



COURT OF APPEAL FILE NO. CA47363

**COURT OF APPEAL**

ON APPEAL FROM the order of Chief Justice Hinkson of the Supreme Court of B.C. pronounced on the March 18, 2021.

BETWEEN:

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

Appellants (Petitioners)

AND:

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

Respondents (Respondents)

**APPELLANTS' FACTUM**

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**SOLICITORS FOR THE APPELLANTS:**

**ROD WILTSHIRE and MARTY MOORE**

c/o Paul Jaffe, Barrister and Solicitor  
Suite 200-100 Park Royal  
West Vancouver, B.C. V7T 1A2  
Telephone: 587-998-1806  
Facsimile: 587-352-3233

**SOLICITORS FOR THE RESPONDENTS:**

**JACQUELINE D. HUGHES, Q.C. and  
EMILY C. LAPPER**

Ministry of Attorney General Legal Services  
Branch 1301 – 865 Hornby Street  
Vancouver, B.C. V6Z 2G3  
Telephone: 604-660-3093  
Facsimile: 604-660-6797

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<b>CHRONOLOGY</b>	
<b>Date</b>	<b>Event</b>
November 19, 2020	Provincial Health Officer (“PHO”) issues oral Order prohibiting in-person worship services, rallies and demonstrations.
November 25-26, 2020	Rabbi Meir Kaplan emails request to PHO to hold regular religious services in person outside in a tent.
November 27, 2020	PHO sends email granting s. 43 variance to Rabbi Kaplan to hold in-person services outdoors with up to 25 people.
November 30, 2020	Appellants Rev. Brent Smith and Riverside Calvary Chapel sends letter to PHO, requesting prohibition on in-person worship services be rescinded, advising of safety precautions adopted for in-person services. No response received.
December 2, 2020	PHO issues written Order confirming the November 19 oral Order, prohibiting in-person worship services, rallies and demonstrations.
December 3, 2020	Appellant Immanuel Covenant Reformed Church sends letter to PHO, requesting prohibition on in-person worship services be rescinded, advising of safety precautions adopted for in-person services. No response received.
December 4, 2020	PHO issues written Order repealing December 2 Order, and reissuing prohibitions on in-person worship services, rallies and demonstrations.
December 7, 2020	PHO orally extends December 4 Order and allows drive-in events.

December 7, 2020	Rev. Garry Vanderveen sends PHO request under s. 43 for reconsideration and a proposal under s. 38 to permit in-person worship services. No response received.
December 9, 2020	PHO issues written Order repealing December 4 Order, repeating prohibitions of in-person worship services, rallies and demonstrations.
December 14, 2020	Rabbi Kaplan emails PHO seeking permission for in-person, indoor worship services for 10 Orthodox synagogues.
December 15, 2020	PHO issues written Order repealing December 9 Order, repeating prohibitions of in-person worship services, rallies and demonstrations.
December 17, 2020	PHO sends email to Rabbi Kaplan granting s. 43 variance for all Orthodox synagogues to hold in-person services outdoors with up to 25 people.
December 18, 2020	PHO sends letters to Appellants Rev. Smith and Rev. John Koopman confirming prohibition on worship services but inviting them to request reconsideration under s. 43.
December 22, 2020	Rev. Koopman sends letter to PHO requesting that in person worship services be allowed.
December 24, 2020	PHO issues written Order repealing December 15 Order, repeating prohibitions of in-person worship services, rallies and demonstrations.
January 7, 2021	Petition and affidavits of Beaudoin, Smith, Koopman (#1), Van Muyen, Dyck, Champ, O'Neil, Pollard, Versteeg and Gusdal filed.

January 8, 2021	Petition and affidavits of Beaudoin, Smith, Koopman (#1), Van Muyen, Dyck, Champ, O'Neil, Pollard, Versteeg and Gusdal sent to PHO.
January 8, 2021	PHO issues written Order repealing December 24 Order, repeating prohibitions of in-person worship services, rallies and demonstrations.
January 8, 2021	PHO emails Rabbis to advise that their variance for in-person services is extended to February 5, 2021.
January 8, 2021 January 14, 2021 January 25, 2021	Counsel for 11 churches requests to PHO seeking reconsideration under s. 43 of January 8 order prohibiting worship services. No response received.
January 29, 2021	Counsel for Appellants requests that PHO reconsider the Order and grant s. 43 exemptions to the Appellant churches
February 5, 2021	PHO issues written Order that repeals January 8 Order, repeats prohibitions of in-person worship services, rallies and demonstrations, but acknowledges <i>Charter</i> rights.
February 8, 2021	PHO's counsel provided with affidavits of Schoeman, Vanderveen, Sikkema and Koopman (#2).
February 8, 2021	Rabbi Kaplan emails PHO requesting an exemption for in-person Purim services at all Orthodox synagogues in BC to be held February 25-26, 2021.
February 9, 2021	PHO's counsel provided with unsworn reports of Dr. Kettner and Dr. Warren.
February 10, 2021	PHO issues written Order that repeals February 5 Order, repeats prohibition of in-person worship services, but permits "outdoor assemblies for the purpose of

	communicating a position on a matter of public interest or controversy” subject to compliance with “guidelines”.
February 12, 2021	Respondents’ application for an injunction against the Appellant churches is heard before Chief Justice Hinkson
February 17, 2021	Chief Justice Hinkson denies Respondents’ injunction request and issues Reasons for Judgment in <i>Beudoin v British Columbia</i> , 2021 BCSC 248.
February 17, 2021	PHO emails Rabbi Kaplan granting s. 43 variance for all Orthodox synagogues in BC to meet for Purim on February 25-26, 2021 with up to 25 people in-person, outdoors.
February 23, 2021	PHO emails Rabbi Kaplan granting s. 43 variance for all Orthodox synagogues in BC to hold Purim and weekly Sabbath services with up to 25 people in-person, indoors.
February 25, 2021	PHO issues Appellant churches s. 43 variance to hold worship services with up to 25 people in-person, outdoors.
February 28, 2021	Counsel for the Appellants request information from PHO about exemption granted to Orthodox synagogues.
March 1, 2021	PHO emails Rabbi Kaplan revising s. 43 variance for Orthodox synagogues to require that services be held outdoors.
March 1-3, 5, 2021	Chambers Hearing
March 18, 2021	Chief Justice Hinkson issues Reasons for Judgment in <i>Beudoin v. British Columbia</i> , 2021 BCSC 512, granting a declaration that restrictions on public protests in PHO Orders predating February 10, 2021, are of no force and effect, but dismissing the petition challenging the prohibition on in person worship services.

## OPENING STATEMENT

1. This is an appeal of a decision made in Chambers, which dismissed a Petition for remedies under the *Charter* and the *JRPA* against prohibitions on in-person worship services contained in a series of Orders made by the respondent Provincial Health Officer (“PHO”) from November 19, 2020 to February 10, 2021.
2. These prohibitions on in-person worship services applied throughout the province, regardless of protective measures taken to prevent the spread of COVID-19.
3. The Respondents concede that the Orders restricted the Appellants’ *Charter*-protected freedoms of religion, expression and peaceful assembly. The Chambers Judge found that the Orders limited the Appellants’ freedom of association as well.
4. The categorical ban on in-person worship services stands in stark contrast to the PHO’s concurrent attempts to address the risk of transmission in other in-person settings, where scrutiny was applied to particular unsafe activities, safety plans were implemented, and those failing to adhere to safety measures were targeted for enforcement and closure. The material before the PHO and the explanations she gave for the Orders show a fundamental gap in her reasons for prohibiting in-person worship: there was no consideration of whether in-person worship services that adhere to safety measures were a significant public health risk, or whether concerns about transmission in worship services could have been addressed by regulation, as in other in-person settings.
5. The PHO’s actions reveal the existence of a reasonable alternative that gives significantly more effect to the *Charter* rights of those who must worship in person. During the time in-person worship was prohibited, the PHO permitted Orthodox synagogues to hold regular in-person services outdoors with masking and no more than 25 people, which the PHO deemed as “low risk” events.
6. The PHO bears the burden of proof and persuasion that the restriction of the Appellants’ freedoms is both reasonable and demonstrably justified under s. 1 of the *Charter*. The categorical prohibition on in-person worship services did not minimally impair or give effect as fully as possible to the *Charter* rights engaged.
7. Finally, the lower Court struck down the PHO’s prior protest prohibitions, but failed to address whether vague content restrictions and unspecified guidelines required by the PHO for protests on February 10, 2021, were unjustified *Charter* violations.

## PART 1 - STATEMENT OF FACTS

### A. The Appellants

1. The Appellants include three churches in the Fraser Valley: Riverside Calvary Chapel and its Pastor Brent Smith, Immanuel Covenant Reformed Church and its Chair John Van Muyen, and the Free Reformed Church of Chilliwack and its Pastor John Koopman (collectively the “Churches”).
2. The Churches’ sincerely held religious beliefs require them to meet in person for religious worship services.<sup>1</sup> Both before and after the first impugned Order, each of the Churches adhered to safety measures like those required of similar in-person gatherings, to minimize any risk of Covid transmission at their services.<sup>2</sup>
3. Starting November 29, 2020, the Churches began receiving \$2,300 tickets for allegedly violating the Public Health Orders prohibiting in-person worship services.
4. The Appellant Alain Beaudoin participated in outdoor protests in Dawson Creek against government restrictions. On December 12, 2020, the RCMP ticketed Mr. Beaudoin for allegedly failing to comply with some guidelines and requirements in the PHO Orders, which they believed applied to these protests, including having a “Covid response plan”, collecting the data of those who attend protests, and limiting attendance at the protest to 50 persons or less.<sup>3</sup> Mr. Beaudoin’s evidence is that he could not comply with those guidelines. He could not, for example, collect contact information from people attending an outdoor protest.

