if they existed, as being subsumed in the s. 2(b) violation.

[25] Turning to whether the infringement of the appellants' rights was justified under s. 1 of the *Charter*, the Chambers judge determined that the appropriate test to apply in answering that question was the one set out in *R v Oakes*, [1986] 1 SCR 103 [*Oakes*]. He understood that this required him to consider whether the objectives to be served by the PHOs were sufficiently important to warrant overriding constitutionally-protected rights or freedoms and, if so, whether the means chosen to achieve those objectives were rationally connected to the objectives, minimally impairing of the rights in question, and proportionate in terms of their salutary and deleterious effects.

[26] Applying the *Oakes* test, the Chambers judge concluded that the gathering limits imposed under the PHOs were a reasonable and demonstrably justified limit on the appellants' s. 2 rights. He found that the objective of "preventing, reducing and controlling the transmission" of COVID-19 was a pressing and substantial objective (at para 43). He also determined that the gathering limits in the PHO-10s were proportionate, in that they were rationally connected to the objective, were minimally impairing of the appellants' rights, and proportionally balanced in their salutary and deleterious effects.

III. ISSUES

[27] The appellants contend that the Chambers judge erred in concluding that the *Charter*-infringing gathering limits imposed by the PHO-10s were saved under s. 1. Their submissions raise the following questions for consideration:

> 1. Did the Chambers judge err by denying the appellants standing to challenge the 30-person limits on outdoor gatherings that existed prior to December 17, 2020?
>
> 2. Did the Chambers judge err by not striking the affidavit of Christine Rathwell?
>
> 3. Did the Chambers judge err in his treatment of the evidence of Dr. Warren?
>
> 4. Did the Chambers judge err by not conducting an individual analysis of the alleged violations of each of ss. 2(b), (c) and (d)?
>
> 5. Did the Chambers judge err in his analysis of whether the violations of the appellants' rights were justified under s. 1 of the *Charter?*

IV. ANALYSIS

A. The jurisprudential landscape

[28] Before proceeding to examine the appellants' arguments, I pause to observe that public health measures similar to those imposed by the Government in this case have been upheld by courts in several other provinces as reasonable and justified limits on individual *Charter* rights in the context of the COVID-19 pandemic.

[29] In British Columbia, a group of individuals brought applications to challenge a series of decisions that the province's Provincial Health Officer had made in relation to requests that she reconsider public health orders that prohibited in-person religious worship and protest gatherings between November of 2020 and February of 2021. The British Columbia Court of Appeal agreed that the orders made by the Provincial Health Officer violated the applicants' rights under ss. 2(a), (b), (c) and (d) of the *Charter*. However, applying the test set out in *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], the Court determined that the violations were reasonable

and justified under s. 1 (*Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427 [*Beaudoin*]). The applicants' request for leave to appeal to the Supreme Court of Canada was denied on August 10, 2023 (*Brent Smith et al v Attorney General of British Columbia et al,* 2023 CanLII 72130).

[30] In Ontario, a religious group brought an application challenging the constitutionality of regulations enacted by the government of that province that had imposed capacity restrictions on indoor and outdoor religious gatherings in late 2020 and early 2021. The Ontario Court of Appeal agreed that the regulations violated the applicant's rights under s. 2(a) of the *Charter*. Applying the test set out in *Oakes*, the Court held that the violation of the applicants' rights was justified under s. 1 (*Ontario (Attorney General) v Trinity Bible Chapel*, 2023 ONCA 134, 478 DLR (4th) 535 [*Ontario Churches CA*]). Leave to appeal to the Supreme Court was denied on August 10, 2023 (*Trinity Bible Chapel, et al v Attorney General of Ontario et al,* 2023 CanLII 72135).

[31] In Manitoba, a religious group applied to challenge the constitutionality of public health orders in place in that province between November 11, 2020, and January 22, 2021. Those public health orders had imposed restrictions on gatherings at private residences, limited public outdoor gatherings to 5 persons, and restricted indoor gatherings at places of worship. Although it was agreed that the gathering restrictions at issue infringed the applicants' rights under ss. 2(a), (b) and (c) of the *Charter,* the Manitoba Court of Appeal, applying the *Oakes* test, determined that the infringements were reasonable and demonstrably justified under s. 1 (*Gateway Bible Baptist Church et al v Manitoba et al*, 2023 MBCA 56 [*Gateway Bible*]). Leave to appeal to the Supreme Court was also denied in this case, on March 14, 2024 (*Gateway Bible Baptist Church, et al v His Majesty the King in Right of the Province of Manitoba et al*, 2024 CanLII 20245).

[32] In Newfoundland and Labrador, an individual applied to challenge the constitutionality of several Special Measures Orders [SMOs] issued by that province's Chief Medical Health Officer. The SMOs restricted travel into the province by non-residents between May of 2020 and February of 2022. An applications judge had decided that the SMOs violated the applicant's mobility rights under s. 6 of the *Charter* but found that the violation was justified under s. 1 (*Taylor v Newfoundland and Labrador*, 2020 NLSC 125 [*Taylor SC*]). The applicant appealed that decision but, by the time the matter came before the Court of Appeal in the summer of 2023, the SMOs had

long since expired. The Court determined that the appeal was moot and declined to hear it (*Taylor v Newfoundland and Labrador*, 2023 NLCA 22), although leave to appeal to the Supreme Court from that ruling has been granted (*Canadian Civil Liberties Association, et al v His Majesty the King in Right of Newfoundland and Labrador, et al*, 2024 CanLII 35287).

[33] In Alberta, a group of applicants challenged certain orders enacted by that province's Chief Medical Officer of Health. Among other things, those orders imposed gathering limits and restrictions on the operation of certain types of businesses. The applicants alleged that the orders violated their rights under ss. 2, 7 and 15 of the *Charter* and also that the orders were *ultra vires* because they had not been made in accordance with the delegated authority under that province's *Public Health Act*, RSA 2000, c P-37. A judge of the Alberta Court of King's Bench held that the impugned orders were *ultra vires* the *Public Health Act.* Notwithstanding that finding, she went on to conduct an analysis of the applicants' *Charter* claims. In that regard, applying *Oakes*, she found that, while the orders violated the applicants' rights under ss. 2(a), (c) and (d) of the *Charter*, the violations were reasonable and demonstrably justified under s. 1 (*Ingram v Alberta (Chief Medical Officer of Health),* 2023 ABKB 453 [*Ingram*]).

B. Analysis the appellants' arguments

1. Standing

[34] The appellants' first argument concerns standing. Even though Ms. Grandel and Mr. Mills were ticketed only for allegedly violating the 10-person outdoor gathering limit imposed by the PHOs in force from December 17, 2020, to May 17, 2021, they contend that they ought to have been granted public-interest standing to challenge an earlier PHO that had imposed a 30-person limit on outdoor gatherings. In this regard, the appellants assert that they were motivated to demonstrate their concerns about the PHOs by protesting as early as November of 2020 and that granting them public interest standing would have been "judicious and principled".

[35] The decision whether to grant standing to a party to challenge the validity of a legislative measure is discretionary in nature (*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 20, [2012] 2 SCR 524 [*Downtown Eastside*]). Discretionary decisions, like all other judicial decisions, are subject to appellate review

in accordance with the standards set out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. This means the applicable standard of review depends on the nature of the error alleged. Where it is argued that a trial judge erred in law (including by misidentifying or misapplying the legal criteria that govern the exercise of their discretion), the standard of review is correctness. Alleged errors of fact, or of mixed fact and law, are reviewed on a standard of palpable and overriding error (see: *MacInnis v Bayer Inc.*, 2023 SKCA 37 at paras 38–39 [*MacInnis*]; and *Kolodziejski v Maximiuk*, 2023 SKCA 103 at paras 24–25). An appellate court may intervene where an error of the relevant sort is established, but it is not entitled to substitute its own decision for that of a trial judge simply because it would have exercised the discretion differently (*Barendregt v Grebliunas*, 2022 SCC 22 at para 104; *MacInnis* at para 39; *J.L. v T.T.*, 2024 SKCA 38 at para 59 [*J.L.*]).

[36] In my respectful view, although the Chambers judge's reasons for denying standing were brief and somewhat conclusory, they do not reveal an error that would permit this Court to intervene. Let me explain why that is so.

[37] A party who seeks to challenge the constitutional validity of a statute or other legislative measure on *Charter* grounds bears the burden of establishing that they have standing to do so (*Hy and Zel*'s *Inc. v Ontario (Attorney General); Paul Magder Furs Ltd. v Ontario (Attorney General)*, [1993] 3 SCR 675 at 688). Generally speaking, this requirement will be met where a party is directly affected by the statute or legislative measure in question, can raise a serious justiciable issue as to its validity, and a court proceeding is a reasonable means of seeking a determination (see: *Minister of Justice of Canada v Borowski*, [1981] 2 SCR 575 at 598; and *Downtown Eastside* at para 18).

[38] At the hearing in the Court of King's Bench, the Government conceded that the appellants had standing to challenge the PHO-10s under which they had been charged, as they were directly affected by those PHOs and, in the circumstances, the other requirements for standing had been met. However, with respect to the 30-person outdoor gathering limit that had been in force prior to December 17, 2020, the Government argued that standing should not be granted because the PHO-30s neither directly affected the appellants nor gave rise to a live controversy, as the PHO-30s had long since expired and the appellants were not facing charges in relation to the 30-person limit.

[39] Given those circumstances, the Chambers judge would have properly viewed the appellants' application as one where public interest standing had not been conceded. In determining whether to exercise its discretion to grant public interest standing, a court must assess and weigh three factors cumulatively, purposively and with regard to the circumstances: (i) whether the case raises a serious justiciable issue; (ii) whether the party bringing the challenge has a genuine interest in the matter; and (iii) whether the proposed challenge is, in all of the circumstances, a reasonable and effective means of bringing the case to court (*British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 28 [*Council of Canadians*]; *Downtown Eastside* at paras 39–52).

[40] A relevant consideration in this calculus is the proper use of scarce judicial resources. In *Downtown Eastside*, the Supreme Court pointed out that, when considering whether there is a serious justiciable issue, judges should be careful to avoid "overburdening the courts with the 'unnecessary proliferation of marginal or redundant suits'" (at para 41). When assessing the nature of the applicants' interest in the matter, it is necessary to be alive to "the concern for conserving scarce judicial resources and the need to screen out the mere busybody" (*Downtown Eastside* at para 43). As for whether the proposed constitutional challenge is a reasonable and effective means of bringing the issue before the court, this factor "should be applied in light of the need to ensure full and complete adversarial presentation and to conserve judicial resources" (*Downtown Eastside* at para 49).

[41] Bearing all of that in mind, the Chambers judge's determination that the appellants should be granted standing only in relation to the PHO-10s under which they had been ticketed is not one that I would interfere with. Although it is difficult to discern from his reasons whether he turned his mind to all of the factors set out in *Council of Canadians* and *Downtown Eastside*, a consideration of those factors inevitably compels the same conclusion the Chambers judge reached.

[42] I reiterate here that, while the appellants alleged that their right to protest had been curtailed by the 30-person gathering limit, they had not been charged with violating the PHO-30s that imposed that limit and, by the time they brought their application, those PHOs had long since expired. All other outdoor gathering limits had also been lifted. Based on that, and the other

evidence that was before the Chambers judge, I am unable to see how the appellants could have had any remaining interest in challenging the 30-person limit that was of sufficient importance to justify the consumption of scarce judicial resources.

[43] Moreover, I am not persuaded that granting standing to challenge the already expired 30-person gathering limit would have been a reasonable and effective means of bringing the issue before the court. The appellants already had personal standing to challenge an outdoor gathering limit – namely, the 10-person limit – that was more restrictive than the limit imposed under the PHOs for which they were denied standing. In other words, the facts that were before the court were those that were most favourable to the appellants' challenge to the PHOs. Expanding the challenge to include the expired PHOs that had imposed the 30-person limit would have consumed further time and judicial resources without adding anything of practical benefit to the proceeding.

[44] Accordingly, this ground of appeal must fail.

2. The Rathwell affidavit

[45] As mentioned above, the Government filed an affidavit sworn by Christine Rathwell, an employee of the Ministry of Health, as part of its response to the appellants' application. Ms. Rathwell deposed that, between June 2, 2021, and September 8, 2021, she reviewed various social media platforms on which Ms. Grandel had posted messages that were highly critical of the Government, Dr. Shahab, face-covering policies, COVID-19 vaccines, and other public health measures. Ms. Rathwell's affidavit also contained links to news stories that reported on things Ms. Grandel had said and done to express her displeasure with public health measures, and YouTube videos that showed Ms. Grandel confronting staff members at a business and arguing with them about the business's policy that required customers to wear face coverings.

