IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Date: 20210318
Docket: S210209
Registry: Vancouver

Between:

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

Petitioners

And

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

Respondents

Corrected Judgment: The text of the judgment was corrected at paras. 149 and 161 on March 19, 2021

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Petitioners:	P. Jaffe M. Moore
Counsel for the Respondents:	J. Hughes, Q.C. G. Morley E. Lapper
Counsel for the Intervenor Association for Reformed Political Action (ARPA) Canada:	G. Trotter A. Schutten
Place and Date of Hearing:	Vancouver, B.C. March 1-3, and 5, 2021
Place and Date of Judgment:	Vancouver, B.C. March 18, 2021

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I. Introduction

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

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

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

II. The Parties

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

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

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

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

III. Background

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

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

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

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

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

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

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

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

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

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

[15] The data from the Fraser Health Region showed that, from March 15, 2020 to January 15, 2021, 7 places of worship were affected by the Virus, with 59 associated COVID-19 cases. Of these cases, 24 were associated with a religious setting in Chilliwack in October 2020, 12 were linked to a religious setting in Burnaby in December 2020, eight were associated with a religious setting in Maple Ridge in November 2020, and six were associated with a religious setting in Langley in November 2020.

[16] The data from the Interior Health Region showed that, from March 15, 2020 to January 15, 2021, 11 places of worship were affected with 20 associated cases. Of these cases, 11 were associated with two religious settings in Kelowna in September and November respectively. The data showed that all of the cases in religious settings in Interior Health occurred between August 2020 and January 2021, with the majority of places of worship being affected in the fall (October and November 2020).

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

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

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

(b) Dr. Henry's Authority

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

[20] Section 31 of the *PHA* in turn provides that a health officer (or the PHO in an emergency) "may order a person to do anything that the health officer reasonably believes is necessary for any of the following purposes… (b) to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard".

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

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

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

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

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

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

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

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

(c) Dr. Henry's Progressive Orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[44] She also said that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> It is a challenge. I know. There are many faith groups. There are a few faith groups that are continuing to meet and that concerns me. It concerns me because it is a misunderstanding of why we are trying to put restrictions in place. These restrictions are about recognizing there are situations where this virus is spreading rapidly, and we have seen when we come together and congregate indoors, in particular, those are settings where the virus is transmitted, despite our best efforts, despite the measures that we have had in place for several months that were working for many months. We are now seeing that those are not enough right now.

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

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

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

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

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

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

> I recognize the societal effects, including the hardships, which the measures which I have and continue to put in place to protect the health of the population have on many aspects of life, and with this in mind continually engage in a process of reconsideration of these measures, based upon the information and evidence available to me, including infection rates, sources of transmission, the presence of clusters and outbreaks, the number of people in hospital and in intensive care, deaths, the emergence of and risks posed by virus variants of concern, vaccine availability, immunization rates, the vulnerability of particular populations and reports from the rest of Canada and other jurisdictions, with a view to balancing the interests of the public, including constitutionally-protected interests, in gatherings and events, against the risk of harm created by gatherings and events;
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> I further recognize that constitutionally-protected interests include the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, including specifically freedom of religion and conscience, freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association. These freedoms, and the other rights protected by the *Charter,* are not, however, absolute and are subject to reasonable limits, prescribed by law as can be demonstrably justified in a free and democratic society. These limits include proportionate, precautionary and evidence-based restrictions to prevent loss of life, serious illness and disruption of our health system and society. When exercising my powers to protect the health of the public from the risks posed by COVID 19, I am aware of my obligation to choose measures that limit the *Charter* rights and freedoms of British Columbians less intrusively, where this is consistent with public health principles.

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

> In consequence, I am not prohibiting outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy, subject to my expectation that persons organizing or attending such an assembly will take the steps and put in place the measures recommended in the guidelines posted on my website in order to limit the risk of transmission of COVID-19.

[58] On February 12, 2021, Dr. Henry was asked why safety protocols accepted in other circumstances, such as bars, restaurants and health clubs, were not sufficient for regular in-person religious services. She replied that the nature of the interaction, the social interaction within a faith group, was “fundamentally different than some of the transactional relationships we have if we’re going to a store or even an individual

working out in a gym, an individual going to a restaurant with your small group of people".