### B. Earlier “Gatherings and Events” Orders

5. On March 16, 2020, the PHO made her first Gatherings and Events (“G&E”) order, which prohibited all gatherings of more than 50 people.<sup>4</sup> It did not impose safety restrictions on gatherings of fewer than 50 people and was to expire on May 30, 2020.

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<sup>1</sup> Affidavit #1 of Brent Smith (“Smith #1”), paras. 1, 3, Ex. A, Appeal Book (“AB”), pp. 183, 192; Affidavit #1 of John Van Muyen (“Van Muyen #1”), paras. 1-2, Ex. A, AB, pp. 100, 108; Affidavit #1 of John Koopman (“Koopman #1”), paras. 1, 3, AB, pp. 114-15.

<sup>2</sup> See Reasons for Judgment (“Reasons”), paras. 156-160, AR, pp. 73-75.

<sup>3</sup> Affidavit #1 of Alain Beaudoin (“Beaudoin”), paras. 9, 26, 39, AB, pp. 41, 43, 45.

<sup>4</sup> Emerson #1, Ex. 9, AB, p. 457.

6. The March 16, 2020 Order was repealed and replaced by a G&E Order on May 22, 2020.<sup>5</sup> Safety restrictions on gatherings of fewer than 50 people were introduced in a G&E Order made July 27, 2020,<sup>6</sup> and repeated in subsequent orders until these gatherings were prohibited in November 19, 2020, as described below.<sup>7</sup>

7. On October 26, 2020, Dr. Henry commented on the success of these restrictions:

I'd like to remind everybody about our mass gathering order. That is, refers across the board to gatherings of no more than 50 people. But there are caveats to this order. It requires that every location must have sufficient space that people can maintain safe distancing between everyone. And we know that when these COVID safety plans are followed in settings like restaurants, event spaces, churches, temples, hotels, that we don't see transmission. But too often, over the last few weeks, we've been hearing stories where people are trying to put aside the safety plans, that feel it is okay to have a few additional people, or for people to mix and mingle. And, and unfortunately, we have seen spread in these environments.<sup>[8]</sup>

8. Gatherings of fewer than 50 people were generally permitted throughout B.C. with prescribed safety restrictions until November 7, 2020, when the PHO made an oral order that prohibited social gatherings in the Vancouver Coastal and the Fraser Health regions.<sup>9</sup> The Order also required that workplaces adhere to Covid safety plans, suspended travel for sports, restricted certain group fitness and sports activities, and ordered party busses to stop operating. In issuing the November 7 Order, Dr. Henry explained that there had been transmission in workplaces, retail locations, group physical activities, and restaurants when Covid safety plans were not followed. Dr. Henry warned that if safety plans were not followed, the medical health officer “will shut those businesses down”.<sup>10</sup>

9. In-person worship services were not, however, treated as “social gatherings”.<sup>11</sup>

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<sup>5</sup> Although not of record, this Order is archived on the Government of British Columbia's website and available here: [https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/Covid-19/archived-docs/pho\\_order\\_mass\\_gatherings\\_may\\_22\\_2020.pdf](https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/Covid-19/archived-docs/pho_order_mass_gatherings_may_22_2020.pdf).

<sup>6</sup> Available at [https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/Covid-19/archived-docs/pho\\_order\\_gatherings\\_and\\_events\\_july\\_27\\_2020.pdf](https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/Covid-19/archived-docs/pho_order_gatherings_and_events_july_27_2020.pdf).

<sup>7</sup> A full list of the Provincial Health Orders, including G&E Orders, are archived and available here: <https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/Covid-19-novel-coronavirus#orders>.

<sup>8</sup> Reasons, para. 34, AR, p. 44; see also, Koopman #1, para. 5, AB, p. 115 [emphasis added].

<sup>9</sup> See Emerson #1, Ex. 23, AB, p. 598.

<sup>10</sup> Emerson #1, Ex. 23, AB, pp. 597-99.

<sup>11</sup> See Emerson #1 at Ex. 23, AB, p. 608. The Chambers Judge incorrectly understood that worship services were “social gatherings” and prohibited under the November 7 Order: see Reasons, paras. 44(k), 127, AR, pp. 46, 68.

10. Cases continued to mount, adding 6,394 cases between November 7 and November 21 in the Fraser Health region,<sup>12</sup> where the Appellant Churches are located. Religious settings were not a significant contributor to these case numbers. According to data before the PHO, cases “associated with religious settings”<sup>13</sup> in the Fraser Health region for the month of November totaled 14 at two different settings, constituting less than a quarter of 1% of the Fraser Health region’s cases.<sup>14</sup>

11. The most serious outbreak in a religious setting in BC listed by the PHO involved 28 cases and one death “associated with” a Vancouver religious setting.<sup>15</sup> The information relied on by the PHO does not say whether this “religious setting” was a worship service, a wedding or funeral, or some other “religious setting”. No information before the PHO describes whether those at this religious setting, or any religious setting “associated with” a case, complied with safety guidelines or not.

12. This serious outbreak in a religious setting was not more notable than outbreaks in other settings. In a November 12, 2020 Monthly Update, the Province provided three examples of outbreaks, based on actual case data<sup>16</sup>:

- 48 cases and 1 hospitalization from an industrial worksite;
- 15 cases from a wedding, causing further outbreaks at a family business and a long term care home, resulting in 1 death and 3 hospitalizations;
- 67 cases from two group fitness studios and another 180 cases from two groups fitness studios, from just one COVID-19 positive person at a fitness class, which then resulted in another 48 cases, 3 hospitalizations, 6 school exposures and an outbreak at a correctional facility.

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<sup>12</sup> See Emerson #1, Exs. 22, 27, AB, p. 587, 644: 11,606 total cases had been reported in Fraser Health Region on November 7, 2021, and 18,000 cumulative cases were reported by November 21, 2021.

<sup>13</sup> Cases are “associated with” merely because of “their attendance in these settings.” Covid need not have had been transmitted in a religious setting with which it is counted as “associated”, as it could have been acquired elsewhere in the community: See Emerson, para. 107, AB, p. 346. The PHO’s evidence provided by Dr. Brian Emerson uses the term “religious setting” to include not only worship services but also apparently weddings and funerals. See Emerson #1, para. 101, 105, AB, pp. 345-46.

<sup>14</sup> Emerson #1, para. 103, AB, p. 346.

<sup>15</sup> Emerson #1, para. 102, AB, pp. 345-46.

<sup>16</sup> Emerson #1, Ex. 39, AB, pp. 860-62.

### C. Evidence of transmission in “religious settings”

13. Dr. Emerson discusses the “Record Before the PHO - Evidence of Transmission in Religious Settings” at paragraphs 97 through 107 of his first affidavit. Dr. Emerson deposes that in the nine-month period from March 15, 2020 to January 15, 2021, a period that spans the introduction of safety measures for gatherings of fewer than 50 people in late July, the PHO was aware of 180 Covid cases and one death “associated with religious settings in British Columbia.”<sup>17</sup> These numbers appear to include those from weddings and funerals that were held in religious settings,<sup>18</sup> which were restricted to 10 attendees but not prohibited by the November 19<sup>th</sup> Order. Within this broader category of events, the percentage of BC’s Covid cases “associated with religious settings” in BC was approximately 0.31% of total cases.<sup>19</sup>

14. For comparison purposes, data obtained via a Freedom of Information request<sup>20</sup> and filed by the Appellants showed that 132 cases were associated with gym/fitness facilities in a two-and-a-half-month period (August 9 to October 24, 2020). This amounted to .95% of the reported cases within that time period.<sup>21</sup>

15. The PHO’s information about cases “associated with religious settings” not only includes cases that may not have been acquired in a religious setting, but also does not distinguish between a) “religious settings” that resemble in-person worship at the Churches (some are weddings and funerals, and the remainder are only known to be in some way religious) or between b) “religious settings” where Covid safety protocols were followed and those where they were not.

16. Nothing in the Record provided by the Affidavit of Brian Emerson contradicts the PHO’s October 26, 2020 conclusion that “we don’t see transmission” when COVID safety

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<sup>17</sup> Emerson #1, paras. 101-105, AB, pp. 345-46.

<sup>18</sup> Emerson #1, paras. 101, 106, AB, pp. 345, 346.

<sup>19</sup> According to Emerson #1, Ex. 38, AB, p. 838, the total number of Covid cases in the Province as of January 9, 2021 was 58,677. This works out to a rate of 180 out of at least 58,677, or less than 1 out of every 325 cases or 0.31% of total cases “associated with” “religious settings” in BC.

<sup>20</sup> The Respondents did not provide any data on the evidence of transmission in settings other than “religious settings”.

<sup>21</sup> Affidavit #1 of Anthony Roy (“Roy #1”), Ex. A, AB, p. 1248: “132/13875 (0.95%) cases have been associated with an exposure setting of gym/fitness facility.” This data did not include the 44 additional cases reported from one outbreak at a dance studio between October 25 and November 8.

plans are followed or her conclusion that spread of the disease is due to people not following safety plans and allowing people to mix and mingle.

#### **D. PHO prohibitions on worship services**

17. On November 19, 2020, the PHO orally issued a new, province-wide, G&E order<sup>22</sup>:

- Workplaces and businesses could allow in-person attendance, but needed to follow COVID safety plans or risk being shut down by inspectors;
- Weddings, funerals and baptisms could continue in person, but were limited to 10 people in attendance;
- Fitness facilities could continue to operate in person, though certain group physical activities were banned, but “[a]ll other group fitness activities indoors can continue to operate but they must adhere to the updated guidance that we are developing;”
- Worship services in person, however, were categorically banned.<sup>23</sup>

18. In issuing her November 19 Order, the PHO identified “social interactions” and the violation of safety rules as a key cause of the increase of Covid transmission she was seeing across numerous in-person workplaces and businesses generally: food production plants, retail outlet, banks, car dealerships and bars and pubs. To address these concerns, the PHO focused on improving adherence to Covid safety plans and implementing more inspections and shutting down those places that were not adhering to Covid safety plans. This contrasts to the categorical prohibition on in-person worship services, regardless of whether safety measures are observed.