[46] The appellants applied to strike Ms. Rathwell's affidavit on the basis that it was not confined to facts that were within her personal knowledge and that it contained inadmissible hearsay, in violation of Rules 13-30(1) and (4) of *The King's Bench Rules*. The Chambers judge rejected that argument, saying:

> [16] Ms. Rathwell spoke to her review of and the process she undertook to review Ms. Grandel's social media posts and media reports, which she presented without embellishment. [The Government] does not submit the social media for the truth of their contents, but rather to establish that they were made and apparently believed by

> Ms. Grandel. With respect to the media reports, [the Government] purports that they contain statements that "permit an inference as to the speaker's state of mind", and therefore "are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred" (*R v Millard*, 2017 ONSC 5701 at para 13).

[47] The appellants also argued that Ms. Rathwell's affidavit should be struck because it was scandalous and of no probative value, in violation of Rule 13-33. The Chambers judge dismissed that argument as well. In that regard, he said:

> [19] A matter will be struck out of an affidavit if it is both irrelevant and scandalous (*R v Bank of Nova Scotia* (1983), 24 Sask R 312 (QB) at paras 11-15; *Goodtrack v Rural Municipality of Waverly No. 44*, 2012 SKQB 413 at para 20, 408 Sask R 36, as cited in *CIBC Mortgages Inc. v Kjarsgaard*, 2015 SKQB 411 at para 5). I agree with Saskatchewan's position that the social media posts – inflammatory as they may be – were not created by Ms. Rathwell, but rather by Ms. Grandel. Moreover, as [the Government] outlines in their brief at para. 60, the posts are relevant to the analysis of the substantive issues as the Rathwell Affidavit shows:
>
> > (a) That there are good reasons to suspect Ms. Grandel would not be (and was not) compliant with public health guidance at outdoor gatherings; and
> >
> > (b) That there were other methods and mediums of expression that Ms. Grandel was able to avail herself of, in lieu of outdoor gatherings.

[48] On this issue, the appellants raise the same arguments on appeal that they raised in the Court of King's Bench, namely, that because the application was one in which relief of a final nature was sought, hearsay evidence should not have been admitted, and that the affidavit contained irrelevant and scandalous material that served no purpose other than to cast Ms. Grandel in a negative light.

[49] Rulings with respect to the admissibility of evidence are generally subject to a correctness standard of review, particularly where the decision regarding admissibility involves the interpretation and application of the rules of evidence, rather than assessing the evidence's probative value (see, for example: *Dolynchuk v McGowan*, 2022 SKCA 42 at para 22; *Kawula v Institute of Chartered Accountants of Saskatchewan*, 2017 SKCA 70 at para 55, 24 Admin LR (6th) 112; and *R v Alves*, 2014 SKCA 82 at para 54, 314 CCC (3d) 313).

[50] I do not accept the appellants' assertion that, because Ms. Rathwell's affidavit described things she had observed on social media platforms, she was giving evidence about matters that were not within her personal knowledge. Ms. Rathwell deposed that the postings referenced in her affidavit and attached as exhibits were things she had personally gathered from various internet

and social media sources. So, in that respect, the fact that certain postings had been made in the form that she exhibited them was a matter of which she had personal knowledge. Some of the attachments to Ms. Rathwell's affidavit (i.e., those marked as Exhibits A and B) contained reproductions of statements and photographs that had been posted to public Instagram and Twitter accounts with usernames that are variations of Ms. Grandel's full name. Ms. Grandel did not deny having created or posted the statements associated to those accounts and also appeared in several of the photographs that accompanied them. Given all of that, it was open to the Chambers judge to draw the inference that Ms. Grandel had made the statements referred to in Mr. Rathwell's affidavit and, on that basis, to admit them for the truth of their contents under the party admission exception to the hearsay rule (see, for example: *R v Schneider*, 2022 SCC 34 at paras 52–57, 418 CCC (3d) 137; and *J.L.* at para 107), and to find that they were evidence of Ms. Grandel's state of mind. The same is true of the YouTube video marked as Exhibit F, which appears to depict, and to have been recorded by, Ms. Grandel herself.

[51] The news reports marked as Exhibits C, D, E and G to Ms. Rathwell's affidavit, however, did not originate from what the Chambers judge found to be one of Ms. Grandel's social media profiles, nor did they contain a direct recording of things that she had said. They contained other persons' recounting of things Ms. Grandel had allegedly said or done in their presence. While the existence of the news reports was properly found to be within Ms. Rathwell's personal knowledge, as she had personally gathered them from the internet, their content was not first-hand information. It was evidence of what other people said they had observed Ms. Grandel say or do. In short, this evidence *was* hearsay that was one step too far removed to fall within an exception to the hearsay rule, including the "state of mind" exception. By admitting those portions of the affidavit as evidence of Ms. Grandel's state of mind, the Chambers judge erred. That said, this error was inconsequential and did not affect the result because the contents of those exhibits added nothing to the social media postings made by Ms. Grandel or the YouTube video that were properly admissible as party admissions and given weight in relation to two narrow and defined issues (*Chambers Decision* at paras 19 and 21).

[52] Accordingly, I would not give effect to this ground of appeal.

3. Dr. Warren's evidence

[53] The appellants took the view that Dr. Warren's evidence was of great importance, as he offered the opinion that the risk of transmission of COVID-19 at outdoor gatherings was negligible, particularly if proper physical distancing was maintained, and that, in any event, it was substantially lower than the risk of transmission in settings where larger gatherings were permitted by the Government, including those covered by *ROSK*. The appellants say Dr. Warren's evidence was crucial to the determination of whether the outdoor gathering limits were rationally connected to the objective for which they were enacted, whether they were minimally impairing of the appellants' rights, and whether they were proportionate. The appellants contend that the Chambers judge made two errors in his treatment of Dr. Warren's evidence: (i) improperly limiting the scope of his expertise; and (ii) failing to afford his evidence due weight.

[54] I would also reject these arguments. Let me explain why.

[55] The first branch of the appellants' submission under this heading is that the Chambers judge erred by limiting Dr. Warren to providing opinion evidence "on the transmission of SARS-CoV-2 but not within the context of public health" (*Chambers Decision* at para 27). Although the appellants concede that Dr. Warren's "recognized expertise is not in the domain of 'public health' per se", they assert that the Chambers judge "erred by excluding infectious disease expertise *from* the public health purview altogether" (emphasis in original).

[56] In considering whether, and to what extent, Dr. Warren's opinion should be admitted, the Chambers judge observed that the central question raised by the appellants' application, and the issue to which Dr. Warren's opinion pertained, was "whether the public health measures adopted by the Government were a proportionate response to the COVID-19 pandemic" (*Chambers Decision* at para 26). The Chambers judge held that an assessment of the efficacy and appropriateness of measures necessary to respond to a pandemic called for expertise in public health. He also explained why he concluded that Dr. Warren was properly qualified to provide opinion evidence concerning virus transmission but not about matters of public health:

> [24] Dr. Warren is an infectious disease consultant and medical microbiologist. He admits that he does not have any expertise or experience in public health or preventative medicine. It is evident that he has expertise but not necessarily in the area that he is opining on. For example, he does not have a residency or fellowship in public health or preventative medicine. Moreover, his current role as an infectious disease consultant, or in any previous

> position, did not involve monitoring and assessing the health needs of a population; public health advice for governments or other public bodies; a leadership or management role on matters related to public health or in any public health capacity during the outbreak of any previous epidemic or pandemic; and planning, implementing, or evaluating programs and policies to promote public health.

[57] I see no error here that would permit intervention. A determination about whether an expert's opinion is properly admissible involves a question of law insofar as the proper articulation and application of the governing legal test is concerned and, as such, it is reviewable for correctness. However, because of the case-specific nature of determinations concerning the admissibility criteria set out in the governing legal test, a Chambers judge's decision to admit or reject expert evidence is generally owed deference, absent an error in principle (*R v D.D.*, 2000 SCC 43 at paras 12–13, [2000] 2 SCR 275; *Frondall v Frondall*, 2020 SKCA 135 at para 20, 49 RFL (8th) 293 [*Frondall*]; *Hess v Thomas Estate*, 2019 SKCA 26 at para 30, 433 DLR (4th) 60 [*Hess*]; *Silzer v Saskatchewan Government Insurance*, 2021 SKCA 59 at para 60; *Double Diamond Distribution Ltd. v Garman Turner Gordon LLP*, 2021 SKCA 61 at para 64).

[58] In this case, the Chambers judge recognized that, in determining to what extent, if any, the opinion evidence offered by Dr. Warren was properly admissible, he needed to consider the four threshold requirements set out in *White Burgess*. He found that, as it related to providing opinion evidence about matters of public health, Dr. Warren was not a properly qualified expert because his experience and training fell short in the ways identified in paragraph 24 of the *Chambers Decision*. The shortcomings identified by the Chambers judge in that paragraph are well-supported by the evidentiary record, as they were things that Dr. Warren had acknowledged during cross-examination. Moreover, Dr. Warren also agreed that he had produced no published work on public health and that his report did not consider the local Saskatchewan context in assessing the appropriateness of the Government's public health response to COVID-19.

[59] In light of all of this, I can find no basis to conclude that the Chambers judge erred in his determination concerning the extent of Dr. Warren's expertise. He made factual findings that were open to him on the evidence and properly applied the correct legal test to them.

[60] The second branch of the appellants' argument under this ground of appeal simply takes issue with the weight given by the Chambers judge to the admissible portions of Dr. Warren's evidence. I see no merit in this argument. A Chambers judge's determinations about the weight

afforded to an expert witness' evidence, and the conclusions to be drawn from it, are factual in nature and, thus, generally entitled to deference absent a palpable and overriding error (*Lapointe v Hôpital Le Gardeur*, [1992] 1 SCR 351 at 358–359; *Frondall* at para 21; *Hess* at para 31; *Slater v Pedigree Poultry Ltd.*, 2022 SKCA 113 at para 221, [2022] 12 WWR 622). The appellants have identified no such error in this case.

[61] I would dismiss this ground of appeal.

4. The alleged need for separate consideration of ss. 2(b), (c) and (d)

[62] At the hearing before the Chambers judge, the Government conceded that the gathering limits in the PHO-10s violated the appellants' right to freedom of expression as guaranteed by s. 2(b) of the *Charter*. The basis for this concession was that outdoor protest gatherings are a form of expression. Given the Government's concession, and relying on the trial-level decisions that were ultimately upheld in *Ontario Churches CA* and *Gateway Bible*, the Chambers judge determined that it was not necessary to consider separately whether the appellants' rights under ss. 2(c) and (d) had been violated when conducting his analysis under s. 1 of the *Charter*. In that regard, he said:

> [77] Section 2(c) of the *Charter* protects the freedom of peaceful assembly whereas s. 2(d) guarantees freedom of association.
>
> [78] [The Government] argues that given the concession on s. 2(b) of the *Charter*, ss.2(c) and 2(d) do not require an independent analysis in this case. I agree with [the Government], in the circumstances of this case, to have the interest protected in ss. 2(c) and 2(d) subsumed by the s. 2(b) analysis of the *Charter*.
>
> [79] Moreover, this case is similar to recent COVID-19 related decisions. For example, the Court in *Ontario v Trinity Bible Chapel*, 2022 ONSC 1344 at para 115 [*Ontario Churches*], declined to conduct separate analyses under ss. 2(b), (c), and (d), but rather subsumed them under s. 2(a) analysis. In *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 at paras 212-213, [2022] 3 WWR 567, the Court stated that there is relatively little jurisprudence on interpreting s. 2(c) and that "[a]s the freedom of assembly can often be integral to freedom of expression, issues surrounding peaceful assembly are often subsumed under the freedom of expression and the infringement can be often resolved under s. 2(b)." The Court subsumed s. 2(c) into s. 2(b) analysis given Manitoba's concession to the prima facie violation of s. 2(b) in the specific context of protests. Section 2(d) was not pled in that case.
>
> [80] Given that there is no established test for s. 2(c) analysis and so long as the freedom of expression analysis sufficiently accounts for the assemblage and associative rights engaged, I see no need to duplicate the analysis across multiple *Charter* rights as expressed in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 77, [2018] 2 SCR 293.

[63] The appellants assert that, by adopting the foregoing approach, the Chambers judge erred. They say that, because each of the rights enumerated in s. 2 of the *Charter* is independent and operates to protect a different interest, a violation of one right cannot properly be seen as being wholly subsumed within the violation of another. The appellants contend that the Chambers judge was obligated to address the alleged violation of each right individually when determining whether the violations were justified under s. 1, and that he ought to have weighed the cumulative effect of the violation of multiple rights when considering the proportionality element of the analysis.

[64] I reject this argument. The live issue in this case was whether the violation of the appellants' rights that resulted from the gathering limits set by the PHO-10s was justified under s. 1. In that regard, the factual matrix underpinning each of the alleged violations of ss. 2(b), (c) and (d) was identical, in that it tied directly, and exclusively, to the limit on the number of people who could gather together outdoors. In *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293 [*Trinity Western*], the Supreme Court held that, where the factual matrix underpinning a violation of closely-related *Charter* rights is largely indistinguishable, it is unnecessary to conduct a separate analysis of each alleged violation, because consideration of the interest protected by one is sufficient to account for the other affected rights in the s. 1 analysis (at paras 76–78 and 122).

