IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Citation: *The Redeemed Christian Church of God v. New Westminster (City),* 2021 BCSC 1401

Date: 20210719
Docket: 209759
Registry: New Westminster

Between:

The Redeemed Christian Church of God, British Columbia

Petitioner

And:

City of New Westminster

Respondent

Before: The Honourable Madam Justice Morellato

Reasons for Judgment
In Chambers

Counsel for the Petitioner:	B. Langhjelm M. Moore
Counsel for the Respondent:	A. Latimer
Place and Dates of Hearing:	New Westminster, B.C. December 2-3, 2020
Place and Date of Written Submissions:	New Westminster, B.C. January 7, 2021 January 28, 2021 February 4, 2021
Place and Date of Judgment:	New Westminster, B.C. July 19, 2021

I. INTRODUCTION AND OVERVIEW

[1] The petitioner, the Redeemed Christian Church of God, also known as Grace Chapel, seeks a judicial review of the City of New Westminster's decision that terminated a contract between them ("Decision"). Grace Chapel also seeks a declaration under s. 24(1) of the *Charter of Rights and Freedoms* that the City's Decision violated certain of its *Charter* rights.

[2] Grace Chapel rented a ballroom in the Anvil Centre, a facility wholly owned and operated by the City, to host a Christian youth conference on July 21, 2018 ("Youth Conference"). Following an email complaint from a member of the public about the alleged nature of the Youth Conference, the City cancelled the licence agreement ("Agreement") for this venue. The complainant asserted that the content of the upcoming Youth Conference would be "anti-LGBTQ" based on the views of one of the conference's facilitators. In the email cancelling the Agreement, the City advised that one of the speaker/facilitators "vocally represents views and a perspective that run counter to City of New Westminster" and also Anvil Centre's booking policy ["Booking Policy"]. This email also stated that the Booking Policy "restricts or prohibits user groups if they promote racism, hate, violence, censorship, crime or unethical pursuits." This portion of the Booking Policy was incorporated into the Agreement by way of a default provision. The City terminated the contract and reimbursed Grace Chapel's booking fee.

[3] Grace Chapel argues that the Decision was "procedurally unfair, biased, unreasonable, and unjustifiably infringed the freedoms of conscience, religion, thought, belief, opinion, expression and association". More specifically, Grace Chapel asserts that the City's Decision unjustifiably infringed ss. 2(a), 2(b), and 2(d) of the *Charter*. Accordingly, it seeks a declaration to that effect pursuant to s. 2(2)(b) of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241 [*JRPA*] and s. 24(1) of the *Charter*. It also seeks to quash the City's Decision pursuant to s. 2(2)(a) of the *JRPA*. Finally, Grace Chapel seeks a further order pursuant to s. 2(2)(a) of the *JRPA* and s. 24(1) of the *Charter* prohibiting the City from denying it "the use of its

facilities on the basis of the ideas, views, opinions, perspectives, values or beliefs as ascribed by the respondent to the petitioner or speakers selected by the petitioner."

[4] In response, the City asserts that Grace Chapel cannot judicially review the cancellation of the Agreement because it is a private contract, commercial in nature. The City submits there has been no exercise of a statutory power and the Decision to cancel the Agreement does not have a "sufficiently public character." If the City is correct, the relief sought by Grace Chapel is not available under ss. 2(2)(a) or 2(2)(b) of the *JRPA*. In addition, the City submits that if the subject matter of this petition does not fall within the ambit of the *JRPA* and the petition was improperly advanced, any lingering *Charter* claim must proceed by way of an action. It joins issue on the merits of the petitioner's *Charter* claims in the alternative. It also challenges Grace Chapel's standing under s. 2(a) of the *Charter*.

[5] For the reasons set out below, I find that this petition is, at its core, a contractual dispute over the rental of property that does not fall within the ambit of the *JRPA*. Declaratory relief under s. 2(2)(b) of the *JRPA* is not available because the Decision did not involve the exercise of a statutory power. In addition, the City's decision to terminate the Agreement does not have a sufficiently public character to engage s. 2(2)(a) of the *JRPA*. While the Decision was informed by the City's policies, it was ultimately the exercise of a contractual right contained within the Agreement. The Booking Policy did not afford the City the capacity to terminate the Agreement; the contract did. The proper remedy, in the context of this case, is not by way of judicial review.