19. Concerning the prohibition on in-person worship services, the PHO stated that “we have seen transmission in some of our faith-based settings.” In response to a reporter’s question, the PHO replied:

What we're saying is those services that were explicitly under the event order, where people came together at specific times and it was up to 50 people in a space, depending on how the large space was.<sup>[24]</sup> that we need those to be suspended for this short period of time, because we have seen that despite our best efforts we have transmission happening in those events.

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<sup>22</sup> Emerson #1, Ex. 28, AB, pp. 655-71.

<sup>23</sup> Emerson #1, Ex. 28, AB, p. 657.

<sup>24</sup> That is, while gatherings of up to 49 people were permitted, the permitted size of the gathering was also limited by the need to observe social distancing, which could reduce the number of persons permitted in a particular space. See Emerson #1, Ex. 28, AB, p. 669.

20. The PHO did not say that transmission had occurred despite the best efforts *of the people gathering* to comply with existing rules, but that the despite *the PHO's* best efforts, transmission was happening at some of those events.

21. The PHO's November 19 Order was confirmed in writing on December 2, 2020. This Order did not provide any reasoning specific to why in-person worship services were categorically banned, other than a general statement that

Social interactions and close contact resulting from the gathering of people and events promotes the transmission of SARS-CoV-2 and increases the number of people who develop COVID-19 and become seriously ill[.]<sup>25</sup>

22. The December 2 Order was repealed and replaced by the December 4 G&E Order,<sup>26</sup> which did not offer any different reasoning for the prohibition it imposed on in-person worship services.

23. The PHO issued another oral Order on December 7, 2020, extending the December 4 Order, and permitting drive-in events. At the media availability, the PHO spoke to the issue of in-person worship services in response to a reporter's question:

These restrictions are about recognizing there are situations where this virus is spreading rapidly, and we have seen when we come together and congregate indoors, in particular, those are settings where the virus is transmitted, despite our best efforts, despite the measures that we have had in place for several months that were working for many months. We are now seeing that those are not enough right now.

24. The PHO again referred to "our best efforts" not working, but did not say that transmission had occurred at in-person worship services despite congregants' best efforts to comply with safety measures.

25. The December 9 and December 15 Orders repealed and replaced earlier Orders, without offering new reasoning for continuing to prohibit in-person worship services.<sup>27</sup>

26. On December 18, 2020, the PHO sent identical letters to the Appellants Rev. Smith at Riverside Calvary Chapel and Rev. Koopman at the Free Reformed Church in Chilliwack.<sup>28</sup> In her letters, the PHO explained her reasoning for prohibiting in-person worship, while allowing other in-person settings to continue their in-person functions

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<sup>25</sup> Emerson #1, Ex. 29, AB, p. 673.

<sup>26</sup> Emerson #1, Ex. 30, AB, pp. 692-711.

<sup>27</sup> See Emerson #1, Exs. 35, 36, AB, pp. 759-803.

<sup>28</sup> Emerson #1, Exs. 49, 50, AB, pp. 956-57, 983-84.

under Covid safety plans. The PHO did not allege that in-person religious settings experienced transmission while following safety measures; rather, she expressed her view that people in religious gatherings would not comply with safety measures:

I am aware that some people do not agree with my decision to prohibit in-person religious services, since other types of activities such as people visiting restaurants or other commercial establishments are permitted with restrictions. In my view, unlike attending a restaurant or other commercial or retail operation, (all of which are subject to WorkSafe COVID-19 Safety Plans) experience has shown it is particularly difficult to achieve compliance with infection-control measures when members of a close community come together indoors at places of worship.

Unlike dining with one's household members in a restaurant, or visiting an establishment for short-term commercial purposes, it is extremely difficult to ensure that attendees keep appropriate physical distance from each other in the intimate setting of gatherings for religious purposes attended by persons outside of each attendee's own household. Additionally, singing, chanting and speaking loudly are proven to increase the risk of infection when indoors.

27. There was no evidence supporting the PHO's statements about a failure to comply by people in religious communities.
28. The PHO's December 18 letters are the first reference in the record to singing and chanting as a justification for prohibiting in-person worship services. As the PHO's variances issued in February 2021 showed, she could prohibit singing and chanting while permitting in-person services.
29. The December 24 Order<sup>29</sup> repealed and replaced the December 9 Order, but did not offer any new reasoning in reissuing the prohibition on in-person worship services.
30. The Appellant churches filed this petition on January 7, 2021, and emailed it and supporting affidavits<sup>30</sup> to the PHO and the AG on January 8, 2021.
31. The January 8 Order<sup>31</sup> repealed and replaced the December 24 Order, but did not offer any new reasoning for reissuing the prohibition on in-person worship services.
32. The February 5 Order was issued less than a month after the Appellants filed their Petition. It repealed and replaced the January 8 Order, but reissued the prohibition on in-

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<sup>29</sup> Emerson #1, Ex. 37, AB, pp. 804-836.

<sup>30</sup> Affidavit #1 of Michelle Gusdal, Beaudoin #1, Champ #1, Affidavit #1 of Russ O'Neill ("O'Neill #1"), Affidavit #1 of Cameron Pollard, Affidavit #1 of Brian Versteeg, Van Muyen #1, Koopman #1, Affidavit #1 of Randy Dyck, Smith #1, AB, pp. 1-202.

<sup>31</sup> Affidavit #2 of Vanessa Lever, Ex. A, AB, pp. 205-237.

person worship services. The February 5 Order was the first to recognize that *Charter* rights were at stake.

33. On February 9, 2021, the Appellants provided the Respondents with additional affidavits,<sup>32</sup> including two unsworn reports prepared by their expert witnesses, Dr. Thomas Warren and Dr. Joel Kettner.<sup>33</sup> Dr. Henry stated that the “affidavits of Dr. Kettner and Dr. Warren do not represent information that was not available to me”.<sup>34</sup>

34. The final Order issued before the Chambers Hearing, on February 10, 2021 repealed and replaced the February 5 Order, without providing any new reasoning for prohibiting in-person worship services. The February 10 Order changed the prohibition of outdoor protests, as discussed below.

35. The most lengthy reasons for the prohibition on in-person worship services were given at a news conference on February 12, 2021, nearly three months after the prohibition was first imposed and after ten different Orders imposing the prohibition had been made and nine had been repealed. This was a month after the Appellants had filed their Petition and ten days after her Deputy Public Health Officer had an affidavit purporting to provide the “Record Before the PHO”.<sup>35</sup>

36. The Chambers Judge ruled that the Second Affidavit of Valerie Christopherson made February 25, 2021, which provided the transcript of the February 12 news conference along with the PHOs variance decision issued to the Appellants, “is irrelevant to the reasonableness of Dr. Henry’s earlier G&E Orders.”<sup>36</sup> We believe he was correct. The Chambers Judge however, quoted extensively from the February 12 news conference earlier in his reasons.<sup>37</sup>

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<sup>32</sup> Affidavit #2 of John Koopman (“Koopman #2”), Affidavit #1 of Jack Schoeman (“Schoeman #1”), Affidavit #1 of John Sikkema (“Sikkema #1”), Affidavit #1 of Garry Vanderveen (“Vanderveen #1”), AB, pp. 1056-1135.

<sup>33</sup> The Chambers Judge incorrectly held that the Affidavits of Drs. Warren and Kettner were not before the PHO when she made her Orders: Reasons at para. 79, AR, p. 57. In fact, those reports had been provided (unsworn) the day before the PHO issued her February 10 Order. See Respondent’s Application Record Index for February 12, 2021 hearing.

<sup>34</sup> Affidavit #2 of Valerie Christopherson (“Christopherson #2”), Ex. B, AB, p. 1186-1242.

<sup>35</sup> See Emerson #1, paras. 60-125, AB, pp. 337-349.

<sup>36</sup> Reasons, para. 105, AR, p. 63.

<sup>37</sup> Reasons, paras. 58-60, AR, pp. 50-52.

37. At the February 12 news conference, the PHO sought to “look back at what we were seeing”<sup>38</sup> and ostensibly give her reasons for issuing the prohibition on in-person worship services in November 2020. Her claims, however, went beyond any of her prior statements on the topic and also went beyond the evidence Dr. Emerson had provided on her behalf just 10 days before.

38. Of note, in Emerson’s Affidavit, he stated that “[b]ased on the information provided to the PHO by the MHOs for each Health Authority, the PHO was aware” of “one death... associated with an outbreak at a religious setting”.<sup>39</sup> Yet, at the February 12 news conference, the PHO recalled that in imposing the worship service prohibition in November 2020, “we were seeing people ending up in hospital, and sadly, we had some deaths in particularly older people who were exposed in their faith settings.”<sup>40</sup> In addition to the difference in the number of deaths the PHO attributed to religious settings, there is a sharp contrast in her new certainty that these individuals were “exposed in their faith setting”,<sup>41</sup> whereas Emerson’s evidence is that cases “associated to these religious settings could have been acquired elsewhere” but were included “because of their attendance in these settings.”<sup>42</sup>

39. February 12 was the first time the PHO stated that “there was transmission in a number of faith settings despite having those measures in place” and “despite people taking their best precautions”.<sup>43</sup> No evidence appears in the material before the PHO in support of the PHO’s February 12 statements, the transcript of which was attached as an Exhibit to a paralegal’s affidavit filed two business days before the Chambers Hearing.

#### **E. PHO’s authorization of in-person worship services**

40. Although the PHO prohibited all outdoor and indoor in-person worship services in her Orders starting November 19, 2020, from that same date the PHO authorized outdoor in-person worship services for Orthodox synagogues. The PHO viewed these outdoor worship services as “low risk.”

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<sup>38</sup> Christopherson #2, Ex. A, AB, p. 1182.

<sup>39</sup> Emerson #1, paras. 101-02, AB, pp. 345-46.