[65] Significantly, in the context of challenges to public health measures invoked in response to the COVID-19 pandemic, two of the appellate decisions I referred to earlier in these reasons have followed the approach set out in *Trinity Western* and, in doing so, have rejected arguments similar to the argument made by the appellants under this ground of appeal.

[66] In *Beaudoin*, the British Columbia Court of Appeal held that the Chambers judge in that case, having found infringements of other *Charter* freedoms, was not required to consider whether the orders in question violated s. 15. On this point, the Court cited *Trinity Western* as authority for the fact that further analysis of other infringements was not necessary 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" (*Beaudoin* at para 233). In support of this point, the Court cited other Supreme Court decisions where an individual analysis of each

alleged *Charter* infringement was found to be unnecessary, including *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 93 [*Carter*]; and *Devine v Quebec (Attorney General)*, [1988] 2 SCR 790 at 819–820 [*Devine*].

[67] The Court in *Beaudoin* also considered whether the Chambers judge in that case had erred by not weighing compound *Charter* violations cumulatively, as an intervenor had argued should have been done. The intervenor suggested that the Court ought to look to the criminal law context, where multiple *Charter* breaches are considered cumulatively in the determination of whether the admission of evidence obtained in a manner that infringed the *Charter* would bring the administration of justice into disrepute. The Court of Appeal rejected this argument, distinguishing the criminal context and holding that the governing jurisprudence – including *Carter*, *Devine*, and *Trinity Western* – precluded them from adopting this approach.

[68] In *Ontario Churches CA*, the primary basis for the challenge to the regulations enacted by the Government of Ontario was rooted in s. 2(a), as the applicants – various churches and their members – had challenged the *Charter* compliance of regulations that imposed specific limits on gatherings for religious worship. However, in addition to arguing that the impugned regulations violated their religious freedoms, the applicants asserted that the regulations also infringed their expression, assembly, and association rights under ss. 2(b), (c) and (d), respectively. They contended that, because the regulations could be seen as infringing multiple rights, the violation of each right had to be addressed separately in the s. 1 analysis, and the magnitude of the violations had to be seen as more serious, given their cumulative nature. That argument was rejected by the motions judge who heard the application in the Ontario Superior Court of Justice (*Ontario v Trinity Bible Chapel et al*, 2022 ONSC 1344). On that point, she said:

> [115] … [I]n the circumstances of this case, it is neither necessary nor desirable to conduct separate analyses under subsections (b), (c), and (d). The interests protected by those subsections are, in this case, wholly subsumed by the s. 2(a) analysis. My finding that s. 2(a) has been infringed has accounted for the various manifestations of religious freedom: the freedom to engage in religious expression; the freedom to assemble in religious unity; and the freedom to associate with those who share faith-based ideals. There is no value added by repeating or repackaging the analysis under different constitutional headings. This case is like *Trinity Western*, in which "the religious freedom claim [was] sufficient to account for the expressive, associational, and equality rights of TWU's community members in the analysis": *Trinity Western*, at para. 77. Like this case, in *Trinity Western*, the factual matrix underpinning the various *Charter* claims was largely indistinguishable.

> [116] There may well be cases in which ss. 2(b), 2(c), or 2(d) add value to the analysis. This not one of them.
>
> [117] Nor, contrary to the submissions of the moving parties and ARPA, is this a case involving multiple breaches. ARPA drew upon criminal caselaw dealing with admissibility of unconstitutionally obtained evidence under s. 24(2) of the *Charter*. Violations are more serious when they represent a pattern of misconduct by police, resulting in multiple violations. However, such cases are invariably concerned with multiple, distinct acts. For example, police may conduct an arbitrary stop, followed by an unreasonable search, which then leads to a statement taken in the absence of rights to counsel. Three separate acts have resulted in three separate breaches. That is very different than a case where, as here, a single compendious act – the imposition of religious gathering limits – impinges on multiple guarantees because they are interrelated. This is not to say that the infringement here is minor or insignificant. It is only to say that its gravity should not be inflated by an artificial tally of provisions.

[69] On appeal, the applicants argued that the motions judge had erred in declining to consider and rule separately on the alleged violations of their rights to freedom of expression, freedom of assembly and freedom of association, and, further, that this failure had affected her application of the *Oakes* test, particularly in the final balancing of deleterious and salutary effects. In their view, assessing the cumulative effect of "compound" rights infringements was necessary to fully identify the impact on *Charter* rights and what constitutes sufficient justification by government. The Ontario Court of Appeal rejected that argument and upheld the reasoning of the motions judge. In that regard Sossin J.A., writing for the Court in *Ontario Churches CA*, said the following:

> [67] … The alleged infringement of the appellants' s. 2(a) rights accounted for their related rights to express their religious beliefs, assemble for the purpose of engaging in religious activity, and associate with others who share their faith. While the appellants also suggest that certain expressive activities took the form of political protest protected under s. 2(b), those activities were directly related to the government restrictions on religious gatherings. The motion judge noted that her finding that s. 2(a) was infringed accounted for these various manifestations of religious freedom, concluding, "There is no value added by repeating or repackaging the analysis under different constitutional headings."
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> [68] This approach finds support in the jurisprudence beyond *Trinity Western*. The respondent points to *Figueiras v. Toronto Police Services Board*, 2015 ONCA 208, 124 O.R. (3d) 641, where the appellant alleged multiple *Charter* breaches arising from policing actions undertaken during the G20 Summit in Toronto. The court found a breach of s. 2(b) but concluded, at para. 78, that there was no need to address the s. 2(c) argument because the claimant's freedom of assembly issues were "subsumed by the s. 2(b) analysis", as was the case in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn*., 2009 BCCA 39, 89 B.C.L.R. (4th) 96, leave to appeal refused, [2009] S.C.C.A. No. 160, [2009] S.C.C.A. No. 161.
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> …
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> [71] Therefore, where an examination of the factual matrix reveals that one claimed s. 2 right subsumes others, it is not necessary to consider the other s. 2 claims (though, of course, there is no bar to a judge doing so). I should add that this approach is particularly

> apposite in the s. 2 context where the rights are related fundamental freedoms, whereas it may have less application across rights (for example, as between ss. 2, 7, and 15 rights).

[70] In *Ontario Churches CA*, the Court of Appeal also dismissed the notion that the nature of the s. 1 analysis under *Oakes* changes where a legislative measure infringes more than one right or freedom protected by the *Charter*. In that regard, it rejected the analogy that the applicants had tried to draw to the way multiple breaches of an accused person's rights are considered to elevate the seriousness of the breach when determining whether evidence should be excluded under s. 24(2). This is because the approach to remedies under s. 24(2) is materially different than the s. 1 analysis under *Oakes* or *Doré*. On that point, Sossin J.A. said:

> [73] I do not agree with the appellants and the intervener that the *Oakes* test changes where there are multiple breaches of the *Charter*. The appellants cite no judicial authority to support their theory that the s. 1 proportionality analysis must consider *Charter* breaches in a cumulative way. …
>
> [74] The *Oakes* test is well-settled. The third step of the proportionality exercise directs that "there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'": *Oakes*, at p. 139 (emphasis in original). Dickson C.J. further explained that not all infringements are as serious as others "in terms of 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": at pp. 139-40. It is this global assessment of the deleterious effects of a measure that is weighed against its importance. Thus, courts are directed to assess the extent, degree, and severity of the effects, but this does not mean multiple infringements necessarily enhance the weight of the harms. As the intervener acknowledged, "The cumulative effect of compound *Charter* violations is not an arithmetic exercise, but a qualitative one".
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> [75] On this point, there is little if any functional difference between the contextual proportionality exercises in *Oakes* and *Doré*. The Supreme Court has held that the *Doré* framework "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. See also *Trinity Western*, at para. 82.
>
> [76] Despite both analytical frameworks providing a wealth of jurisprudence, neither line of cases provides precedent for the proposition that proportionality must add up *Charter* breaches in a cumulative way. Instead, *Trinity Western*, the case most on point, follows the well-known balancing stage of the proportionality analysis. To paraphrase the majority at para. 78, no matter which s. 2 right is used to label the interference, all deleterious effects will be considered in the proportionality analysis.
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> …
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> [78] Several recent articles in the Supreme Court Law Review are critical of *Trinity Western*, arguing it should not be broadly applied or should be limited to its facts: Dwight Newman, "Interpreting Freedom of Thought in the *Canadian Charter of Rights and Freedoms*" (2019) 91 S.C.L.R. (2nd) 107; or that the court missed a critical opportunity to recognize compound infringements and how they may aggravate the breach: Jamie

> Cameron, "*Big M's Forgotten Legacy of Freedom*" (2020) 98 S.C.L.R. (2nd) 15; or that each right should have been dealt with as a distinct right and considered on its own to determine whether the infringements were justified: André Schutten, "Recovering Community: Addressing Judicial Blindspots on Freedom of Association" (2020) 98 S.C.L.R. (2nd) 399.
>
> [79] This academic commentary was considered by the B.C. Court of Appeal in *Beaudoin* as support for the proposition that compound *Charter* breaches should be weighed cumulatively in the s. 1 analysis. The court rejected this submission and followed the majority in *Trinity Western*. It also found the argument that a cumulative breach analysis must inform the s. 1 inquiry in every case was foreclosed by governing jurisprudence, including *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, and *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790.
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> [80] I agree. Although no case (prior to *Beaudoin*) specifically rejects this proposition, it goes against the tide of jurisprudence that has declined to determine every alleged *Charter* breach, such as *Carter*, *Khawaja*, and *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101. None of the cases relied on by the appellants hold otherwise.
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> …
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> [82] The only proffered authority for considering the cumulative effects of multiple *Charter* breaches comes from the s. 24(2) jurisprudence, namely *R. v. Poirier*, 2016 ONCA 582, 131 O.R. (3d) 433. The motion judge distinguished this case, and the applicability of s. 24(2) cases in general, on the basis that each breach stemmed from a separate act. That is true of *Poirier*. I would add a more fundamental difference is that the test to exclude evidence obtained in a manner that infringes the *Charter*, as set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, is different than the proportionality analysis in *Oakes*.
>
> [83] Section 24(2) has developed its own body of case law, distinct from remedies under s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act*, *1982*. Analytically, the burden of proof rests on the person seeking to exclude evidence, rather than the Crown: *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 280. Furthermore, the focus of s. 24(2) is solely on the administration of justice, not what is reasonable and demonstrably justified in a free and democratic society. I am not aware of any cases borrowing concepts from the s. 24(2) jurisprudence to inform the s. 1 analysis. Also, the B.C. Court of Appeal rejected a similar argument in *Beaudoin*, at paras. 236-38.

[71] I acknowledge that there is a collection of scholarly commentary which suggests that freedom of assembly is an independent right with an amplificatory and collective purpose that is not captured by freedom of expression, and that, as a result, it should not be subsumed into the analysis under s. 2(b) when violations of both freedoms are alleged. In that regard, in addition to the works listed in Sossin J.A.'s reasons in *Ontario Churches CA*, see also: Basil S. Alexander "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8:1 UWO J Leg Stud 4, 2018 CanLII Docs 66; Derek B.M. Ross "Truth-Seeking and the Unity of the *Charter*'s Fundamental Freedoms" (2020), 98 SCLR (2d) 63 at 90–91; and Jamie Cameron "Freedom of Peaceful Assembly and Section 2(c) of the *Charter*" (*Report for the Public Order Emergency Commission*, September 2022). However, notwithstanding this scholarly work, the jurisprudence

has followed the approach in *Trinity Western*, holding that although there may be circumstances in which a separate analysis of each individual right is called for, it is unnecessary where the same facts underlie each alleged violation and the analysis of the infringement of one *Charter* right sufficiently accounts for the interests engaged by the alleged violations.

[72] Therefore, while I would not preclude the possibility that, in a different factual matrix, a separate analysis of each alleged *Charter* violation may be appropriate, I find that a separate analysis was not required on the facts of *this* case. Given the present circumstances, I would adopt Sossin J.A.'s reasoning on this point in *Ontario Churches CA* in its entirety. The protest gatherings that were at the heart of the appellants' application had expressive, collective and associative value. All three of those rights were potentially affected by the same gathering limit in the PHO-10s. the Government conceded that the 10-person gathering limit violated the appellants' right to freedom of expression. In these circumstances, there was no need for the Chambers judge to have conducted separate analyses of the appellants' claims of violations of their rights under ss. 2(c) and (d) because the factual matrix underpinning the claimed violations of those rights was largely indistinguishable from that which underpinned their claim under s. 2(b). Moreover, as I will discuss in the next section of the analysis, the deleterious effects of the PHO-10s on the appellants' other s. 2 rights were all properly considered by the Chambers judge under the s. 1 analysis.