[59] Dr. Henry further explained that:

> … we engaged very early with faith leaders across the province. And they recognize the important role that they play. I just want to reiterate, we know how important - essential - faith services are for people and for communities across BC. And that is why we have been working with faith community leaders since March of last year.
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> And we stopped all of those types of interactions when we were learning about this virus, and what was happening with this virus, and how it was transmitted, and in what situations it was being transmitted last March. And then when we reopened gatherings, and particularly faith gatherings, we did talk with the community about what were the things that made it safer.
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> ...
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> We also know that there is a demographic that goes to many faith services that is older and more at risk in some cases. So we needed to take that into account. And we were able to allow and to have active in-person services through most of the summer and into the fall.
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> As with many other things, as we got into the respiratory [season], we saw the transmissibility of the virus increasing. And what we were seeing was that there was transmission in a number of faith settings despite having those measures in place. So that spoke to us about there was something about those interactions that meant that the measures that we thought were working were no longer good enough to prevent transmission in its highly transmissible state during the winter respiratory season.
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> So it was because of that we put in additional measures to stop the in-person services starting at the end of November. It really was because we were seeing, despite people taking their best precautions, we were still seeing transmission. We were seeing people ending up in hospital, and sadly, we had some deaths in particularly older people who were exposed in their faith settings.

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

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

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

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

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

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

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

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

(d) Reconsideration under Section 43 of the PHA

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

> 43(1) A person affected by an order, or the variance of an order, may request the health officer who issued the order or made the variance to reconsider the order or variance if the person
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> (a) has additional relevant information that was not reasonably available to the health officer when the order was issued or varied,
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> (b) has a proposal that was not presented to the health officer when the order was issued or varied but, if implemented, would
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> (i) meet the objective of the order, and
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> (ii) be suitable as the basis of a written agreement under section 38, or
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> (c) requires more time to comply with the order.

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

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

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

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

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

IV. Relief Sought

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

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

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

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

c. orders made by the Public Health Officer entitled "Gatherings and Events" and made pursuant to Sections 30, 31, 32 and 39(3) *Public Health Act*, SBC 2008, c. 28, including orders of November 19, 20202, December 2nd, 9th, 15th and 24th, 2020 and such further orders as may be pronounced which prohibit or unduly restrict gatherings for public protests and for worship and/or other religious gatherings including services, festivals, ceremonies, receptions, weddings, funerals, baptisms, celebrations of life and related activities associated with houses of worship and faith communities;

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Impact of the Reconsideration Decision on this Petition

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Record of Proceedings

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

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

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

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

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

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

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

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

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

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

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

[88] I found that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Further to the variance granted I granted to the Orthodox Jewish congregations on February 23 to hold Purim and Sabbath services in-doors, this is to clarify that consistent with your original request, the variance only allowed indoor services for Sabbath of February 27, given that it followed immediately after the Purim gatherings on Thursday and Friday.
>
> We are noting that virus transmission remains elevated and there are indications of increased viral transmission in some areas of the province. In addition we are seeing increased reports of virus variants of concern (VOCs). Modelling suggests that if these VOCs were to become established or predominant in our province, case counts will rise quickly and significantly. The enclosed presentation from the Public Health Agency of Canada notes that "With spread of VOC, current public health measures will be insufficient, and epidemic resurgence is forecast" (see slide 12) and "In all provinces current controls may not be sufficient to fully control the variants of concern. The early lifting of public health measures could lead to a resurgence of the epidemic, including the community transmission of variants of concern" (slide 16).
>
> Furthermore, with the spring break season nearly upon us we anticipate that there will be additional people travelling, including people coming from other provinces where transmission is higher than in BC, in spite of our recommendation to limit travel to essential reasons. Also, with schools out of session we are concerned that additional socialization will also drive viral transmission to higher levels, potentially increasing hospitalizations, intensive care admissions and deaths.
>
> With respect to the risk of indoor services, the likelihood of transmission of SARS-CoV-2 is greater when people are interacting in communal settings, when people are close to each other, in crowded settings, in indoor settings due to less ventilation than outdoor settings; and when people speak, and especially when they sing, chant or speak at higher than conversational volume. These are all conditions that are exist [sic] when services are held indoors, which make them of particular concern.
>
> The likelihood of transmission also increases exponentially in a population when a number of people are simultaneously infected in a group setting, and subsequently infect their contacts, who infect their contacts and so on. This can, and has, quickly result in a scenario where local public health resources can be overwhelmed such that they are no longer able to trace all the contacts of such an exposure and require them to self-isolate. If this occurs, community spread can quickly become rampant, leading to increased case

> counts and, in time, has the potential to overwhelm our healthcare system as hospitalizations increase. As well, transmission in religious settings have led to introductions of the virus into vulnerable community settings such as long term care homes leading to serious outbreaks with resultant deaths.
>
> For these reasons I am revising the variance to the order to be clear that weekly Sabbath services at all Jewish Orthodox Synagogues must be held outdoors, according to the following conditions…