<sup>40</sup> Christopherson #2, Ex A, AB, p. 1183.

<sup>41</sup> *Ibid.* Exposure does not equate to transmission: see Affidavit #1 of Dr. Joel Kettner (“Kettner #1”), paras. 48-50, AB, pp. 1166-167.

<sup>42</sup> Emerson #1, para. 107, AB, p. 346.

<sup>43</sup> Christopherson #2, Ex. A, AB, p. 1183.

41. The PHO provided an email from Rabbi Meir Kaplan, dated November 26, 2020, to the PHO, specifically emailed to Dr. Emerson. The email recounts, in part:

3. At the phone conference with religious leaders on Wednesday, November 18, I asked Dr Henry if we would be able to have services outdoors with face masks and 6 ft. distancing. I was told that this would be acceptable.
4. Following the government order, I called the Provincial Health Officer on Friday, November 20 to follow up and confirm that we would be able to hold Services in that fashion. I was put on hold and eventually, it was confirmed to me again that this would be allowed.<sup>44</sup>

42. By 7:09 the next morning, Dr. Emerson replied to Rabbi Kaplan on behalf of Dr. Bonnie Henry, allowing up to 25 people to attend services outside, with physical distancing and mask wearing in place, stating specifically:

Based on our review of the safety plan and you circumstances it is our opinion that *this will be a low risk event as long as the safety plan is implemented* as described, and you follow the other applicable requirements of the *Gatherings and Events* order posted on my website at <https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincialhealth-officer/current-health-topics/Covid-19-novel-coronavirus>.<sup>45</sup>

43. On December 17, the PHO allowed approximately 10 other Orthodox synagogues in BC to hold outdoor services, reiterating that “it is our opinion that in-person services will be a low risk events” if the safety conditions were met.<sup>46</sup> On December 26, the PHO confirmed that this variance applied to “all the Orthodox Synagogues”.<sup>47</sup>

44. On January 8, 2021, the PHO extended this permission for in-person services to February 5, 2021. On February 17, 2021, the PHO allowed all Orthodox congregations to hold Purim services outdoors.<sup>48</sup> Then, on February 23, 2021, the PHO allowed Orthodox synagogues to hold “Purim and weekly Sabbath services indoors” subject to some additional requirements, including a prohibition on singing and encouraging people over age 60 and certain others to not attend.

45. Although the above requests to hold worship services in person had made no reference to reconsideration or variance under the *Public Health Act*<sup>49</sup> (“PHA”), the PHO nonetheless granted them pursuant to s. 43(3)(c).

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<sup>44</sup> Emerson #1, Ex. 43, AB, pp. 934-36.

<sup>45</sup> *Ibid.* [emphasis added].

<sup>46</sup> Emerson #1, Ex. 44, AB, pp. 937-39.

<sup>47</sup> Emerson #1, Ex. 46, AB, p. 944.

<sup>48</sup> Affidavit #4 of Vanessa Lever (“Lever #4”), Ex. A, AB, p. 1276.

<sup>49</sup> S.B.C. 2008, c. 28.

## F. Requests to PHO for reconsideration to hold in-person services

46. The PHO received requests from numerous churches, including the Appellants, which requested reconsideration of the prohibition on in-person worship. The only such request that received a response from the PHO was a request from the Appellant Churches' lawyer three weeks after filing this case, which received a response a month later, two business days before the Chambers Hearing.

47. The Appellants Rev. Brent Smith and Immanuel Covenant Reformed Church wrote letters to the PHO on November 30 and December 3, 2020, respectively, requesting that she reconsider the ban on indoor in-person worship. They described their religious obligation to worship together, claimed their *Charter*-protected freedoms, and described safety measures they would follow at worship, which were similar to those in force before the ban on in-person worship.

48. The PHO did not respond to either Immanuel Covenant Reformed Church's<sup>50</sup> or to Rev. Smith's letters. The PHO's December 18, 2020 letter to Rev. Smith did not respond to his concerns or the safety measures that Rev. Smith proposed.<sup>51</sup> The letter makes no reference to his previous correspondence. The Respondents nowhere claim this letter is a response to Rev. Smith, saying instead that it and an identical letter to Rev. John Koopman are attempts to secure compliance with the PHO's ban on in-person worship services. The PHO suggested the Rev. Smith request the PHO to reconsider that Order, something that Rev. Smith had already done, without any response.

49. Rev. Garry Vanderveen had written to the PHO on December 7, 2020.<sup>52</sup> His letter lays out his congregants' religious obligation to gather to worship, claims their *Charter*-protected freedoms, and a *very* detailed proposal for an agreement relating to in-person worship under s. 38 and s. 43 of the *Public Health Act*. Rev. Vanderveen received no response, other than an autoreply from the PHO's email address listed on her orders.<sup>53</sup>

50. Rev. Koopman responded to the PHO's December 18 letter on December 22, 2020. He informed the PHO that he was aware that "many requests have been made for you to reconsider your Order prohibiting all in-person worship services" including from

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<sup>50</sup> Emerson #1, para. 121, AB, p. 349.

<sup>51</sup> Emerson #1, Ex. 49, AB, pp. 956-58.

<sup>52</sup> Vanderveen #1, Ex. A, AB, pp. 1124-130.

<sup>53</sup> Vanderveen #1, Ex. B, AB, p. 1131.

“other churches”. As “they have not received a response to their request”, Rev. Koopman concluded that the PHO’s “offer to consider a request from our church to reconsider your Order sadly rings hollow.”<sup>54</sup>

51. Another group of churches, through counsel, emailed and faxed the PHO a letter and safety plan requesting reconsideration of her January 8 order prohibiting worship services.<sup>55</sup> Despite multiple resubmissions, they never received a response.

52. A few weeks after filing this Petition counsel for the Appellants asked the PHO to grant them s. 43 exemptions from the January 8 Order to meet in-person, via letters to the PHO’s Counsel on January 29 and on February 3, 2021.<sup>56</sup>

53. On February 25, nearly a month after the Appellants’ counsel had formally asked to hold indoor in-person services with safety measures in place, the PHO denied their request, but granted them the permission that the PHO had given to Orthodox synagogues since November 2020, permitting them to meet outdoors with up to 25 people.<sup>57</sup> The PHO imposed the additional condition that they not sing.

54. One of the Appellant churches became aware of the indoor exemption the PHO had granted to Orthodox synagogues, on Thursday, February 28, 2021. Counsel for the Appellants requested that the PHO’s communication related to that exemption be available to Appellants at the Chambers Hearing set to commence the next day. By 11 a.m. on March 1, 2021, the first day of the Chambers Hearing, Dr. Henry had sent an email to Rabbi Kaplan revoking permission for indoor weekly Sabbath services and requiring that they must be held outdoors.<sup>58</sup>

### **G. Restrictions on Outdoor Protests**

55. The Orders that prohibited in-person worship services as described above also generally prohibited events, defined to include even outdoor rallies and demonstrations, and thus prohibited outdoor protests.

56. This changed in the PHO’s February 10, 2021 Order, which stated:

I am not prohibiting outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy, subject to my

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<sup>54</sup> Emerson #1, Ex. 51, AB, p. 1010.

<sup>55</sup> Sikkema #1, Exs. A, B, AB, pp. 1108-121.

<sup>56</sup> Koopman #2, Ex. L, AB, pp. 1096-1100.

<sup>57</sup> Christopherson #2, Ex. B, AB, pp. 1186-1242.

<sup>58</sup> See Lever #4, Ex. B, AB, pp. 1281-289.

expectation that persons organizing or attending such an assembly will take the steps and put in place the measures recommended in the guidelines posted on my website in order to limit the risk of transmission of COVID-19.<sup>59</sup>

57. The Order however did not provide any link or web address to the “guidelines”, or identify what “website” was being referenced.

58. The Respondents had not identified even a single Covid case associated with an outdoor protest, including Black Lives Matter and “Anti-Mask” protests.<sup>60</sup>

59. At the hearing, the Respondents conceded that the prohibition on outdoor protests violated ss. 2(b) and 2(c) of the *Charter* and were not justified under s. 1.<sup>61</sup>

60. The Chambers Judge issued a declaration that the prohibition on outdoor protests between November 19, 2020 and February 10, 2021 violated ss. 2(b) and 2(c) of the *Charter* and are of no force or effect,<sup>62</sup> but did not address the restrictions on outdoor protests that remained in the February 10 Order.

## **PART 2 - ERRORS IN JUDGMENT**

61. The Chambers Judge erred by:

- a. Finding that the Appellants were not entitled to challenge the G&E Orders because they had applied to the PHO for reconsideration under s. 43 of the *PHA*;
- b. Failing to determine that s. 15(1) of the *Charter* was violated by the prohibition on in-person worship services;
- c. Finding that the PHO’s prohibition on in-person worship services was a reasonable restriction of *Charter* rights;
- d. Failing to apply the *Oakes* analysis and hold that the prohibition on in-person worship services was unjustified;
- e. Failing to determine whether the vague and unspecified continued restrictions on outdoor protests unjustifiably violated the *Charter*.

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<sup>59</sup> Affidavit #1 of Valerie Christopherson (“Christopherson #1”), Ex. A, para. J, AB, pp. 1024-25.

<sup>60</sup> Emerson #1 para. 109, AB p. 347.

<sup>61</sup> Reasons, para. 132, AR, p. 69.

<sup>62</sup> Reasons, paras. 174, 251, AR, p. 78, 94; see also Order Made after Application, entered June 28, 2021, para. 1, AR, p. 35.