[73] Furthermore, given the material difference between the analytical approach called for when determining whether evidence should be excluded under s. 24(2) in a criminal case and the approach called for in the present context, the Chambers judge was not required to alter the nature of the s. 1 test to account for the fact that the PHO-10s may have infringed more than one of the appellants' rights.

[74] Accordingly, I would not give effect to this ground of appeal.

5. Section 1 of the *Charter*

a. Standard of review

[75] The question of whether a *Charter*-infringing measure is justified under s. 1 is a question of law, reviewable for correctness. A correctness standard of review also applies, in connection with constitutional questions, to the "mixed" finding of whether the facts satisfy the applicable

legal test (*Société des casinos du Québec inc. v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at paras 45 and 94–97). However, the factual findings made by a first-instance judge that underpin such conclusions, whether they relate to social and legislative facts, or to what happened in the particular case, are reviewable only for palpable and overriding error (*Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 49, [2013] 3 SCR 1101).

b. The s. 1 framework

[76] The rights and freedoms guaranteed by the *Charter* are not absolute; s. 1 states that they are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Section 1 provides a "stringent standard" for the justification of limits on fundamental rights and freedoms, and the onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified rests upon the party seeking to uphold the limitation (*Oakes* at paras 68–70).

[77] Two different frameworks have emerged for determining whether a limit on a right or freedom is reasonable and demonstrably justified. The first framework, established in *Oakes*, applies to laws or rules of general application. In order to pass constitutional muster under the *Oakes* framework, the first requirement is that the objective of the impugned law must be of sufficient importance to warrant overriding a *Charter* right or freedom. The second requirement is that the means chosen to meet that objective are reasonable and demonstrably justified. This involves the satisfaction of a "proportionality" test, which has the following three components: (a) the particulars of the law must be rationally connected to its objective; (b) the law must impair the right or freedom in question as minimally as possible; and (c) there must be an overall proportionality between the deleterious effects of the law and the object which has been identified as being of sufficient importance (*Oakes* at paras 73–75).

[78] The second framework, established in *Doré* and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*], applies to discretionary decisions made by administrative decision-makers, including adjudicative tribunals and government ministers. The *Doré-Loyola* framework is primarily concerned with reasonableness. As Abella J. noted when writing for the majority in *Loyola*, when a discretionary administrative decision infringes a *Charter*-protected right or freedom, such a decision will only be justified under s. 1 where the

decision-maker has "proportionately balance[d] the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue" (at para 4).

[79] In the present case, the Chambers judge assessed the Government's claim that the outdoor gathering limit contained in the PHO-10s was justified under s. 1 by applying the *Oakes* test. In that regard, he concluded that, because the PHO-10s had both characteristics of rules of general application and characteristics of a delegated administrative decision, a "clear-cut decision [could] not be made" with respect to whether the *Oakes* framework or the *Doré-Loyola* framework applied (*Chambers Decision* at para 66). He also observed that both frameworks "work the 'same justificatory muscles: balance and proportionality'" and that, as a result, "either test should lead to the same substantive outcome regarding the constitutional challenges" (at para 68). He went on to choose the *Oakes* test, as he determined that "[i]f the review satisfies the *Oakes* test it should also satisfy [*Doré-Loyola*]" (at para 68).

[80] A question was raised during the appeal hearing about whether the s. 1 analysis should have been conducted under the *Oakes* framework or under *Doré-Loyola* in this case. The appellants say the Chambers judge was right to find that the *Oakes* framework applied but assert that he erred in his application of it. The Government, on the other hand, takes the position that, because the order-making power that was exercised in imposing the gathering limits under the PHOs was fundamentally discretionary, the *Doré-Loyola* framework ought to have been used. It points to the decision in *Beaudoin*, where the British Columbia Court of Appeal applied *Doré-Loyola* in analysing the reconsideration decisions made by a public health officer. On the other hand, in *Ontario Churches CA* and *Gateway Bible*, in circumstances that were arguably more like the case at hand, provisions that mirrored the PHO-10s were treated as rules of general application, and the Ontario and Manitoba Courts of Appeal applied the *Oakes* framework. In *Taylor SC*, Burrage J. of the Supreme Court of Newfoundland and Labrador also applied the *Oakes* framework to the s. 1 analysis, as did Romaine J. of the Alberta Court of King's Bench in *Ingram*.

[81] The question of which framework should have been applied in the circumstances at hand is not one that needs to be definitively answered for the purpose of disposing of this appeal. The Chambers judge applied the *Oakes* framework which, in my respectful view, sets the bar for s. 1

justification at least as high as the framework in *Doré-Loyola*, if not higher. In other words, if the gathering limits are reasonable and demonstrably justified under *Oakes*, the result would be no different than if the *Doré-Loyola* framework were applied.

c. The Chambers judge's s. 1 analysis

[82] In the course of his reasons, after reviewing the evidence and before conducting his analysis under s. 1, the Chambers judge noted that the COVID-19 pandemic was an unprecedented occurrence and, when it arrived, the available evidence indicated that the consequences of inaction on the part of the Government would be dire. He referred to the evidence showing that, during the first year of the pandemic, the transmission rates for COVID-19 were extremely high, the mortality rates were high, there were no vaccines and no antiviral treatments, and the hospitals were being overrun with patients in need of care. The Chambers judge observed that, against that backdrop, the Government had acted by making orders, based on the science available to it, to attempt to balance public safety and individual liberty. He went on to say:

> [57] In January 2021, the continuing and escalating threat of COVID-19 in Saskatchewan was evidenced by the province having the highest case rate in Canada, at 143/100,000. The COVID-19 related mortality rate during the months of December 2020 and January 2021 was also the highest the province had experienced since the beginning of the pandemic, a total of 238 deaths occurring within those two months. Other surveillance monitoring indicators including the test positivity rate, effective reproductive rate, outbreaks and hospitalizations were also high. Additionally, it was evident that the risk of SARS-CoV-2 transmission in communities existed throughout the province. Modeling from December 2020 and January 2021 predicted that Canada could remain on a rapid growth trajectory, which indicated a stronger response, through a combination of measures, in order to prevent severe illness and death. The emergence of the more highly contagious VOC added to the growing risk of uncontrolled community transmission. Between November 8, 2020 and January 24, 2021, weekly records for deaths due to COVID-19 were broken ten times over in thirteen weeks.
>
> [58] With minor exceptions, all monitoring indicators showed concerning trends. The virus' effective reproduction number (R_t) ranged between 1.5 and 1.9, indicating exponential growth. Test positivity ranged between 6.9% and 11.0%, nearly double the target of less than 5%, indicating a high proportion of undiagnosed positive cases.
>
> [59] Vaccination remained largely unavailable and no anti-viral treatments were available.
>
> [60] Most of the transmission was known to occur in indoor and crowded settings, and the research regarding outdoor transmission was limited. However, without restrictions to private and public gatherings, during periods of high community transmission and high incidence of COVID-19 cases, there was greater probability that people may attend gatherings while they are infectious, regardless of the presence of symptoms.

> [61] The above-noted factors contributed to the risk that even small gatherings indoors or outdoors would have increased the spread of COVID-19 in Saskatchewan when the prevalence of COVID-19 (particularly VOCs) was high. Limits on gathering sizes helped to reduce the risk of overall COVID-19 transmission across Saskatchewan, even if any particular gathering might not necessarily have resulted in transmission.
>
> [62] A holistic, multi-layered approach was introduced to reduce the risk of COVID-19 transmission. Individual and population level measures – including gathering restrictions – were implemented.
>
> [63] The Outdoor Gathering Restrictions remained in force until May 28, 2021, when it was repealed as part of Step 1 of the *Re-Opening Roadmap*, which wound down other public health measures in response to thresholds in population-wide vaccination update. The PHOs had their intended effect. The infection rate plateaued and fell slowly over the spring, fueled by a surge in VOCs, particularly in the Regina area.

[83] At the outset of the portion of the decision where the Chambers judge applied the *Oakes* test, he began by noting that a certain level of deference was owed to the Government in the circumstances. In that regard, he said:

> [83] I agree with the Court in *Ontario Churches* [*Ontario v Trinity Bible Chapel*, 2022 ONSC 1344 (affirmed 2023 ONCA 134, leave to appeal to SCC denied 2023 CanLII 71235)] at para 126 in that greater deference is owed where "public officials are dealing with a complex social problem, balancing the interests of competing groups, or seeking to protect a vulnerable segment of the population." [The Government] was charged with the task of protecting public health during an unprecedented public health emergency involving serious illness and death, which was disproportionately impacting the most vulnerable. As well, this task engaged the balancing act of curbing transmission of SARS-CoV-2 on one hand and managing the impact of COVID-19 on social and commercial activities all within the context of evolving knowledge about COVID-19 and newly emerging VOCs.
>
> [84] [The Government] could not wait for scientific certainty in order to act in a situation where catastrophic loss of life was at risk. As such, I find the precautionary principle to be essential in this case. Dr. Khaketla's Report explains that "when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically" (Dr. Khaketla affidavit at 14, Exhibit B of Vol III at R-1372).
>
> [85] I find that the enactment of the PHOs restricting outdoor gatherings was not politically driven as challenged by the applicants in argument. This is a government that, for the most part, have a proclivity to foster personal rights and freedoms. It is incongruous to conclude that the public health measures were politically fueled. In addition, other provinces had more stringent restrictions in outdoor gatherings, some allowed more. Accordingly, I am inclined to give more deference to [the Government].
>
> [86] With the benefit of hindsight to reflect on the public health measures enacted in the height of the pandemic, we can all see things which we would wish had been done differently or not at all. Even so, it is difficult to come to a consensus as to what the right balance is or should have been. Some feel the public health measures were too restrictive, whereas for others, they were lenient. Leaving aside the competing viewpoints, the essence of the analysis is to evaluate the public health measures at the time they were enacted

> without the retroactive lens through which we view the PHOs. I am guided by Pomerance J. in *Ontario Churches* at para 128:
>
> > [128] … This mix of conflicting interests and perspectives, centered on a tangible threat to public health, is a textbook recipe for deferential review. As it was put by Joyal C.J. in *Gateway*, at para. 292, the court must "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."

[84] Then, focusing on the individual components of the *Oakes* test, the Chambers judge found that the objective of protecting Saskatchewan residents from a "potentially fatal and novel virus amidst a pandemic of said virus is pressing and substantial" (at para 88).

[85] As for the requirement for a rational connection between the objective and the *Charter*-infringing measures, the Chambers judge accepted the Government's assertion that, although the risk of transmission at outdoor gatherings was lower than the risk at indoor gatherings, it was not non-existent, especially when viewed in light of the evidence before him concerning the activities that accompanied protest gatherings. As a result, he concluded that the PHO-10s were "rationally connected to the objective of averting, diminishing and managing the transmission" of COVID-19 (at para 93).

[86] Turning to minimal impairment, the Chambers judge noted that a "healthy dose of deference" was to be afforded to the Government in its choice of measures to combat COVID-19 (at para 94). He framed the question as being whether the limits on outdoor gatherings were "proportionate in their overall impact in the context of public health measures in a pandemic" (at para 94). He noted that, while the test at this stage of the *Oakes* analysis is rigorous, it did not limit the government to making "the least intrusive choice imaginable" (at para 95).

[87] The Chambers judge also addressed the appellants' argument that, because the PHOs, in conjunction with *ROSK*, permitted greater numbers of persons to gather indoors at places of business and places of worship, the outdoor gathering limits could not be found to be minimally impairing. In rejecting that submission, the Chambers judge noted that there were multiple layers of protection for indoor gatherings that simply did not exist for outdoor gatherings, and that the Government did not have the luxury of waiting for definitive evidence and full debate on the issue.

He also pointed to the evidence that outdoor protest gatherings were more likely to be attended by persons who generally did not adhere to COVID-19 safety protocols like personal distancing, registering, and testing, and that those persons often engaged in high-transmission activities like shouting, hugging, and carpooling to and from the gatherings.

[88] Finally, as to the proportional balancing of the salutary and deleterious effects of the *Charter*-infringing measures, the Chambers judge noted that, although the PHO-10s had curtailed the number of persons who could lawfully attend outdoor protests, those inclined to participate in protests had other options available to them, including gathering by virtual means to exchange their ideas (as many other people who wished to meet for other reasons had to), and protesting outdoors as long as they gathered in groups of 10 or fewer to do so. He also went on to say:

> [112] … [The Government] did not opt for the most draconian measure to combat the pandemic, such as complete lockdowns for extended periods. The measures as reflected in the PHOs were calibrated, reviewed, and readjusted on a regular basis and were informed by statistical data on [variants of concern], rates of vaccination, infection, hospitalization, and ICU capacity.
>
> [113] In any case, the outcome bears some proof that the restrictions may have helped. It certainly would have been preferable to have information on the impact of each public health measure. However, that is not the case and we may never know the true impact of each public health measure.
>
> [114] With regard to the final stage of the *Oakes* test, I find that the salutary effects of the Outdoor Gathering Restrictions outweighed the deleterious effects, and therefore [the Government]'s decision to impose limits on outdoor gatherings is proportional.
>
> [115] In a state of public health emergency wreaking severe havoc on the health of Saskatchewan residents, [the Government] was burdened with the immense task of balancing multiple interests.
>
> [116] I find that [the Government]'s PHOs which imposed the Outdoor Gathering Restrictions violated the *Charter* right of freedom of expression as articulated in s. 2(b). I also find that [the Government] has met its burden to establish that the Outdoor Gathering Restrictions are reasonable, demonstrably justifiable in a free and democratic society and are therefore saved pursuant to s. 1 of the *Charter*.

d. The alleged errors

[89] The appellants contend that the Chambers judge erred in his application of the *Oakes* test. In that regard, they do not challenge the Chambers judge's conclusion that the PHO-10s, including the outdoor gathering limits, were enacted for the express purpose of "preventing, reducing and controlling the transmission of SARS-CoV-2 pursuant to s. 25.2(3) of the *Regulations*" (*Chambers*

Decision at para 88) or his finding that controlling the serious threat that the COVID-19 pandemic posed to public health was a pressing and substantial objective.