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

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

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

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

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

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

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

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

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

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

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

VII. Standard of Review

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

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

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

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

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

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

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

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

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

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

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

VIII. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Mr. Beaudoin

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

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

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

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

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

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

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

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

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

> When exercising my powers to protect the health of the public from the risks posed by COVID-19, I am aware of my obligation to choose measures that limit the *Charter* rights and freedoms of British Columbians less intrusively, where this is consistent with public health principles. In consequence, I am not prohibiting outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy, subject to my expectation that persons organizing or attending such an assembly will take the steps and put in place the measures recommended in the guidelines posted on my website in order to limit the risk of transmission of COVID-19.

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

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

(b) The Religious Petitioners

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

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

[149] It is apparent that the religious petitioners accept that public health measures against the spread of the Virus are necessary for secular reasons. Indeed, two of the three churches discontinued in-person services before they were under a legal obligation to do so.

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

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

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

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

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

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

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

iii) providing physical, mental and emotional care; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

j) closed the nursery;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[161] Notwithstanding these precautions, the churches have been discouraged in various ways from holding in-person services by members of the RCMP. They have been issued at least 11 tickets totalling $34,500 for allegedly contravening the G&E Orders issued by Dr. Henry.

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

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

(i) Section 2(a) of the Charter

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

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

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

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

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

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

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

(ii) Section 2(b) of the Charter

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

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

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

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

(iii) Section 2(c) of the Charter

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

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

(iv) Section 2(d) of the Charter

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

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

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

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

(v) Section 7 of the Charter

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

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

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

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

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

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

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

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

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

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

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

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

(vi) Section 15(1) of the Charter

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

> (a) Does the impugned law, on its face or in its impact, create a distinction on the basis of an enumerated or analogous ground?
>
> (b) If it does draw a distinction, does the impugned law fail to respond to the actual capacities and needs of the members of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage?

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

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

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

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

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

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

b) Personal prayer or reflection; and

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

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

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

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

[195] In response, the intervenor commented that:

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

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

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

[197] As with their s. 7 *Charter* submissions, the religious petitioners addressed their claim pursuant to s. 15 of the *Charter* in only a summary way. They focused their submissions on their s. 2 *Charter* rights. Given the concessions of the respondents and my findings with respect to the *Charter* rights in s. 2, I find that it is unnecessary to expand the jurisprudence relating to s. 15 of the *Charter*, and will make no finding with respect to s. 15.

(vii) Section 1 of the Charter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[216] Under the *Doré* analysis, the issue is not whether the exercise of administrative discretion that limits a *Charter* right is correct (i.e., whether the court would come to the same result), but whether it is reasonable (i.e., whether it is within the range of acceptable alternatives once appropriate curial deference is given). An administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* right with the objective of the measures that limit the right.

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

> [40] A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing. Both [*Oakes*] and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives: see *RJR-*

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

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

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

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

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

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

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

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

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

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

[224] Containing the spread of the Virus and the protection of public health is a legitimate objective that can support limits on *Charter* rights under s. 1. An outbreak of a communicable disease is an example of a crisis in which the state is obliged to take measures that affect the autonomy of individuals and of communities within civil society. The constitutional importance of combating the COVID-19 pandemic has been stated by courts across the country.

[225] The respondents concede that there is no question that restrictions on gatherings to avoid transmission of the Virus limit rights and freedoms guaranteed by the *Charter*, as well as personal liberty in a more generic sense. But they contend

that protection of the vulnerable from death or severe illness and protection of the healthcare system from being swamped by an out-of-control pandemic is also a matter of constitutional importance.

[226] The intervenor submits that the risks of in-person religious gatherings were "obviously identical risks" to those present in school, gymnasium, support group or restaurant settings. This simplistic analysis fails to account for the key distinguishing factors relied on by Dr. Henry in restricting religious gatherings including the ages of the participants, the intimate setting of religious gatherings, and the presence of communal singing or chanting in religious gatherings (and the religious petitioners' evidence shows that masks do not appear to be used throughout religious services and that singing is not prohibited).

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

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

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

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

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

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

[233] I disagree. I have set out the series of G&E Orders made by Dr. Henry between November 7, 2020 and February 10, 2021, and the basis upon which they were made. I find that they were based upon a reasonable assessment of the risk of transmission of the Virus during religious and other types of gatherings.