## PART 3 - ARGUMENT

### A. Standard of Review and Burden of Proof

62. Whether the PHO's power to reconsider an Order precludes this Petition is a question of law and must be correct.<sup>63</sup>

63. Whether *Charter* rights are infringed is a question of law reviewed for correctness. The Chambers Judge failed to determine that s. 15(1) rights were infringed.<sup>64</sup>

64. The Orders challenged are properly considered laws of general application to all British Columbians. Whether a limitation of *Charter* protections by a law of general application is justified under s. 1 is determined by an *Oakes* analysis.<sup>65</sup>

65. The Chambers Judge treated the Orders as administrative decisions rather than laws of general application. On appeal of a judicial review, the Court steps into the shoes of the lower court whose decision is not entitled to deference.<sup>66</sup>

66. Under *Vavilov*, the presumptive standard of review for administrative decisions is reasonableness.<sup>67</sup> *Vavilov* holds that:

- a. Judicial review of a decision by a subordinate decision-maker is a review of “the decision maker actually made, including the justification offered for it.”<sup>68</sup> It is not a determination of whether a decision is correct, all things considered, and thus excludes reasons that might be adduced in support of a decision after the fact.
- b. In reviewing a decision for reasonableness, a Court must ask whether the decision has the qualities that define reasonableness: justification, transparency and intelligibility.<sup>69</sup> A reasonable decision must be based on an internally coherent and rational chain of analysis.<sup>70</sup>

<sup>63</sup> *Housen v. Nikolaisen*, [2002 SCC 33](#) at para. 11.

<sup>64</sup> The Appellants are not advancing the issue of an impairment of s. 7 rights on this appeal.

<sup>65</sup> See *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 579, paras. 51-69, which applied the *Oakes* test rather than the *Doré* reasonableness analysis where the issue was constitutionality of particular provisions in administrative policies of general application to all physicians. The Court of Appeal applied the same approach without deciding the issue: see *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 at paras. 58-60.

<sup>66</sup> See *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10-12, referring to *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013 SCC 36](#) at paras. 45-47; see also *Yu v. Richmond (City)*, 2021 BCCA 226 at paras. 44-45.

<sup>67</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at para. 34.

<sup>68</sup> *Vavilov* at para. 15.

<sup>69</sup> *Vavilov* at para. [99](#).

<sup>70</sup> *Vavilov* at para. [85](#).

67. Reasonableness in a *Charter* context further requires proof that the decisions at issue affected *Charter* protections as little as reasonably possible in light of the applicable statutory objectives.<sup>71</sup> The Court in *LSBC v TWU* held:

if there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes.<sup>72</sup>

68. “The *Charter* enumerates a series of guarantees that can only be limited *if the government can justify* those limitations as proportionate.”<sup>73</sup>

### **B. The Petition is not precluded by section 43 of the PHA**

69. At paragraphs 61 through 66 and 70 through 79 of his reasons, the Chambers Judge considers the effect of the PHO’s power to reconsider her Orders under s. 43 of the *PHA* on the Appellants’ Petition. He concluded that “[t]he religious petitioners have not satisfied me that they are entitled to challenge the G&E Orders on their judicial review under s. 2 of the *JRPA*”,<sup>74</sup> on the basis that

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

70. [73] On an application for relief under s. 2 of the *JRPA*, the basic principle of judicial review is that an applicant must first exhaust all adequate statutory remedies and that review must be of a final decision. Where a party has taken advantage of a reconsideration process, only the reconsideration decision may be judicially reviewed: *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 [*Yellow Cab*] at para. 40 [Further Citations]. The PHO’s failure to respond promptly or at all to the Appellants’ (and others’) requests for reconsideration until the eve of trial shows that s. 43 did not offer an adequate alternative remedy in these circumstances.

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<sup>71</sup> *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*LSBC v. TWU*] at para. 80.

<sup>72</sup> *Ibid.* at para. 81 [emphasis in original].

<sup>73</sup> *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*] at para. 38 [emphasis added].

<sup>74</sup> Reasons, para. 250, AR, p. 94.

1. *The PHO failed to reconsider her Orders prior to January 8, 2021*

71. Although the Appellants *attempted* to have the November 19 Order varied to allow indoor in-person worship and proposed safety measures, the PHO did not “undertake the reconsideration”.<sup>75</sup> The PHO’s prompt and thoughtful responses to Rabbi Kaplan, who did not specifically request reconsideration under the *PHA*, show she was able to do so.

72. Judicial review of the PHO’s Orders made on November 19 and December 2, 4, 7, 9, 15 and 24, 2020 is properly sought despite the PHO’s power to reconsider them. There are no reconsideration decisions to review because the PHO failed to make any.

73. The PHO’s delay is crucially important here. The Appellant Churches have been issued 14 tickets totaling \$32,200 for allegedly contravening the G&E Orders issued by Dr. Henry.<sup>76</sup> These charges remain before the courts. The legality of the Orders could not be determined by judicial review of subsequent reconsideration by the PHO of the now repealed Orders,<sup>77</sup> but by judicial review of the specific Orders in effect when people were charged.

2. *Reconsideration after this litigation began*

74. This Petition also sought review of future Orders made that restricted the Appellants’ freedom to worship. Such Orders were made on January 8 and February 5 and 10, 2021.

75. On January 29, 2021, the Appellants, through counsel, requested that the PHO reconsider and vary her January 8 Order to allow indoor in-person worship.

76. The hearing of this matter began on Monday, March 1, 2021. Two court days earlier on Thursday, February 25, 2021, the PHO responded to the Appellants’ January 29 request for reconsideration. She refused their request for indoor in-person worship, but allowed outdoor worship subject to safety measures, much as she had done since

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<sup>75</sup> The Appellants’ requests that the PHO reconsider her prohibition on in-person worship services thus fall between the alternatives described by Mr. Justice Groberman in *Yellow Cab* at paragraphs 39 and 40, which discuss requests for reconsideration that are decided and requests that are not made.

<sup>76</sup> *Champ #1*, Ex. B, AB, pp. 76, 78; *Van Muyen #1*, Exs. B, C, AB, pp. 112-113; *Koopman #1*, Ex. G, AB, pp. 155, 157; *Schoeman #1*, Ex. H, AB, p. 160; *Riverside #1*, Ex. C, AB, p. 195; *Smith #1*, Ex. E, AB, p. 201; *Koopman #2*, Exs. G, H, I, J, K, AB, pp. 1087, 1089, 1091, 1093, 1095.

<sup>77</sup> *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 [*Yellow Cab*], at para. 39: “Where the power of reconsideration is not wide enough to encompass the alleged error, reconsideration cannot be considered an adequate alternative remedy to judicial review, and the existence of the limited power of reconsideration will not be an impediment to judicial review.”

late November for Orthodox synagogues. This communication to the Appellants, unlike the PHO's email responses to Rabbi Kaplan, took the form of a formal letter, with four attachments totaling 49 pages.

77. The Respondents' preliminary objection, that the PHO's February 25, 2021 response to the Appellants' request for reconsideration is the proper subject for judicial review, is a transparent machination to advance the PHO's position in this litigation long after the impugned Orders were actually made:

- The preliminary objection would prevent the Court from considering the merits of the PHO's Orders based on material before the PHO when those orders were made and the explanations she gave for them. It is instead an attempt to supplement the actual basis for her Orders after the fact.
- The PHO's reconsideration, coordinated by her counsel, was a strategic move in this litigation. The permission she granted to the Appellants to hold outdoor services, which the PHO had granted Orthodox synagogues since November 2020, could have been granted in response to their requests months before.

78. Mr. Justice Groberman's comments in *Yellow Cab* are wholly appropriate here. There, he considers the circumstance where a decision-maker's refusal of leave to reconsider a decision does not amount to a dismissal of the reconsideration application on the merits. He holds that the initial decision is the there the proper subject of judicial review. A failure to consider requests for reconsideration amounts to the same thing:

[44] Where a denial of leave does not constitute a determination that the request for reconsideration lacks merit, it is my view that the initial administrative decision, and not the denial of leave, will be the appropriate target for judicial review. To hold otherwise would be to allow a tribunal, through procedural machinations, to oust the inherent, constitutionally-protected supervisory jurisdiction of the superior courts. In *Jozipovic v. British Columbia (Workers' Compensation Board)*, [2012 BCCA 174](#), this Court emphasized that a tribunal cannot, by blocking access to administrative review of a decision, bar the courts from passing on the merits of judicial review.

### C. The prohibition on in-person worship services impaired equality rights

79. The Chambers Judge made no finding regarding s.15 of the *Charter* but recounts arguments made regarding s. 15 at paragraphs 188 through 197 of his reasons.<sup>78</sup> In his discussion he agreed with the Respondents that “There is no evidence before me that the G&E Orders only disadvantage a group of people based on their religious beliefs. The same activities are allowed and restricted for secular and religious people, and whether in a secular or religious setting.”<sup>79</sup> The lower court’s failure to find a distinction on the basis of religion, errs by mis-reading the Orders, mis-defining the comparator groups, and focusing on formal rather than substantive equality.<sup>80</sup>

80. Further, in-person worship services were not prohibited after specific consideration of the risks they posed, but because they were in a broad sense *religious*. The PHO’s broad prohibition on “worship and other religious events” did not consider the particular character of such events or whether worship services that followed safety measures constituted an unacceptable transmission risk.

81. The PHO’s categorical ban on in-person worship, including indoor in-person worship as proposed by the Appellants, thus involves “stereotyping on the basis of [enumerated and analogous grounds] that results in a decision that does not correspond to a claimant’s or group’s actual circumstances and characteristics.”<sup>81</sup> Such stereotyping is explicit in the PHO’s December 18 letter to Rev. Koopman and Rev. Smith asserting that “it is particularly difficult to achieve compliance” with safety measures by people in places of worship.<sup>82</sup>

82. Nor did the Appellants receive the consideration given to people gathering for secular purposes, at bars, restaurants, exercise facilities and the like, where updates to and enforcement of safety measures was deemed sufficient. “Support groups” with up to 50 people were permitted to meet with identical safety measures as those adhered to by the Appellants.<sup>83</sup> Permitting gatherings focused on interpersonal support while prohibiting

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<sup>78</sup> The Chambers Judge’s decision to not decide the s. 15 issue was not followed in *Gateway Bible Baptist Church et al. v. Manitoba et al.*, 2021 MBQB 219, at paras. 217-233.