[90] However, the appellants allege that the Chambers judge erred in addressing the proportionality component of the s. 1 analysis. They come at this argument from two angles. First, they say the Chambers judge was wrong to conclude that the outdoor gathering restrictions were rationally connected to the objective of reducing transmission of the virus that causes COVID-19. Second, the appellants contend that the Chambers judge erred in holding that the 10-person outdoor gathering restriction imposed by the PHO-10s was minimally impairing of their *Charter* rights.

[91] As I will explain, I am not persuaded that the Chambers judge erred in either of these ways.

e. Analysis

i. The Chambers judge did not err in finding that the PHOs were rationally connected to their objective

[92] The first component of the proportionality aspect of the *Oakes* test requires the party seeking to uphold a *Charter*-infringing measure to demonstrate that the measure is rationally connected to the objective it seeks to achieve. A rational connection means that the measure or measures adopted "must be carefully designed to achieve the objective in question [and] must not be arbitrary, unfair or based on irrational considerations" (*Oakes* at para 70).

[93] In the case at hand, the Chambers judge accepted that the outdoor gathering limits were rationally connected to the Government's objective in imposing those limits. In that regard, in the *Chambers Decision*, he said:

> [91] I accept [the Government]'s position that COVID-19 is transmitted from person to person. Although the risk is lower in outdoor settings and as the applicants point out that [the Government] failed to identify a single transmission of SARS-CoV-2 that occurred at an outdoor protest, the risk of transmission remains. The logical nexus is reinforced by the type of activities that took place during unstructured outdoor gatherings, including at the protests the applicants attended, such as chanting, shouting, embracing, and carpooling. As well, the attitude of the protestors in their reluctance to disclose their attendance to contact tracers and to test for COVID-19 made it difficult to prove as a fact that transmission occurred at pandemic-related protests.
>
> [92] Additionally, the applicants submit that restricting outdoor gatherings to 10 persons or less lacks rationality since [the Government] simultaneously permitted larger in-person gatherings in indoor settings with a higher transmission risk. Suffice to say, the restrictions pertaining to unstructured outdoor gatherings cannot be compared to in-person

> gatherings in indoor settings that were subject to mandatory compliance of public health measures under ROSK.
>
> [93] [The Government] has demonstrated that "it is reasonable to suppose that the limit may further the goal, not that it will do so" (*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48, [2009] 2 SCR 567 [*Hutterian Brethren*]; *RJR-MacDonald* at para 153). Consequently, the Outdoor Gathering Restrictions were rationally connected to the objective of averting, diminishing, and managing the transmission of SARS-CoV-2.

[94] The appellants submit that this conclusion reflects error because there was no evidence that transmission of the virus had *actually* been linked to any specific outdoor gathering, and, in light of that, restrictions on outdoor gatherings could not reasonably be seen as having any impact whatsoever on the Government's objective.

[95] I reject this argument. I would begin by observing that the burden the Government was required to discharge at this stage is not particularly demanding. *Oakes* makes it clear that a rational connection cannot be arbitrary, unfair, or based on irrational considerations. But that does not mean the government must show that the measure it has taken to attain a goal is a silver bullet, or that it will inevitably contribute to achieving the objective. A rational connection will be made out where there is a "causal connection between the infringement and the benefit sought on the basis of reason or logic" and it is "reasonable to suppose that the limit *may* further the goal" (*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48, [2009] 2 SCR 567 [*Hutterian Brethren*], emphasis added).

[96] The Government's objective in imposing outdoor gathering limits under the PHOs was to control the transmission of COVID-19. To state the obvious, gatherings bring people into proximity, whether they take place indoors or outdoors. There was extensive evidence before the Chambers judge that COVID-19 is a communicable disease that is capable of exponential growth, and that it spreads primarily through respiratory contact, which means it can be carried on small droplets or aerosols by exhaling, including normal breathing, and by stronger expulsions like coughing, sneezing, speaking, singing or shouting. In other words, the evidence amply supported a conclusion that multi-person gatherings increase the risk of the spread of COVID-19. There was also evidence that COVID-19 can spread asymptomatically and pre-symptomatically, and that, at the time the PHO-10s were enacted, the province was in the midst of a second phase of the pandemic that saw unprecedented transmission of COVID-19 and resultantly high numbers of

hospitalizations and deaths. All of this was enough, as I see it, to establish a rational connection between the means chosen and the objective. The government was not required to prove that outbreaks *actually* occurred at the gatherings to establish a rational connection. All it needed to show was that there was a reasoned and logical basis to conclude that imposing restrictions on the number of people who could gather outdoors *might* contribute to achieving the goal of preventing, reducing, or controlling the spread of COVID-19. The Chambers judge found that the Government had met that burden, and I see no error in that outcome.

[97] The Chambers judge's conclusion on this point is not undermined, in my view, by the absence of evidence demonstrating that COVID-19 transmission had actually occurred at an outdoor protest in Saskatchewan. His reasons reveal that he was well aware of that absence of evidence but found that it did not negate the logical nexus between gatherings and COVID-19 transmission. Moreover, while there was clear evidence that the risk of transmission at outdoor gatherings was lower than the risk of transmission in indoor settings, there was also evidence that outdoor protests brought with them a higher incidence of activity that elevated the level of risk, including an unstructured environment, prolonged periods of contact, non-maintenance of physical distancing, carpooling, travelling from various communities, and an inability or unwillingness of participants to take public health precautions. In the face of all of that, I can find no error in this aspect of the *Chambers Decision.* The Chambers judge made factual findings that are supported by the evidence and correctly applied the legal test to them.

ii. The Chambers judge did not err in finding that the outdoor gathering limit was minimally impairing

[98] The appellants' remaining three arguments, in my view, are all different ways of asserting that the Chambers judge erred in relation to his assessment of the minimal impairment component of the proportionality analysis under *Oakes.*

[99] First, the appellants say the Chambers judge erred in concluding that the outdoor gathering limits were minimally impairing, given that the Government had presented no evidence to explain why it had not opted for other measures short of an outright prohibition of gatherings of more than 10 people that would have achieved the objective with less detrimental effects upon individual rights. The appellants list several examples of what they say are less intrusive measures that could

have achieved the Government's goal, including requiring that persons attending outdoor gatherings wear face coverings, register their attendance, undergo testing for COVID-19, and refrain from sharing food or drink.

[100] Second, the appellants assert that the Chambers judge erred by relying on mere allegations concerning their non-compliance with public health protocols at outdoor gatherings as a basis for s. 1 justification. They say there was no evidence that either of *them* had actually failed to comply with COVID-19 protocols, apart from the limits on the number of persons in attendance, at any of the protests in which they had participated.

[101] Third, the appellants say the Chambers judge erred by affording undue deference to the Government's policy choices. They submit that, even though the evidence showed that outdoor gatherings were safer than indoor gatherings, the Government chose to permit greater numbers of people to gather indoors to pursue activities that are not constitutionally protected, such as shopping and dining in restaurants. This policy choice, say the appellants, demonstrates that the Government failed to adequately consider the importance of constitutional protections for public gatherings and that the Chambers judge should have found that it meant the Government had failed to meet its burden under s. 1.

[102] As I will discuss, I am not persuaded that the Chambers judge erred in any of these ways either.

[103] I repeat here the observation that I made at the outset of these reasons regarding the appellate-level jurisprudence that has developed in relation to the s. 1 justification of public health measures, including gathering restrictions, that were enacted in response to the COVID-19 pandemic. As decisions like *Beaudoin, Ontario Churches CA, Gateway Bible*, *Taylor SC* and, to some extent, *Ingram* have all demonstrated, where provincial governments are faced with a complex and challenging pandemic that poses a significant threat to public safety and calls for timely and decisive action in the face of uncertain circumstances and inconclusive scientific evidence, significant deference will be afforded by the courts where provincial decision-makers have taken a precautionary approach.

[104] In the section of the *Chambers Decision* where the Chambers judge dealt with the minimal impairment component of the *Oakes* analysis, he self-instructed on the law by referring to leading authorities from the Supreme Court of Canada. He then reviewed the parties' submissions and noted that the appellants had relied primarily on the discrepancy between the "stricter numerical limits on outdoor gatherings, including outdoor protests" and the less restrictive requirements that governed indoor events and activities as a basis for suggesting that the PHO-10s were not minimally impairing (*Chambers Decision* at para 97). He explained why he rejected that argument and found that the Government had shown that the PHO-10s were minimally impairing of the appellants' rights. In that regard, he said:

> [99] First, the discrepancy in the limits between the two settings does not necessarily mean that the Outdoor Gathering Restrictions should have been higher. [The Government] did not have the luxury of debate in the context of a raging pandemic. They were required to act promptly and effectively, applying the precautionary principle. Considering the overwhelming effect of the pandemic on Saskatchewan's population and healthcare system, the Outdoor Gathering Restrictions were within the range of reasonable alternatives.
>
> [100] Second, the existence of ROSK allowed for outdoor gatherings to be unstructured whereas the indoor gatherings were subject to layered protocols and protections that were mandatory. Comparing the two types of gathering settings is outside the purview of "a comparison of comparables" (*Beaudoin* at para 229; *Ontario Churches* at para 153).
>
> [101] Third, there were cogent reasons to have preferred a lower gathering limit as opposed to imposing ROSK-like protections on unstructured outdoor gatherings, particularly protests. [The Government] outlines these reasons at para. 141 of their brief:
>
> > 141 …
> >
> > a) The Applicants, and others with them, failed to maintain mandatory social distancing or adopt even basic COVID-19 mitigation measures to offset their flagrant non-compliance with the Outdoor Gathering Limit. Non-compliance is a serious concern in COVID-19 public health regulation [*E.g. Ontario Churches*, at para 153; *Taylor*, at paras 472-475].
> >
> > …
> >
> > c) The lack of structure at protests and other gatherings to which the Outdoor Gathering Limit applied is also serious concern. Unlike movie theatres, retail stores, or other indoor gatherings governed by the ROSK, there is no person or corporation who can be held accountable for misconduct, and no practical way for organizers to admit or exclude non-compliant attendees.
> >
> > d) In many facilities where the ROSK applied—particularly food distribution locations (*e.g.* grocery stores), public eating establishments (*e.g.* restaurants and bars), pools, hotels, and personal services (*e.g.* salons and tattoo parlors)—the facility is already regulated by public health … These operators are generally both able and willing to comply with public

> health measures. This is not true of *ad hoc* or unstructured gatherings, including protests.
>
> e) Limiting the number of attendees at unstructured gatherings restricted the social mixing that could occur before and after such gatherings, including carpooling, set-up and take-down, and social visits, which could only partially be mitigated with controls at the event itself.
>
> [102] Fourth, both primary and secondary transmission must be considered. Limiting outdoor gatherings could reasonably be expected to have indirect benefits on the rates of infection.
>
> …
>
> [104] If all things were equal with participants in both settings fully adhering to the COVID-19 protocols and measures – physical distancing, absence of factors increasing risk of transmission – perhaps, it may be feasible to equate risk of outdoor transmission to risk in indoor settings. However, this is not the case. The applicants at outdoor protests did not adhere to the COVID-19 protocols such as physical distancing, testing for COVID-19 before and after attendance, registering participants. As well, they engaged in activities that increased the risk of transmission such as shouting or chanting, prolonged periods of contact, hugging, carpooling, travelling from different communities, and handing items back and forth.
>
> …
>
> [106] Given the rationale provided by [the Government], coupled with the standard not being scientific certainty in relation to providing "proof" of transmission, I find the Outdoor Gathering Restrictions to be minimally impairing.

[105] I see no error here. The second component of the *Oakes* proportionality test considers whether the impugned legislative measure impairs the right or freedom in question as minimally as possible. This does not require the government to adopt the least ambitious or least restrictive means possible of achieving its end (see, for example: *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at para 89 (WL)). While a law or other government measure may fail at the minimal-impairment stage if the government is unable to explain why a less restrictive measure was not chosen, it will not fail just because it is possible to "conceive of an alternative which might better tailor objective to infringement" (*RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160). In this sense, minimal impairment does not call for perfection; it requires that "[t]he law must be reasonably tailored to its objectives [and that it] impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account" (*R v Sharpe*, 2001 SCC 2 at para 96, [2001] 1 SCR 45, emphasis in original).