[234] On the record in this case, I find that Dr. Henry turned her mind to the impact of her orders on religious practices and governed herself by the principle of proportionality. She consulted widely with faith leaders and individually asked for the input of the leaders of two of the churches making up the religious petitioners, while affirming the need for respect for the rule of law and public health.

[235] Under *Vavilov* at para. 101, there are two bases for holding a decision maker’s decisions to be unreasonable. One is a failure of rationality internal to the reasoning process. The second is where the decision is untenable in light of a factual or legal constraint.

[236] A decision has internal rationality if the reviewing court can trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and there is a line of analysis that could reasonably lead the decision maker from the evidence before it to the conclusion at which it arrived: *Vavilov* at para. 102.

[237] I accept that under either approach to reasonableness, a reasonableness review begins with the reasons of the decision maker and "prioritizes the decision maker's justifications for its decisions". What matters is not whether there are formal reasons but whether the reasoning process underlying the decision is opaque.

[238] I have concluded that Dr. Henry's reasons, both in the preambles to the orders and in the media events, do not exhibit a failure of internal rationality. Gatherings and events are a route of transmission. Whether measures less intrusive than prohibition are effective depends on the prevalence of the Virus in the community and behavioural factors. Dr. Henry responded to evidence of accelerating transmission when she made the orders, and she has explained her reasoning.

[239] I find that in making the impugned G&E Orders, Dr. Henry assessed available scientific evidence to determine COVID-19 risk for gatherings in B.C. including epidemiological data regarding transmission of the Virus associated with religious activities globally, nationally and in B.C., factors leading to elevated transmission risk in religious settings, and COVID-19 epidemiology in B.C.

[240] I also find that in making the impugned G&E Orders Dr. Henry was guided by the principles applicable to public health decision making, and in particular, that public health interventions be proportionate to the threat faced and that measures should not exceed those necessary to address the actual risk. Her orders are limited in duration and constantly revised and reassessed to respond to current scientific evidence and epidemiological conditions in B.C.

[241] Through the pandemic, Dr. Henry has consistently expressed her awareness of the impacts of her orders, of her mandate to protect public health, and of her duty to do so in a way that is proportionate to those impacts, but the religious petitioners assert that she did not account for their *Charter* rights adequately, or at all.

[242] While she made no specific reference to *Charter* rights and values prior to her G&E Orders of February 5 and 10, 2021, I am unable to accept that those rights and

values were not considered by Dr. Henry from the outset of her G&E Orders in November 2020.

[243] I find that Dr. Henry carefully considered the significant impacts of the impugned G&E Orders on freedom of religion, consulting with the inter-faith community to discuss and understand the impact of restrictions on gatherings and events on their congregations and religious practices.

[244] The dangers that Dr. Henry's G&E Orders were attempting to address were the risk of accelerated transmission of the Virus, protecting the vulnerable, and maintaining the integrity of the healthcare system. Her decision was made in the face of significant uncertainty and required highly specialized medical and scientific expertise. The respondents submit, and I agree, that this is the type of situation that calls for a considerable level of deference in applying the *Doré* test.

[245] The respondents point to a number of ways in which Dr. Henry's G&E Orders have attempted to minimize impacts on the rights in question. She waited until there was evidence of exponential increase in cases, first in the Vancouver Coastal and Fraser Health regions and then across the province, before tightening restrictions. She has also permitted individual prayer, reflection, and other forms of religious activity at places of worship, and individual meetings with religious leaders. And, perhaps most importantly, where appropriate, Dr. Henry has made exemptions for religious organizations under s. 43 of the *PHA*.

[246] I find that Dr. Henry's decision fell within a range of reasonable outcomes. There is a reasonable basis to conclude that there were no other reasonable possibilities that would give effect to the s. 2 *Charter* protections more fully, in light of the objectives of protecting health, and in light of the uncertainty presented by the Virus.

[247] Although the impacts of the G&E Orders on the religious petitioners' rights are significant, the benefits to the objectives of the orders are even more so. In my view, the orders represent a reasonable and proportionate balance.

[248] Thus, the respondents have proven that the limits the G&E Orders place on the religious petitioners' s. 2 *Charter* rights are justified under s. 1 of the *Charter*.

IX. Conclusion

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

[250] The religious petitioners have not satisfied me that they are entitled to challenge the G&E Orders on their judicial review under s. 2 of the *JRPA*. Even if they could do so, the infringement of their s. 2 *Charter* rights by the impugned G&E Orders is justified under s. 1 of the *Charter*. This part of their petition is thus dismissed.

X. Remedy for Mr. Beaudoin

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

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

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

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

"The Honourable Chief Justice Hinkson"