<sup>79</sup> Reasons, para. 191, AR, pp. 81-82.

<sup>80</sup> *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 40.

<sup>81</sup> *R. v. Kapp*, 2008 SCC 41, at para.18, referring to *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143.

<sup>82</sup> Emerson #1, Ex. 49, AB, p. 958.

<sup>83</sup> Emerson #1, Ex. 28, AB, pp. 657, 668.

gatherings focused on the worship of a deity is an impermissible distinction based on religion, particularly as worship services are also critical support for people.<sup>84</sup>

83. The Chambers Judge also considers whether the Appellants' s. 15 claim is resolved by a consideration of our s. 2(a) argument. These claims are distinct: the PHO's Orders contravene s. 2(a) because they unjustifiably *burden* religious practice and *also* contravene s. 15(1) because they *allocate* the burdens of public health measures in a discriminatory fashion, which offends the Appellants' equality before the law. These wrongs are distinct and both are present here.

#### **D. The PHO's Orders prohibiting in-person worship are unreasonable restrictions of Charter-protected rights and freedoms**

84. Should the Orders be treated as administrative decisions subject to judicial review rather than as laws of general application subject to an *Oakes* analysis, the principles of administrative law, reasonableness review and the *Doré/TWU/ Loyola* framework apply. In this section we consider the reasoning and evidence given in support of the impugned Orders, and the permission granted to others but denied to the Appellant Churches. These reveal a failure of justification, transparency and intelligibility in the decision-making process that unreasonably limits *Charter*-protected freedoms and equality rights.

85. First, administrative law analysis of this case requires consideration of what may properly be considered the Record before the PHO for the Orders and identification of the PHO's reasons for prohibiting in-person worship services when the Orders were made.

86. Some of the information put forward by the Respondents raises the concern that the materials "simply seek to shore up weaknesses in the record, or serve to provide a revisionist version of the tribunal's reasons".<sup>85</sup>

87. The most significant example of the Respondents attempting to "shore up weaknesses in the record" or "provide a revisionist version of the tribunal's reasons" is the transcript of the February 12<sup>th</sup> news conference, placed in a paralegal's affidavit and filed two business days before the Chambers hearing. The PHO had already filed her response to this Petition and the Record in the form Affidavit of Brian Emerson, on

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<sup>84</sup> O'Neill #1, paras. 4-6, AB, p. 81; Koopman #1, paras. 26-30, AB, pp. 118-119.

<sup>85</sup> See *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at para. 40.

February 2, 2021. The PHO, through her counsel, was in Court seeking an injunction against the Appellant Churches on the very day she chose to issue her most lengthy comments in support of her prior Orders, referring to additional and different information than had earlier been provided.

88. In their response to this Petition, the Respondents indicated that the reasons for the PHO's oral orders were those provided in the media briefing announcing the order and that the reasons for the written Orders were the written recitals provided in the Order.<sup>86</sup>

*1. Fundamental gap in the reasoning supporting the prohibition*

89. There is a "fundamental gap" in a decision's reasons "[w]here a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record"; in such circumstances, the "decision will generally fail to meet the requisite standard of justification, transparency and intelligibility."<sup>87</sup>

90. Considering the PHO's Orders in light of the rationale and the record provided for them, they each contain a fundamental gap in their reasoning: specifically, there is no detectable attempt in any of them to evaluate the public health implications of in-person worship where attendees actually comply with the Covid safety protocols in place. As the prohibition on in-person worship services was implemented concurrently with other public settings being subject to increased regulation and enforcement – but not prohibition – the difference in treatment of worship services was an essential element of the PHO's decisions and required consideration and explanation.

91. *Vavilov's* strictures against an expansive reading of the PHO's rationale for a ban on in-person worship regardless of safety measures observed is particularly important here, as the Orders limit the Appellants' *Charter*-protected freedoms. *The PHO* has the burden of showing that these freedoms are reasonably limited, i.e., that in-person worship with implemented safety measures would not meet her public health concerns.

92. The PHO's reasons for both the November 19<sup>th</sup> and December 7<sup>th</sup> Orders prohibiting in-person worship were that there had been transmission in religious settings

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<sup>86</sup> Response to Petition, paras. 16-19, AR, p. 24.

<sup>87</sup> *Vavilov* at paras. 96, 98 [emphasis added].

“despite our best efforts”.<sup>88</sup> There is nothing unique about the claim that transmission had occurred in some religious settings: indeed, on November 19<sup>th</sup>, the PHO had discussed transmission occurring in many public in-person settings.<sup>89</sup> Yet, these other settings were permitted to open with appropriate Covid safety plans, with only certain activities in these settings prohibited.<sup>90</sup>

93. The claim that transmission had occurred “despite our best efforts” is not remarkable when understood to reflect the efforts of the PHO and her office. There is excellent reason to not attribute to the PHO any belief that transmission had significantly occurred at worship services where safety measures akin to those observed and proposed by the Appellants are observed:

- a. The PHO specifically addressed *this issue* on October 26, 2020 and said transmission did not occur when safety measures were observed, regretting spread that occurred when safety measures were not followed;
- b. The PHO’s press briefings on November 19 and December 7, 2020 do not in fact contradict her earlier conclusion;
- c. Nothing in the supporting record suggests that safety measures, when observed, were insufficient to prevent spread in religious settings.

94. As shown in paras 101-107 of the Emerson Affidavit, the PHO treated “religious settings”, which included such events as weddings and funerals, as a broad category for evaluating the risk posed by in-person worship services, without attention to whether or what measures had been observed to prevent spread of COVID-19 at the religious events in question. By ignoring this difference, the PHO treated the fact that an event was “religious” as being itself significant from a public health perspective.

95. When considering other gatherings, which are not in any obvious way *Charter*-protected, like workplaces, bars, restaurants, and gyms, the PHO showed herself to be perfectly capable of distinguishing between gatherings that properly observe safety measures and those that do not, and looked to enforcement measures to secure

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<sup>88</sup> Emerson #1, Exs. 28, 34, AB, pp. 655, 748.

<sup>89</sup> Emerson #1, Ex. 34, AB, pp. 658, 660, 662, 665-66, 670-71.

<sup>90</sup> Emerson #1, Ex. 34, AB, pp. 658-61, 667-71.

compliance; she would shut down only non-compliant operators rather than shutting down an entire sector.

96. The PHO's only substantive comment on the effectiveness of the safety measures at in-person worship came in her December 18 letter sent to two Appellant churches, which claimed it was "particularly difficult" and "extremely difficult" to ensure people's compliance with infection control measures in places of worship.<sup>91</sup> There is no evidence to support this accusation against people of faith, or against the Appellant Churches in particular. Further, this claim contradicts the PHO's earlier statements on November 19<sup>th</sup> indicating that people in a wide variety of "transactional" and other settings had in fact not complied with the rules and had caused spread. The very low instances of transmission recorded in "religious settings" further preclude this explanation from addressing why all in-person worship services needed to be prohibited and not just those out of compliance with safety measures, as was the PHO's approach with other in-person settings.

97. Finally, the PHO's December 18<sup>th</sup> claim that there is a "high risk of transmission" in places of worship<sup>92</sup> is not supported in the Record.

## 2. *Availability of reasonable alternatives*

98. The conceded fact that prohibitions on in-person worship services limited *Charter* freedoms requires the PHO to consider whether there were other reasonable options that would have given effect more fully to the Appellants' freedoms of religion, expression, peaceful assembly and association in light of the PHO's objectives.<sup>93</sup>

99. The complete prohibition on in-person worship services was the most extreme possible measure to prevent transmission at worship services.

100. The Record before the PHO, however, shows not only the existence of a reasonable option that would have given much more effect to the *Charter* protections at stake, but also the PHO's own acknowledgement that this option met her objectives.

101. The PHO viewed the outdoor in-person worship services she permitted Orthodox synagogues to be "low risk" and to meet her objectives.<sup>94</sup> The PHO permitted these in-

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<sup>91</sup> Emerson #1, Exs. 49, 50, AB, pp. 958, 984.

<sup>92</sup> See page 1 of Dec 18 letter, Emerson #1, Exs. 49, 50, AB, pp. 957, 983.

<sup>93</sup> *LSBC v TWU* at paras 80-82.

<sup>94</sup> Emerson #1, Exs. 43-47, AB, pp. 934-49.

person worship services for the duration of the in-person worship service prohibition contained in the PHO's Orders. For a period in February 2021, the PHO also viewed in-person indoor services, with the conditions she required, as sufficiently safe.

102. The blanket prohibition on in-person services thus does not “fall within the range of reasonable outcomes” since there was clearly “an option or avenue *reasonably* open” to the PHO that would have reduced the impact on the protected right while still allowing the PHO to “sufficiently further” the objective of reducing the rate of transmission in worship services.<sup>95</sup>

103. The PHO's February orders show that she was perfectly able to address concerns around singing and for elderly or at-risk people in a way that satisfied her objectives, without categorically prohibiting in-person worship services.

#### **E. The prohibitions on worship services are not demonstrably justified**

104. Since the Respondents concede that the Appellants' *Charter* freedoms were violated, the question is whether these violations are “demonstrably justified in a free and democratic society” under s. 1. The onus of justification is on the party who has limited the *Charter* rights engaged—the Respondents.<sup>96</sup> This burden requires that they provide “cogent and persuasive” evidence which “makes clear to the Court the consequence of imposing or not imposing the limit.”<sup>97</sup>

##### *1. Pressing and Substantial Objective*

105. The Supreme Court of Canada holds that “people should not be left guessing about why their *Charter* rights have been infringed.”<sup>98</sup>

106. An appropriate statement of the objective of the Prohibition is to reduce the rate of transmission in worship services. Is this objective “pressing and substantial”?