[106] The mere fact that other alternatives existed, even those that may have been less restrictive, does not mean that measures chosen by a government are overbroad (*Ontario Churches CA* at para 23; *Gateway Bible* at paras 97–100). Nor, in the present context, does the fact that certain venues and businesses were permitted to hold larger gatherings indoors if they complied with certain conditions mean the limits imposed on outdoor gatherings were not minimally impairing (see: *Gateway Bible* at paras 91–96).

[107] Proper assessment of the minimal impairment component calls for a healthy measure of deference to the government where the measure in issue is aimed at tackling a problem that is complex, may be approached in more than one way, and where there is no certainty as to which measure will be most effective. As the Supreme Court observed in *Canada (Attorney General) v JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 SCR 610 at para 43, "[c]rafting legislative solutions to complex social problems is necessarily a complex task … on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives" (see also: *R v Brown*, 2022 SCC 18 at para 135; and *Hutterian Brethren* at para 53).

[108] In *Ontario Churches CA*, Sossin J.A., whose reasoning I agree with on this point as well, observed that the amount of deference owed at the minimal impairment stage of the *Oakes* test is context-dependent, meaning that in times of crisis greater deference may be owed to the government when precautionary but reasoned measures are taken. In that regard, she said:

> [102] …[D]eference under the minimal impairment stage of the *Oakes* analysis is contextual. I would add that deference is not a free-floating concept that moves up and down a spectrum. Nor is it a blank cheque whenever governments are faced with a challenging policy issue. Rather, it takes its meaning from the context of the challenged law or state action. In this case, the COVID-19 pandemic required Ontario to act on an urgent basis, without scientific certainty, on a broad range of public health fronts. That context not only informs the degree of deference owed to government as the crisis shifted on the ground in real time, but also the heightened importance of vigilance by all branches of government over fundamental rights and freedoms during such times of crisis.
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> …
>
> [108] The appellants are right to emphasize that the government cannot escape accountability for its decisions just because they were made during a public health crisis. They are also right to highlight that deference to public health experts during such a crisis does not lead to a different constitutional standard of scrutiny of regulations enacted by government.
>
> …

> [110] In my view, it was appropriate for the motion judge to consider the precautionary principle as informing whether and how the state could meet its objectives of reducing transmission risk and saving lives in a situation of scientific uncertainty. This accords with the contextual approach to the *Oakes* test generally. As stated in *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 77, "Where the court is faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, the court may rely on a reasoned apprehension of that harm." See also *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 115; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 85; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 132-34.
>
> [111] By the same token, a reasoned or reasonable apprehension of harm does not mean governments can justify infringing *Charter* rights based on apprehension alone. The minimal impairment analysis still requires an evidentiary basis to show why a measure is a reasonable means of achieving a pressing and substantial objective. While not a constitutional standard in itself, the precautionary principle helps inform what it means to rely on a reasoned apprehension of harm where scientific certainty is not possible.
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> …
>
> [113] This observation is equally if not more apposite when considering the complex regulatory scheme of Ontario's COVID-19 response. In *Grandel v. Saskatchewan*, 2022 SKKB 209, the Saskatchewan Court of King's Bench found the precautionary principle was "essential" in the s. 1 context when reviewing the government's response to COVID-19 where "some cause and effect relationships are not fully established scientifically": at para. 84.
>
> [114] The motion judge invoked the precautionary principle in a similar fashion here to explain why it was reasonable for Ontario to act in the manner it did, in the absence of scientific certainty.
>
> [115] In my view, this application of the precautionary principle was consistent with the jurisprudence and did not introduce an excessively deferential standard into the s. 1 analysis.

[109] It is also important to understand that the question of whether a government measure was minimally infringing of *Charter* rights is not properly examined through the lens of hindsight (*Hutterian Brethren* at para 37). This is especially so in the context of a public health crisis like the COVID-19 pandemic, as Fitch J.A. observed in *Beaudoin*:

> [268] I emphasize that hindsight has no place in this analysis…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.
>
> (Citations omitted)

[110] Bearing the foregoing jurisprudence in mind, I can see no basis to impugn either the Chambers judge's approach or his bottom-line conclusion regarding the question of whether the gathering limits in the PHOs were minimally impairing.

[111] The evidence before the Chambers judge established that, at the time the 10-person outdoor gathering limit was imposed, the COVID-19 situation in Saskatchewan had become particularly dire. The disease was spreading exponentially. New variants that were highly dangerous and difficult to manage were emerging. Vaccines were only in the development stage and would not become widely available for some time. Nearly 4.5% of those who contracted COVID-19 required hospitalization and more than 1% who contracted it died. In short, the disease was novel, and it was serious. The Government needed to act.

[112] The evidence before the Chambers judge also supported the conclusion that outdoor transmission of COVID-19 was possible, and that the risk of transmission may be elevated by activities such as chanting and shouting, close physical contact, remaining in close proximity for extended periods of time, and by non-use of face coverings. Many of these things occurred at outdoor protest gatherings. While it may have been possible to argue that some of those risk factors could be feasibly reduced through the measures the appellants say ought to have been imposed instead of gathering limits, there was no basis in the evidence to conclude that such measures would have been effective. The very purpose of the protest gatherings in which the appellants participated was to express opposition to such restrictions. Moreover, there was no evidence as to who, as part of such a gathering, might have taken responsibility for enforcing those measures or how they might have been enforced. In light of all of that, I am unable to accept that the Chambers judge erred by not requiring the Government to lead evidence as to why it did not impose less restrictive means.

[113] I also do not agree that the Chambers judge erred by relying on "mere allegations" about how the appellants may have behaved at protest gatherings when considering the question of minimal impairment. The appellants were both cross-examined on their affidavits. That cross-examination was in evidence before the Chambers judge, and it showed that the appellants had both engaged in and observed activity at the protest gatherings they attended that was of the very sort that had been identified as contributing to a higher risk of virus transmission. Further, there

was ample evidence concerning their objection to public health protocols. All of this supported the conclusion that the risk of transmission increased with the size of the gathering and that those who organized and attended protest gatherings were less likely to follow public health protocols. It was not an error for the Chambers judge to take that into account in a contextual analysis of the minimal impairment component under *Oakes*.

[114] Nor was it an error, in my respectful view, for the Chambers judge to have rejected the arithmetical argument made by the appellants, namely, that the outdoor gathering limits could not be seen as minimally impairing because they were lower than the permitted gathering limits for other indoor and outdoor settings under *ROSK*. As the Government states in its factum, "[c]ontrolling and regulating the spread of COVID-19 is far more complex than a straight comparison of gathering sizes. Different gatherings can, and should, be regulated differently". In this regard, I agree with the Government's submission that the larger permitted indoor limits under *ROSK* were neither arbitrary nor indicative of overbroadness in the outdoor gathering limits. The exemption from unstructured gathering limits under *ROSK* came with a constellation of mandatory protections that needed to be in place before licenced and regulated businesses could avail themselves of *ROSK*'s more specific gathering limits (including regulatory measures that had to be complied with and strict penalties that would adversely affect the operation of those businesses if they did not comply). No such protections could be reasonably applied to unstructured outdoor gatherings. The inaptness of the comparison that the appellants invite the Court to make is readily apparent.

[115] Moreover, even if the differential treatment between unstructured outdoor gatherings and retail settings could not be justified on an entirely public health rationale, that would not be determinative of whether the PHO-10s were sufficiently tailored to be minimally impairing. The Government was "entitled to balance the objective of reducing the risk of COVID-19 transmission in congregate settings with other objectives … such as preserving economic activity and preserving other social benefits which that activity made possible" (*Ontario Churches CA* at para 118). I would also observe, as Sossin J.A. did in *Ontario Churches CA*, that when considering whether less restrictive means were available to achieve the Government's objective, the Chambers judge properly understood that the Government did not have the luxury of full debate or the time to wait

for the science to develop to a place of conclusiveness. Action was required and the outdoor gathering limits fell within a range of reasonable alternatives.

[116] All of this is to say that, in my respectful view, the Chambers judge did not err by affording deference to the Government's choice of measures to achieve the goal it sought to achieve in preventing, reducing or controlling the spread of COVID-19. The 10-person outdoor gathering limit was a temporary measure invoked as part of a coherent and comprehensive package of measures implemented to respond to a once-in-a-century public health emergency. The jurisprudence strongly supports the conclusion that a healthy measure of deference was appropriate.

[117] Moreover, the urgency of the objective and the temporary and carefully crafted nature of the outdoor gathering limits imposed by the PHO-10s satisfy me that the restriction on the appellants' *Charter* rights was proportionate to the benefits realized. The Chambers judge did not err by concluding that the *Charter*-limiting measures chosen by the Government were justified under s. 1.

[118] Accordingly, the appellants' arguments under this heading must also fail.

V. CONCLUSION

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

[120] I would make no order as to costs, for two reasons: (i) the Government did not seek an order for costs; and (ii) the appeal raised legitimate issues of public interest.

"Kalmakoff J.A."

Kalmakoff J.A.

I concur. "Caldwell J.A."

Caldwell J.A.

I concur. "Tholl J.A."

Tholl J.A.

FORM 10a
(Judgment Dismissing Appeal)

CACV4088

IN THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN:

JASMIN GRANDEL and DARRELL MILLS

Appellants
(*Applicants*)

AND:

THE GOVERNMENT OF SASKATCHEWAN and DR. SAQIB SHAHAB IN HIS CAPACITY AS CHIEF MEDICAL OFFICER FOR THE PROVINCE OF SASKATCHEWAN

Respondents
(*Respondents*)

BEFORE

The Honourable Mr. Justice N.W. Caldwell

The Honourable Mr. Justice J.A. Tholl

The Honourable Mr. Justice J.D. Kalmakoff

JUDGMENT OF THE COURT

THIS APPEAL from the judgment of the Honourable Mr. Justice D.B. Konkin, dated September 20, 2022, was heard on February 6, 2024, at Saskatoon.

ON READING the material filed with the Court, including the judgment pronounced by the Honourable Mr. Justice D.B. Konkin and the reasons therefor, and

ON HEARING the submissions made on behalf of the parties,

THIS COURT HEREBY ORDERS THAT:

1. This appeal be dismissed.

2. There shall be no order for costs.

DATED _____

_____
Registrar, Court of Appeal

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. In the past few years, the freedom of peaceful assembly has risen to national importance. Whether it was because of COVID-19-related restrictions, as evident in the facts of this case, or today's economic, cultural, political or geopolitical issues, Canadians are more frequently engaging in their right to peaceful assembly than ever before. This fundamental freedom enshrined in the *Charter* is essential to a free and democratic society, and the time for the development of the values underpinning it with guidance for a test to be used by Canadian Courts could not be more timely and necessary.

2. Since the *Charter's* inception, this Court has never authoritatively fleshed out s. 2(c) as an independent freedom: what is its scope? What are its limits? Should the freedoms guaranteed by s. 2(c) be subsumed under those guaranteed by s. 2(b)? Is the test for determining whether a violation of s. 2(c) has occurred the same as for s. 2(b)? If so, why? If not, how is it different?

3. This test case centres on a 10-person limit Saskatchewan imposed on outdoor gatherings, including for protests, which saw dozens of persons, including the appellants, charged and convicted for engaging in peaceful protests.

4. The respondents refused to concede a violation of the freedom of peaceful assembly. The lower Court subsumed the freedom of peaceful assembly under the conceded violation of freedom of expression. This approach was upheld by the Court of Appeal. As a result, a case primarily about the restriction on peaceful assembly transmuted into a case about freedom of expression.

5. The appellants submit that this case raises two issues of public importance warranting leave to appeal to this Honourable Court, namely:

1. Where the factual matrix underpinning multiple *Charter* claims is largely indistinguishable, may Courts appropriately subsume all *Charter* claims into a conceded violation, where the impugned law or government action strikes directly at the core of a subsumed claim?

2. Given the lack of a separate test for the guarantee of the freedom of peaceful assembly under s. 2(c) of the *Charter,* must Courts addressing s. 2(c) claims, either apply the test established under s. 2(b) or subsume such claims into s. 2(b)?

B. Background

6. Beginning on March 17, 2020, until July 11, 2021, the Government of Saskatchewan issued a series of public health orders ("**PHOs**") restricting private and public gatherings of persons outdoors to 150, 50, 30 or 10 persons, at various timeframes in response to the COVID-19 pandemic.[1] None of the PHOs explicitly addressed public protests, but protests were captured by what was generally described as "unstructured outdoor gatherings" within such PHOs.[2]

7. All the relevant PHOs to the appellants' application were issued pursuant to s.45 of *The Public Health Act*, 1994, SS 1994, c P-37.1 ("*Act*") and the restriction imposed on outdoor gatherings during the material time was no more than 10 persons ("**Outdoor Gathering Restrictions**").[3]

8. That is to say, the impugned law provided that no more than 10 persons in the province of Saskatchewan could assemble outdoors for any purpose, including for protests.

9. During the Outdoor Gathering Restrictions, the appellants attended demonstrations to protest measures imposed under PHOs and were charged for participating in gatherings exceeding 10 people.

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[1] *Grandel v Government of Saskatchewan*, 2024 SKCA 53 [*Grandel Appeal*], at para 9, 10 and 14
[2] *Ibid,* at para 13
[3] *Ibid,* at para 10

10. At the lower Court, the appellants commenced an originating application challenging the Outdoor Gathering Restrictions as unjustified infringements of their *Charter* rights of freedom of expression s.2(b), freedom of peaceful assembly s.2(c) and freedom of association s.2(d).[4]

11. The respondents conceded that the Outdoor Gathering Restrictions violated the appellants' rights under s.2(b), freedom of expression, but no further concessions were made with respect to other rights claimed by the appellants.[5]

C. Decision of the Saskatchewan Court of King's Bench

12. On September 20, 2022, the Saskatchewan Court of King's Bench dismissed the appellants' originating application holding that:

    a. The PHOs violated the right of the applicants under s.2(b) of the *Charter*;

    b. That violation of ss. 2(c) and 2(d) of the *Charter* were subsumed into s.2(b);

    c. That sufficient evidence was presented to demonstrably justify the PHOs under s.1 of the *Charter*; and

    d. That costs are declined because reasonable issues were raised for review.[6]

13. As noted above, the respondents conceded on s.2(b) of the *Charter* and the Court held that an independent analysis of ss.2(c) and (d) were not necessary in the circumstances and therefore subsumed the latter rights into s.2(b).[7]

14. As part of its reasons, the Court cited *Ontario v. Trinity Bible Chapel et al,* 2022 ONSC 1344 [*Ontario Churches*] as a similar case where s.2(c) was subsumed into s.2(b). Additionally, the lower Court cited *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 [*Gateway*], by stating that in *Gateway*, the Court "…subsumed s.2(c) into s.2(b), given

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[4] *Ibid,* at para 17
[5] *Ibid,* at para 24
[6] *Grandel v Saskatchewan,* 2022 SKKB 209 [*Grandel*], para 117-119
[7] *Ibid,* paras 76 and 78

Manitoba's concession to the *prima facie* violation of s.2(b) in the specific context of protests."[8]

15. Moreover, the Court stated: "Given that there is no established test for s.2(c) analysis and so long as the freedom of expression analysis sufficiently accounts for the assemblage and associative rights engaged, I see no need to duplicate the analysis across multiple *Charter* rights…"[9]

16. At the salutary and deleterious considerations of the proportionality analysis in s.1, the Court held:

> [109] Sask responded to this issue in that like all other activities during COVID-19, much collective action moved online during the pandemic. The Rathwell Affidavit speaks to how the applicants communicated, networked, and planned on online platforms. The applicants were able to express themselves online, communicate with each other online, and relay their opinions directly to government officials online. Granted, online gatherings are not the perfect substitute for in-person ones by any means, but the applicants did have alternative avenues available to express themselves.
>
> [110] In addition, at no point was public protest prohibited. As long as there was physical distancing at protests, there was nothing hindering the applicants from organizing and participating in multiple outdoor gatherings of 10 persons or less, concurrently or consecutively.
>
> [111] The applicants argued that the "jurisdictional scans" which compared Saskatchewan's gathering limits with those enacted in other provinces did not share the whole story as noted in the applicants' brief at para. 114:

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[8] *Ibid,* at para 79;
However, the Court in *Gateway* at para 213 merely stated that subsuming s.2(c) into s.2(b) is often done so. Further in *Gateway*, the Court went on to identify Manitoba's concessions on all s.2 rights claimed and found that indeed s.2(c) was limited along with ss. 2(a) and (b) and stated that, "…further analysis will have to be conducted with respect to these breaches pursuant to the *Oakes* test and the justificatory framework found under s.1 of the *Charter*." (see *Gateway* para 214-215)

[9] *Ibid,* at para 80

> 114 [t]hese "jurisdictional scans" were particularly inaccurate or incomplete in representing other provinces' approach to outdoor protests. For example, the "jurisdictional scans" failed to note that BC had expressly exempted outdoor protests from its public health restrictions beginning on February 10, 2022 [Exhibit C, Kryzanowski Transcript, February 10, 2021 Gatherings and Events Order], or the fact that in March 2021, BC had consented to a Court order striking down its earlier prohibition on outdoor protests as of no force and effect [*Beaudoin* at para. 147]. The "jurisdictional scans" noted Alberta's prohibition on "outdoor social gatherings" [See Kryzanowski Affidavit, Exhibit P, R-1268] but did not consider that that restriction did not prohibit outdoor public protests.
>
> [112] In a different perspective, Sask did not opt for the most draconian measure to combat the pandemic, such as complete lockdowns for extended periods. The measures as reflected in the PHOs were calibrated, reviewed, and readjusted on a regular basis and were informed by statistical data on VOCs, rates of vaccination, infection, hospitalization, and ICU capacity
>
> [113] In any case, the outcome bears some proof that the restrictions may have helped. It certainly would have been preferable to have information on the impact of each public health measure. However, that is not the case and we may never know the true impact of each public health measure.
>
> [114] With regard to the final stage of the *Oakes* test, I find that the salutary effects of the Outdoor Gathering Restrictions outweighed the deleterious effects, and therefore Sask's decision to impose limits on outdoor gatherings is proportional.

17. After concluding the above proportionality analysis under s.1, the Court held that the Outdoor Gathering Restrictions violated the *Charter* right of freedom of expression and that they were reasonable and demonstrably justifiable in a free and democratic society under s.1.[10]

D. Decision of the Saskatchewan Court of Appeal

18. The Court of Appeal below upheld the lower Court's decision on all appealed grounds, including with respect to the manner in which assemblage and associative rights were subsumed into the conceded ground of freedom of expression.

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[10] *Ibid,* at para 116

19. Most authoritatively relying on the decision by this Honourable Court in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293 [*Trinity Western*], the Court of Appeal held that because the factual matrix underpinning each of the violations of ss. 2(b), (c) and (d) was identical, it was therefore, "…unnecessary to conduct a separate analysis of each alleged violation, because consideration of the interest protected by one is sufficient to account for the other affected rights in the s. 1 analysis…".[11]

20. As a result, the Court of Appeal upheld the lower Court's decision to subsume the appellants' rights under s.2(c) freedom of assembly and s.2(d) freedom of association into s.2(b) freedom of expression, as the respondents had conceded a violation of freedom of expression s. 2(b) and purported that outdoor protest gatherings are [wholly] a form of expression.[12] This, even though the Outdoor Gathering Restrictions under review, struck at the very core of the right of peaceful assembly under s. 2(c) and only had consequential, but significant, infringements on expressive and associational rights.

21. The Court of Appeal below also held that the proportionality analysis conducted by the lower Court cited above was sufficient to account for the right to protest, without elaborating on how the proportionality analysis sufficiently identified the deleterious impacts on assemblage and associational rights which were subsumed.[13]

PART II – STATEMENT OF ISSUES

22. This proposed appeal raises the following issues of public importance:

Issue 1: Where the factual matrix underpinning multiple *Charter* claims is largely indistinguishable, may Courts appropriately subsume all *Charter* claims into a conceded violation, where the impugned law or government action strikes directly at the core of a subsumed claim?

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[11] *Grandel Appeal*, at para 64
[12] *Ibid,* at para 62
[13] *Ibid*, at para 88

Issue 2: Given the lack of a separate test for the guarantee of the freedom of peaceful assembly under s. 2(c) of the *Charter,* must Courts addressing s. 2(c) claims, either apply the test established under s. 2(b) or subsume such claims into s. 2(b)?

PART III – STATEMENT OF ARGUMENT

Issue 1: Where the factual matrix underpinning multiple *Charter* claims is largely indistinguishable, may Courts appropriately subsume all *Charter* claims into a conceded violation, even where the impugned law or government action strikes directly at the core of a subsumed claim?

23. Subsuming ss. 2(b), 2(d) and 15 *Charter* claims into freedom of religion was appropriate in *Trinity Western*, as the freedom of religion was at the heart of the matter in dispute, and where the parties themselves had focused almost exclusively.[14] Moreover, this Honourable Court held that while considerations under s. 2(a) freedom of religion were sufficient in that case to account for the expressive, associational and equality rights of TWU's community members,[15] the Court must still include the subsumed rights in the ambit of the guarantee of freedom of religion[16] and all such rights claimed were nevertheless accounted for in the proportionality analysis.[17]

24. A string of recent jurisprudence across Canada relies on *Trinity Western* to subsume s.2 rights in their analysis where numerous *Charter* claims have been raised. The Ontario Court of Appeal has gone further to add that fundamental freedoms as guaranteed under s.2 are more aptly subsumed as between them, in comparison to subsuming across other *Charter* sections (for example, as between ss. 2, 7 and 15 rights).[18] Aside from this recent further development of the law surrounding the subsuming s.2 rights, none of the cases since *Trinity Western* appear to have gone as far as the current case, which has subsumed the right most

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[14] *Trinity Western,* at para 77
[15] *Ibid.*
[16] *Ibid,* at para. 122
[17] *Ibid,* at para 78
[18] *Ontario (Attorney General) v Trinity Bible Chapel, 2023 ONCA 134* [*Ontario Churches Appeal*]*,* at para 71

directly impacted by the impugned law (freedom of assembly), into another right (freedom of expression).

25. In *Ontario Churches*, the Court subsumed *Charter* ss. 2(b), (c) and (d) into religious freedom under s. 2(a), because the regulations under review centrally targeted gatherings for religious worship and therefore s. 2(a), "…accounted for various manifestations of religious freedom: the freedom to engage in religious expression; the freedom to assemble in religious unity; and the freedom to associate with those who share faith-based ideals."[19]

26. On appeal in *Ontario Churches Appeal*, the Court of Appeal upheld the lower Court's findings that the religious freedom claim accounted for the other freedoms as "…those activities were directly related to the government restrictions on religious gatherings."[20]

27. The Court of Appeal in *Ontario Churches Appeal* referenced *Figueiras v Toronto Police Services Board,* 2015 ONCA 208, 124 P.R. (3d) 641 [*Figueiras*], where it had subsumed a claimants' s.2(c) claim into s.2(b).[21] However, in *Figueiras*, the government action by way of police conduct preventing the claimant from demonstrating was not particularly, aimed at restricting the freedom of assembly over the freedom of expression, as it is in this case.

28. The Court of Appeal in *Ontario Churches Appeal* also referenced *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn*., 2009 BCCA 39, 89 B.C.L.R. (4th) 96, leave to appeal refused, [2009] S.C.C.A. No. 160, [2009] S.C.C.A. No. 161., where the Court subsumed s.2(c) into s.2(b), as the main challenge in the action was centered on the claimants' right to freedom of expression stemming from an impugned law which was aimed at preventing teachers from engaging in work stoppages and not directly at limiting the assembling of persons per se.[22]

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[19] *Ontario Churches,* at para 115
[20] *Ontario Churches Appeal,* at para 67
[21] *Figueiras*, at para 78
[22] *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn*., 2009 BCCA 39, 89 B.C.L.R. (4th) 96, leave to appeal refused, [2009] S.C.C.A. No. 160, [2009] S.C.C.A. No. 161., at paras 1-2 and 39

29. In *Beaudoin v British Columbia (Attorney General)*, the Court of Appeal upheld the lower Court's decision not to conduct an analysis of s.15 (rather than to subsume), after having found infringements of s. 2(a), 2(b), 2(c) and 2(d) rights.[23]

30. In the present case, the impugned restriction specifically targets the assembling of persons together—the obvious core of the freedom of peaceful assembly. Given that the freedom of expression and the values underpinning it do not focus on the assemblage of persons, subsuming assembly claims under expression claims could fail to sufficiently account for assembly claims.

31. This Court's leave on this issue is warranted, as failing to specifically analyze the *Charter* protection which is directly impinged may predicably result in the following harms:

    a. The parties—and the Canadian public—are deprived of the Courts' specific interpretation and demarcation of the most directly affected *Charter* protection.

    b. No guidance is provided on whether a particular government measure violates the *Charter* protection it most directly affected.

    c. Not only is the most directly engaged *Charter* protection not analyzed, but the purpose of that right is not reflected in the Courts' decision-making process.[24]

    d. The Courts' reasons for decision will fail to reasonably and proportionately address the deleterious impact of the impugned restriction on the subsumed *Charter* protection,

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[23] *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427, at para. 233

[24] *Commission scolaire francophone des Territories du Nord-Quest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, [*CSFTNO*] at para 75:

> *Charter* values are those that "underpin each right and give it meaning" (*Loyola*, at para. 36). *Charter* values are inseparable from *Charter* rights, which "reflect" them (para. 4). The choice made by the framers to entrench certain rights in the text of the supreme law of Canada means that the purpose of these rights is important for Canadian society as a whole and must be reflected in the decision making process of the various branches of government.

unless the purpose and underlying values of that *Charter* protection are expressly raised and balanced in the Courts' s. 1 analysis.