107. The extent to which it may have been “pressing and substantial” to reduce the rate of transmission in worship services varies significantly in different areas of the province. For example, in the Island Health region, there is no evidence of any transmission in “religious settings” at all, indicating that seeking to reduce that rate of transmission was

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<sup>95</sup> *LSBC v TWU* at para. 81.

<sup>96</sup> *R. v. Oakes* at para. 66.

<sup>97</sup> *R. v. Oakes* at para. 68; *R. v. Spratt*, 2008 BCCA 340 at para. 30.

<sup>98</sup> *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 23.

not “pressing and substantial”. The extent to which reducing the rate of transmission in worship services in other areas was pressing and substantial is relevant to the overall proportionality analysis in the *Oakes* test, discussed below.

### 3. *Rational Connection*

108. What has become known as the “rational connection test” was first set out by the Court in *Oakes*, as follows:

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.<sup>99</sup>

109. This inquiry can also be described as “a consideration of the rationality of the provision”.<sup>100</sup> While it can be stated that categorically prohibiting religious worship services is “rationally connected” to the objective of reducing the rate of transmission of Covid at such services, the rationality of that prohibition is seriously undermined by its context. The following points, which are also relevant to the “minimal impairment” and overall proportionality of the prohibition, show that the categorical prohibition on in-person worship services was arbitrary and unfair:

- a. Religious settings accounted for a minute portion of the Province’s Covid cases;
- b. No evidence was provided showing that religious settings where safety protocols were followed experienced transmission;
- c. Settings with much greater rates of transmission, such as gyms and fitness facilities were permitted to remain open; and
- d. Orthodox synagogues were permitted to gather in-person for outdoor religious services for months while others’ requests were ignored.

110. Dr. Kettner, Manitoba’s former Chief Public Health Officer, notes that the Record provided by Dr. Emerson shows a lack of consideration and data to address whether the prohibition on worship services, in contrast to the permission for attendance at

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<sup>99</sup> *Oakes* at para. 74.

<sup>100</sup> *Oakes* at para. 81.

restaurants, bars, and retail, was “evidence-based”, “reasonable” and “fair.”<sup>101</sup> Further, he notes that the PHO’s claim that worship services constitute a high risk of transmission suffers from “a significant gap of epidemiological evidence”.<sup>102</sup>

#### 4. *Minimal Impairment*

111. The PHO is obligated to show on a balance of probabilities<sup>103</sup> that the means chosen to reduce the rates of transmission in religious services impaired the *Charter* protections “as little as possible.”<sup>104</sup> The Court is called upon to make this determination on the basis of the evidence tendered.<sup>105</sup>

112. The PHO has not tendered any actual evidence that categorically prohibiting worship services was necessary to reduce transmission at those services to the level of transmission accepted in other settings, which were regulated but not prohibited. The PHO provided vague statements that transmission was occurring despite “our” best efforts and current measures, but did not provide any evidence of transmission occurring in worship services where safety protocols were observed.<sup>106</sup> Unsupported and vague claims to the contrary do not satisfy the PHO’s evidentiary burden.

113. The PHO’s December 18 letters to Revs. Koopman and Smith indicated that the concern about transmission at worship services was in fact based on her view that, unlike restaurants, commercial or retail operations, it was very difficult to get people in places of worship to comply with Covid safety measures.<sup>107</sup> In addition to being discriminatory, this claim is just not true and not supported by any evidence. The PHO’s own statements<sup>108</sup> indicated that in fact many “commercial” and business settings had seen attendees failing to comply with the rules, resulting in transmission.

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<sup>101</sup> Kettner #1, paras. 22-23, AB, pp. 1160-61; see also para. 39, AB pp. 1163-64: “If activities such as spiritual gatherings are prohibited, it is incumbent on the accountable decision-makers to explain the estimated threat – in absolute and relative terms – posed by the activity, the estimated effectiveness of intervention options and the estimated harms from the intervention options.”

<sup>102</sup> Kettner #1, para. 69, AB, p. 1171.<sup>103</sup> Oakes at paras 67.

<sup>103</sup> Oakes at paras 67.

<sup>104</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CarswellQue 115, [1989] 1 S.C.R. 927 at para. 79.

<sup>105</sup> *Ibid.* at para. 82.

<sup>106</sup> Emerson #1, Exs. 28, 34, AB, pp. 669, 756.

<sup>107</sup> Emerson #1, Exs. 49, 50, AB, pp. 958, 984.

<sup>108</sup> Emerson #1, Exs. 23, 28, AB, pp. 599, 609, 660.

114. On November 19, 2020, with rising case numbers caused by transmission, including in retail, gyms, restaurants and pubs, businesses and workplaces, the PHO's response was not to categorically shut down all such settings but to provide "active inspections" and shut down those places not complying with safety guidelines.

115. From the evidence tendered, there is no discernable reason why the PHO could not have adopted the same approach for worship services. For example, in the Fraser Health region where all the Appellant Churches are located and which saw more Covid cases than any other region in the Province (36,591 cases by January 9, 2021<sup>109</sup>), the PHO's evidence is that in the ten-month period between March 15, 2020 and January 15, 2021, only seven places of worship were "associated with" a total of 59 Covid cases.<sup>110</sup> There is no evidence why further education and enforcement of safety guidelines could not have addressed the concern about transmission in religious settings, as was being done to address transmission in workplace, gyms and "transactional" settings.

116. Despite the failure of the PHO to provide useful settings data for anything other than the broadly inclusive "religious settings", the Appellants were able to secure data which showed that gyms and fitness facilities constituted a much more significant part of Provincial Covid cases and transmission risks than "religious settings."<sup>111</sup> Yet, only the higher risk activities in gyms were shut down (e.g. high intensity interval training), despite the potential for transmission in lower intensity activities as well, which were permitted to continue (e.g. individual workouts).<sup>112</sup>

117. The expert reports of the Appellants found that imposing the same kinds of restrictions on worship services that were imposed on other settings would have rendered worship services "at least as safe"<sup>113</sup> and with a low risk of transmission "not greater than the risk of transmission within the general community." Dr. Warren, an infectious disease specialist, after reviewing the measures adopted at the Appellant Churches, found that their in-person worship services posed a low risk of infection.<sup>114</sup>

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<sup>109</sup> Emerson #1, Ex. 38, AB, p. 838.

<sup>110</sup> Emerson #1, para. 103, AB, p. 346.

<sup>111</sup> Roy #1, Ex. A, AB, p. 1248.

<sup>112</sup> Emerson #1, Ex. 28, AB, pp. 658-60.

<sup>113</sup> Kettner #1, para. 76, AB, p. 1172.

<sup>114</sup> Affidavit #1 of Dr. Thomas A. Warren, para 43, AB, pp. 1143-44.

118. The PHO had in fact permitted in-person worship services she deemed “low risk”, services held outdoors with up to 25 persons, throughout the period of time she categorically prohibited in-person services.<sup>115</sup> Rather than permit religious adherents across the Province to gather in this manner, the PHO only provided this option to a handful of faith communities. The PHO only granted permission for the Appellant Churches to meet outdoors in late February – on the eve of the Chambers Hearing.

119. Clearly in this context, the categorical prohibitions on in-person worship services did not impair the Appellants’ and others’ *Charter* rights as little as possible. They were not minimally impairing.

##### 5. *Proportionality of the Prohibition’s Effects*

120. The Appellant churches have sincerely-held religious beliefs requiring them to meet for religious worship, which is an “essential component of the exercise of [their] faith.”<sup>116</sup> They have attested to the profound importance such services have to the mental, spiritual and even physical well-being of their members.<sup>117</sup> They have met safely without any transmission in their worship services.<sup>118</sup>

121. In contrast to targeted enforcement of effective safety protocols as was done for a significant number of other secular in-person settings, every in-person worship service in the province was categorically prohibited. Without hyperbole, it is difficult to recollect a more complete infringement of the right to worship in Canada’s history.

122. Against this, any salutary effects of the Prohibition must be considered. It is possible that the Prohibition prevented some Covid transmission in religious settings. According to the evidence provided by the PHO, total transmissions in “religious settings” in BC, including weddings and funerals, amounted roughly to 0.31% of total cases. Given the lack of any evidence that there was transmission at worship services which observed the safety protocols, it is a legitimate question whether there was in fact any benefit to prohibiting in-person worship services.

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<sup>115</sup> Emerson #1, Exs. 43, 44, AB, pp. 934, 937.

<sup>116</sup> See eg Koopman #1, paras. 8-11, 14, AB, p. 116; Smith #1, paras. 14-22, AB, p. 186-87.

<sup>117</sup> See eg Koopman #1, paras. 24, 26-33, AB, pp. 118-19.

<sup>118</sup> See eg Smith #1, para. 27, AB, p. 188.

123. There is simply no proportionality between the severe deleterious effects of a blanket province-wide ban on in-person worship services and any salutary effects it may have had.

124. The PHO's prohibitions on in-person worship should be declared to be of no force and effect pursuant to section 52 of the *Constitution Act, 1982*.<sup>119</sup>

**F. The requirement for outdoor protests to follow unspecified “guidelines” is not “prescribed by law” and therefore cannot be justified**

125. In the Petition filed January 7, 2021, the Appellant Alain Beaudoin challenged existing orders and “such further orders as may be pronounced which prohibit or unduly restrict gatherings for public protests”.<sup>120</sup>

126. Although the Chambers Judge issued a declaration that the prohibition on outdoor protests between November 19, 2020 and February 10, 2021 violated ss. 2(b) and 2(c) of the *Charter* and are of no force or effect,<sup>121</sup> the February 10 Order continued to restrict outdoor protests to those who communicated “a position on a matter of public interest or controversy” and who “take the steps and put in place the measures recommended in the guidelines posted on my website in order to limit the risk of transmission of COVID-19.”<sup>122</sup>

127. As the Respondents acknowledge in their Response to Petition, “[t]here is no question that restrictions on gatherings to avoid transmission of SARS-CoV-2 limit rights and freedoms guaranteed by the *Charter of Rights and Freedoms*.”<sup>123</sup>

128. The Chambers Judge did not discuss why the alleged “guidelines” referred to in the February 10<sup>th</sup> Order did not violate the rights asserted by Mr. Beaudoin, despite the fact that the police had ticketed Mr. Beaudoin for allegedly failing to comply with certain guidelines and requirements the police had sought to impose on the protests he organized, including having a “Covid response plan”, collecting the data of those who attend protests, and limiting attendance at the protest to 50 persons or fewer.<sup>124</sup> Mr.