32. The present case illustrates each of these pitfalls and demonstrates the importance and need of this Court's further guidance since *Trinity Western,* on the judicial discretion to subsume rights. Neither the lower Court nor Court of Appeal interpreted or demarcated the *Charter*'s protection for peaceful assembly in a case where the impugned law directly and severely restricted the assemblage of persons.

33. Suffice it to say, a case about government's restriction on the assemblage of persons, turned into a case about the freedom of expression.

34. Since Saskatchewan had not conceded a violation of the freedom of assembly, the issue of the core *Charter* right most impacted by Saskatchewan's 10-person limit on outdoor gatherings was never directly addressed for the benefit of the Government of Saskatchewan, the appellants, or all Saskatchewanians who were affected by this restriction.

35. Further, there was no consideration by either level of Court of the underlying purpose(s) for the *Charter* protections for the freedom of peaceful assembly. Crucial to a proportionality analysis is consideration of the extent of a *Charter* violation, and *Charter* values help in that determination.[25] This Court requires that administrative decisions engaging *Charter* values reflect "that the purpose of these rights is important for Canadian society as a whole…."[26] This requirement must apply with equal or greater force to Canada's Courts, especially regarding the *Charter* protections most directly engaged in the cases before them.

36. It is conceptually impossible to proportionately balance the deleterious effects of a particular law or government action on a subsumed *Charter* protection, when the government does not concede—and the Court does not determine—whether that *Charter*

[25] *Ibid,* at para 77
[26] *Ibid,* at para 75.

protection is even limited. If a determination is not made on its limitation, an insightful analysis of its deleterious effects cannot be made.

37. The violation of multiple distinct *Charter* protections necessarily affects the *Charter* analysis, as explained by the Court in *British Columbia Civil Liberties Assn v Canada (Attorney General)*, 2018 BCSC 62, at para 262:

> "A law that has deleterious effects on multiple protected interests will weigh differently in the balance than a law that impacts only one."

38. Further, because *Charter* values help determine when limitations on the *Charter* are proportionate in light of the applicable statutory objectives, failing to consider the *Charter* values underlying a subsumed right in determining the extent of the infringement of a *Charter* protection, renders the justification analysis under s. 1 deficient with regard to the subsumed right, unless the Court specifically takes account of those values in the justification analysis.

39. The freedom of peaceful assembly is of specific and unique importance to Canadian society, as enshrined by its separate entrenchment as a "fundamental freedom" in s.2(c).

40. In this case, the Court of Appeal below held that the proportionality analysis was sufficient.[27] However, the analysis, which was to sufficiently account for all rights claimed at the proportionality analysis, respectfully lacked the necessary considerations to properly balance the deleterious impacts with the salutary effects. Subsuming a centrally impacted right into another risked this outcome.

41. It is sensible not to labour judges in a robotic and unnecessary exercise of considering each violation of the *Charter* in every fact scenario presented. *Trinity Western* is an example where subsuming the rights claimed into freedom of religion did not risk undermining the value of other rights impacted, as freedom of religion was broadly considered to sufficiently account for the other rights claimed. Although at times appropriate, subsuming rights should be cautiously exercised, where at least the centrally impacted right by government

[27] *Grandel Appeal,* at para 88

legislation or action remains the primary focus and where all rights claimed are sufficiently accounted for in the proportionality analysis.

42. The approach of subsuming rights has not remained without academic critique. The Court of Appeal below was alive to the presence of recent scholarly work on the pitfalls of not considering the rights claimed independently but held that the jurisprudence has followed the approach in *Trinity Western*.[28] An insightful and applicable comment is made by Professor Dwight Newman:

> What could appear to be a trivial infringement of one freedom might actually be more appropriately recognized as a more substantial infringement in the context of an intersectionality of different freedoms […] The possibility of such intersectional freedom infringement is a further reason to carry out independent development of each of the freedoms recognized within the section 2 fundamental freedoms clause -- only in doing so can we fully identify the full depth of impacts on human freedom arising from certain state actions.[29]

43. Although the benefits of this Court's guidance in *Trinity Western* on subsuming rights have now been realized, this Court's further guidance as to the extent to which subsummation is appropriate, especially where, as in this case, the law or government action under review most directly targets a right which is being subsumed. The need for this Court's guidance is therefore necessary.

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[28] *Ibid,* at para 71 citing scholarly commentary

[29] Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms", (2019), 91 SCLR (2d) 107 – 122, at page 12; See also Jamie Cameron, "Big M's Forgotten Legacy of Freedom", (2020) 98 SCLR (2d) 15 – 45, at page 36:

> "Minimizing the severity of the violation [by addressing only one freedom] demonstrated a lack of insight into the scope and severity of the breach and how it engaged section 2's guarantees as an integral whole…[This] can diminish the significance and severity of compound violations.";

See also Basil S. Alexander "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8:1 UWO J Leg Stud 4, 2018 CanLII Docs 66; Derek B.M. Ross "Truth-Seeking and the Unity of the *Charter*'s Fundamental Freedoms" (2020), 98 SCLR (2d) 63 at 90–91; and Jamie Cameron "Freedom of Peaceful Assembly and Section 2(c) of the *Charter*" (*Report for the Public Order Emergency Commission*, September 2022).

Issue 2: Given the lack of a separate test for the guarantee of the freedom of peaceful assembly under s. 2(c) of the *Charter*, must Courts addressing s. 2(c) claims, either apply the test established under s. 2(b) or subsume such claims into s. 2(b)?

44. Each *Charter* protection "is distinct and must be given effect." [30] Freedom of peaceful assembly "protects rights fundamental to Canada's liberal democratic society."[31] The freedom of peaceful assembly is not derivative of other s. 2 freedoms.[32]

45. Yet, after four decades of *Charter* jurisprudence, only the "barest contours" of the "fundamental freedom" of peaceful assembly have been defined.[33] It is "geared towards protecting the physical gathering together of people."[34] It is a "group activity, incapable of individual performance."[35] Although it is common for Courts to combine or subsume freedom of peaceful assembly with freedom of expression, it must be recognized that the drafters of the *Charter* separately affirmed this distinct fundamental freedom.[36] Madame Justice Bich of the Quebec Court of Appeal insightfully notes:

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[30] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, 1998 CanLII 829, at para. 80.
[31] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [*Mounted Police*], at para 48.
[32] See *Ibid,* at para 48-49:

> Freedom of association, like the other s. 2 freedoms — freedom of expression, conscience and religion, and peaceful assembly — protects rights fundamental to Canada's liberal democratic society.
>
> Freedom of association is not derivative of these other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.

[33] *Mills v Corporation of the City of Calgary*, 2024 ABKB 256 [*Mills*] at para 122; *Attorney General of Ontario v. 2192 Dufferin Street*, 2019 ONSC 615, at para 54.
[34] *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 1994 CanLII 3453 (FCA), at para. 50 (Linden J.A. (dissenting in part)); *Bérubé v. Quebec City*, 2019 QCCA 1764 [*Bérubé*], at para 44; *Mills* at para 122; *Directeur des poursuites criminelles et pénales c Pépin*, 2024 QCCQ 299 [*Pépin]*, at para 394;
[35] *Mounted Police*, at para 64.
[36] *Bérubé,* at paras 43-44.

> [43] Tout cela pour dire que dans le cadre d'une manifestation (entendue dans son sens collectif usuel), la réunion devient le moyen, la modalité de l'expression et en est indissociable. Or, tant l'expression, c'est-à-dire le discours, que la manière d'être de cette expression, en l'occurrence la réunion, sont protégées distinctement par les al. *b)* et *c)* de l'art. 2 de la *Charte canadienne*. Que le constituant ait jugé utile de garantir la liberté de réunion pacifique en la distinguant de la liberté d'expression (ou de la liberté d'association, de laquelle elle se rapproche aussi[33]) et en l'affirmant de manière autonome est révélateur.
>
> [44] Certainement, le constituant était conscient de ce que nombre d'activités mêlent ces libertés, qu'il a néanmoins différenciées. On doit, il me semble, en conclure qu'il attachait à la réunion pacifique, c'est-à-dire à la rencontre physique des individus, une importance intrinsèque comme élément définitionnel d'une société libre et démocratique : la liberté de se réunir pacifiquement, à la fois individuelle et collective (comme la liberté d'association), est fondamentale en elle-même. Sans doute est-elle souvent jointe à d'autres libertés – au premier chef desquelles la liberté d'expression – et exercée simultanément, mais elle possède ses vertus inhérentes, qui marquent l'importance du regroupement et du rassemblement, en l'occurrence pacifique, quel que soit l'objet ou le but de cette réunion (qui peut d'ailleurs être autre que l'expression d'une opinion), et l'al. 2*c)* de la *Charte canadienne* la protège en tant que telle.
>
> [45] Selon les termes d'un auteur, la liberté de réunion pacifique est pourtant « *the least judicially explored freedom* » et l'on pourrait même dire qu'elle est, doctrinalement et jurisprudentiellement, le parent pauvre du domaine des libertés fondamentales garanties par l'art. 2 de la *Charte canadienne*. Cela n'en fait pas pour autant une liberté accessoire ou de second ordre, dont la protection devrait être moins robuste.[37]

46. The intrinsic importance and inherent values of the freedom of peaceful assembly warrant this Court's exposition. The most comprehensive consideration of the values underlying this freedom to date was done by Justice Adams of the Ontario Superior Court in the *Dieleman* case in 1994, where he stated:

> If we do indeed have a right to speak, and to be heard, the right to assemble may be the only way of ensuring the advocacy of the right to speak. Mr. Justice Berger notes that:

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[37] *Ibid,* at paras 43-44 [internal citations omitted].

> Assemblies, parades and gatherings are often the only means that those without access to the media may have to bring their grievance to the attention of the public.
>
> Groups without the money to advertise often find it necessary to demonstrate. If their right to demonstrate is denied, the group must languish in a communicative vacuum. Demonstrations guarantee media exposure and in Western society, access to the media is essential to the communication of a point of view, and to the fulfillment of group interests.
>
> In addition to this group fulfillment rationale for freedom of assembly, there are social instrumentalist justifications:
>
> > Whenever the demonstrators are complaining of a bona fide wrong, society's interests will be advanced if their grievance is brought to public attention and relief is granted.
> >
> > Moreover, by allowing free assemblies, governmental authorities are able to measure both the identity of feeling with regard to an issue and the "extent" of grass-root support for a specific point of view.[38]

47. No legal test for freedom of peaceful assembly has been developed by this Court. No doubt this contributes to Courts declining to explore this freedom, as it did in the present case.[39] Three tests specific to freedom of assembly have been proposed, but none have been adopted.[40] Rather, tests for other freedoms are borrowed. A recent decision from Alberta incorporated into s. 2(c) the same internal limitation as s. 2(a) to eliminate trivial or insubstantial interference from the purview.[41]

48. More often, when Courts do consider this freedom, they apply the test for s. 2(b).[42] This test undoubtedly captures some of the scope of s. 2(c) protection, but as discussed above, is inadequate to fully identify the extent of infringements of freedom of peaceful assembly.

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[38] *Ontario (Attorney-General) v. Dieleman*, (1994) 117 DLR (4th) 449, 1994 CanLII 7509 (ON SC) [*Dieleman*], at para 700, quoting Tarnopolsky and Beaudoin eds., *Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982), at 142-148; see also *Mills* at para 121-131.
[39] *Grandel,* at para 80.
[40] *Pépin,* at para 321-326.
[41] *Mills*, at paras 131-132 and 135.
[42] *Pepin,* at paras 320, 327; 331-338; *Villeneuve v. Montreal (City of),* 2016 QCCS 2888, at para 397.

49. Freedom of peaceful assembly has gained increasing significance and relevance to Canadians in recent years, particularly in light of COVID-19 restrictions and public societal controversies regarding environmental, economic, political, geopolitical and other issues.

50. Peaceful assembly is now exceedingly ripe for the exercise of the Court's role in establishing its underlying values and proper test.

PART IV – SUBMISSIONS ON COSTS

51. The applicants do not seek costs against the respondents. Having regard to the precedential value and public interest tied to the issues presented and the fact that costs were neither sought nor ordered at the Courts below, the applicants submit that that a costs award should continue to be waived.

PART V – ORDER SOUGHT

52. The applicants request that this Honourable Court grant leave to appeal.

DATED at Saskatoon, Saskatchewan, this 14th day of August 2024.

CHARTER ADVOCATES CANADA

Per:_____
Andre F. Memauri
Solicitor for the appellants,
Jasmin Grandel and Darrell Mills

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