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<sup>119</sup> Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>120</sup> Petition to the Court, para. 1(c), AR, p. 3.

<sup>121</sup> Reasons, paras. 174, 251, AR, pp. 78, 94; see also Order Made after Application, entered June 28, 2021, para. 1, AR, p. 35.

<sup>122</sup> Christopherson #1, Ex. A, para. J, AB, p. 1025.

<sup>123</sup> Response to Petition, para. 27, AR, p. 26.

<sup>124</sup> Beaudoin #1, paras. 9, 26, 39, AB, pp. 41, 43, 45.

Beaudoin's testimony was that he could not comply with those guidelines. The failure to consider the restrictions remaining on outdoor protests was an error.

129. The February 10 Order limiting the content of outdoor protests to matters of "public interests or controversy" infringes the *Charter* freedom of expression.<sup>125</sup> Further, imposing compliance with "guidelines" in order for people to gather in public to express themselves also limits the *Charter* freedoms of expression, peaceful assembly and association.

130. The Appellants contend that the February 10 Order's restrictions on outdoor protests were not "prescribed by law" and cannot be justified under s. 1 of the *Charter*.

131. First, the requirement that the protests "communicat[e] a position on a matter of public interest or controversy" is subjective and does not constitute a legal standard.

132. Second, the Order did not provide any link or web address to the "guidelines posted on my website", or even identify what "website" was being referenced.

133. In *Greater Vancouver*, the Supreme Court of Canada indicated that limitations on *Charter* rights are "prescribed by law" only if they are sufficiently accessible and precise, thereby "precluding arbitrary state action" and providing "individuals and government entities with sufficient information on how they should conduct themselves."<sup>126</sup>

134. The February 10 Orders' restrictions on outdoor protests did not provide sufficient information to guide the actions of individuals or law enforcement and did not preclude further arbitrary state action. Mr. Beaudoin's prior experience of the RCMP requiring a 50-person limit, the collection of protestors' personal data and having a "Covid response plan" indicates exactly the kind of arbitrary state action that the February 10 Order invited by referring to unspecified "guidelines" on an unspecified website.

135. Finally, the PHO can not point to a single Covid case associated with an outdoor protest.<sup>127</sup> The PHO therefore failed to bear her burden to justify any restrictions on outdoor protests for the purpose of reducing transmission at outdoor protests.

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<sup>125</sup> See *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 [*Greater Vancouver*] at para. 38.

<sup>126</sup> *Greater Vancouver* at para. 53.

<sup>127</sup> See *Emerson #1*, para. 109, AB, p. 347.

**PART 4 - NATURE OF ORDER SOUGHT**

136. The Appellants seek an Order:
- a. Declaring that the prohibitions on in-person worship services contained in Provincial Health Orders issued by the PHO, including on November 19 and December 2, 4, 7, 9, 15 and 24, 2020, January 8, February 5 and 10, 2021, unreasonably restrict ss. 2(a), 2(b), 2(c), 2(d), and 15(1) of the *Charter* and are therefore of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*.
  - b. Declaring that the prohibitions on in-person worship services contained in Provincial Health Orders issued by the PHO, including on November 19 and December 2, 4, 7, 9, 15 and 24, 2020, January 8, February 5 and 10, 2021, unjustifiably violate ss. 2(a), 2(b), 2(c), 2(d), and 15(1) of the *Charter* and are therefore of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*.
  - c. That the requirements for outdoor protests to express “a position on a matter of public interest or controversy” and to comply with unspecified “guidelines” contained in Provincial Health Orders issued by the PHO, including on February 10, 2021, unjustifiably violate ss. 2(b), 2(c) and 2(d) of the *Charter* and are therefore of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*.
137. All of which is respectfully submitted.

Dated at the City of Calgary, Province of Alberta, this 13<sup>th</sup> day of December of 2021.

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Rod Wiltshire and Marty Moore

Counsel for the Appellants

## APPENDIX A: ENACTMENTS

### ***CANADIAN CHARTER OF RIGHTS AND FREEDOMS,*** PART I OF THE *CONSTITUTION ACT, 1982,* BEING SCHEDULE B TO THE *CANADA ACT 1982* (UK), c 11

#### **Rights and freedoms in Canada**

**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.

#### **Fundamental freedoms**

**2** Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

#### **Equality before and under law and equal protection and benefit of law**

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

### **PART VII OF THE CONSTITUTION ACT, 1982,** BEING SCHEDULE B TO THE *CANADA ACT 1982* (UK), c 11

#### **Primacy of Constitution of Canada**

**52 (1)** The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

#### **Constitution of Canada**

**(2)** The Constitution of Canada includes

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

**PUBLIC HEALTH ACT**  
[SBC 2008] CHAPTER 28

**Reconsideration of orders**

- 43** (1)A person affected by an order, or the variance of an order, may request the health officer who issued the order or made the variance to reconsider the order or variance if the person
- (a)has additional relevant information that was not reasonably available to the health officer when the order was issued or varied,
  - (b)has a proposal that was not presented to the health officer when the order was issued or varied but, if implemented, would
    - (i)meet the objective of the order, and
    - (ii)be suitable as the basis of a written agreement under section 38 [*may make written agreements*], or
  - (c)requires more time to comply with the order.
- (2)A request for reconsideration must be made in the form required by the health officer.
- (3)After considering a request for reconsideration, a health officer may do one or more of the following:
- (a)reject the request on the basis that the information submitted in support of the request
    - (i)is not relevant, or
    - (ii)was reasonably available at the time the order was issued;
  - (b)delay the date the order is to take effect or suspend the order, if satisfied that doing so would not be detrimental to public health;
  - (c)confirm, rescind or vary the order.
- (4)A health officer must provide written reasons for a decision to reject the request under subsection (3) (a) or to confirm or vary the order under subsection (3) (c).
- (5)Following a decision made under subsection (3) (a) or (c), no further request for reconsideration may be made.
- (6)An order is not suspended during the period of reconsideration unless the health officer agrees, in writing, to suspend it.

(7) For the purposes of this section,

(a) if an order is made that affects a class of persons, a request for reconsideration may be made by one person on behalf of the class, and

(b) if multiple orders are made that affect a class of persons, or address related matters or issues, a health officer may reconsider the orders separately or together.

(8) If a health officer is unable or unavailable to reconsider an order he or she made, a similarly designated health officer may act under this section in respect of the order as if the similarly designated health officer were reconsidering an order that he or she made.

## LIST OF AUTHORITIES

<b>Authorities</b>	<b>Factum Page</b>	<b>Factum Paragraph</b>
<a href="#"><u><i>Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)</i>, 2018 BCCA 387</u></a>	19	86
<a href="#"><u><i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i>, 2019 SCC 65</u></a>	14-15, 20	66, 91
<a href="#"><u><i>Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario</i>, 2018 ONSC 579</u></a>	14	64
<a href="#"><u><i>Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario</i>, 2019 ONCA 393</u></a>	14	64
<a href="#"><u><i>Fraser v. Canada (Attorney General)</i>, 2020 SCC 28</u></a>	18	79
<a href="#"><u><i>Gateway Bible Baptist Church et al. v. Manitoba et al.</i>, 2021 MBQB 219</u></a>	18	79
<a href="#"><u><i>Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component</i>, 2009 SCC 31</u></a>	29	129, 133
<a href="#"><u><i>Housen v. Nikolaisen</i>, 2002 SCC 33</u></a>	14	62
<a href="#"><u><i>Irwin Toy Ltd. v. Quebec (Attorney General)</i>, 1989 CarswellQue 115, [1989] 1 S.C.R. 927</u></a>	25	111
<a href="#"><u><i>Law Society of British Columbia v. Trinity Western University</i>, 2018 SCC 32</u></a>	15, 23	67, 99, 103
<a href="#"><u><i>Loyola High School v. Quebec (Attorney General)</i>, 2015 SCC 12</u></a>	15	68
<a href="#"><u><i>Northern Regional Health Authority v. Horrocks</i>, 2021 SCC 42</u></a>	14	65
<a href="#"><u><i>R. v. Kapp</i>, 2008 SCC 41</u></a>	18	81
<a href="#"><u><i>R. v. Oakes</i>, 1986 CarswellOnt 95, [1986] 1 SCR 103</u></a>	24	105, 109, 110
<a href="#"><u><i>R. v. Spratt</i>, 2008 BCCA 340</u></a>	24	105
<a href="#"><u><i>Sauvé v. Canada (Chief Electoral Officer)</i>, 2002 SCC 68</u></a>	24	106
<a href="#"><u><i>Yellow Cab Company Ltd. v. Passenger Transportation Board</i>, 2014 BCCA 329</u></a>	15-16	70-71, 73, 78
<a href="#"><u><i>Yu v. Richmond (City)</i>, 2021 BCCA 226</u></a>	14	65

<b>Legislation</b>	<b>Factum Page</b>	<b>Factum Paragraph</b>
<a href="#"><u>Public Health Act, S.B.C. 2008, c. 28</u></a>	10-11, 13, 15-16	45, 49, 61, 69, 71
<a href="#"><u>Constitution Act, 1982, schedule B to the Canada Act 1982 (UK), 1982, c 11</u></a>	11, 13-15, 18, 20, 22-25, 27-30	49, 59-60, 61, 63-64, 67-68, 79, 91, 95, 99, 101, 105-106, 111, 119, 126-127, 129-130, 133, 136