[6] I find that the petitioner's request for declaratory relief under s. 24(1) of the *Charter* was brought properly by way of petition. I also find that the City unjustifiably infringed Grace Chapel's freedom of expression. I am unable to find an infringement of Grace Chapel's s. 2(d) right to freedom of association. Further, I find Grace Chapel's claim that the City infringed its s. 2(a) *Charter* right involves triable issues that must be determined by way of a civil claim or action, and not by petition.

II. BACKGROUND FACTS

[7] Grace Chapel is a multi-ethnic Christian church that meets in downtown New Westminster. It is a registered society pursuant to the *Societies Act*, S.B.C. 2015, c. 18. It does not own any facilities. It rents space in New Westminster for its Sunday services, various events, and its office needs. Grace Chapel has previously rented space in the Anvil Centre, which is located in downtown New Westminster.

[8] Ms. Val Marling, the General Manager of Anvil Centre, deposes that the Centre "accommodates a wide range of events, arts and culture programs and community led programs". She confirms Anvil Centre is owned by the City and managed by staff employed by the City. She explains the Centre's mission statement in the following manner:

> Anvil Centre's Mission Statement is to operate as a vibrant gathering place for residents and visitors, to inspire community spirit and pride, cultivate commerce, promote tourism, and foster learning and engagement through the celebration and discovery of arts, culture and heritage in our theatre, museum and archives, art gallery and studios together with the hosting of special events and conferences.

Ms. Marling deposes that the City Council adopted a Booking Policy when Anvil Centre opened in 2014. The Booking Policy, in Ms. Marling's view, is "consistent with the City's commercial purposes and also City Council's vision of an inclusive City known for social equity."

[9] The Booking Policy states that it was approved by City Council and the City's Chief Administrative Officer. The Policy provides:

> **Conditions & Insurance**
>
> Event bookings may be cancelled, at any time, based on violations of the rental agreement, non-payment of fees, unexpected closures in service delivery or unforeseen circumstance.
>
> …
>
> User groups will be restricted or prohibited if they:
>
> a) promote racism, hate, violence, censorship, criminal or other unethical pursuits;

…

f) intend to conduct activities in City facilities that are incongruent with the Mission and Vision of the Anvil Centre and the City of New Westminster.

A. The License Agreement with Grace Chapel

[10] In December 2017, Grace Chapel began to plan a one-day Youth Conference for July 21, 2018. On December 20, 2017, Grace Chapel's "Teen's Pastor", Seun Salami, submitted an inquiry to the Anvil Centre about booking space for this conference. A staff member responded by highlighting that its policy was to book each event three weeks prior to the event date, if the space was available.

[11] On May 15, 2018, Mr. Brown, the administrator of Grace Chapel, spoke to the Director of Sales and Marketing of Anvil Centre, Heidi Hughes, about booking a space for the Youth Conference. He was seeking a "theatre-style set up for 150 people." The next day he received an email, with Anvil Centre's preliminary "proposal", which confirmed the date and time of the function, along with the applicable costs of the space rental. Mr. Brown then confirmed his intention to proceed with renting the space and, on May 18, 2018, he received an email from the City thanking him for "confirming your event at the Anvil Centre on July 21, 2018", and attaching "a copy of the License Agreement and Event Resume…."

[12] On the evening of June 20, 2018, a poster for the Youth Conference was displayed in a window in the space rented by Grace Chapel for its Sunday Services. Grace Chapel chose the theme "Let God Be True" for the Youth Conference, a biblical phrase drawn from Romans 3:14. The acronym used on the poster advertising the conference was "LGBT" surrounded by rainbow colouring ("Poster").

[13] The Poster listed the names of individuals who would be involved in the Youth Conference. Two individuals were prominently featured on the Poster with photographs of each beside their names: Josh Bredahl was noted as "speaking" and Stephanie Standerwick was noted as "singing". The poster also listed Kari Simpson and Tia MacDougal as "facilitating". Below these names, Grace Chapel Pastors, Dorcas and Seun Salami, were listed as "Teen Pastors", along with Bayo and Ola

Adedira who were listed as “Senior Pastors.” The Poster indicated that registration was free. The event was open to the public so long as participants registered with the petitioner.

B. The City’s Cancellation of the License Agreement

[14] On the evening of June 20, 2018, an Anvil Centre staff member received the following email:

> Are you aware that the ‘Let God be True’ event at the Anvil Centre on July 21st is an anti-LGBTQ event? Kari Simpson, who’s noted on the playbill as a Facilitator for the event is a very active anti-LGBTQ speaker and the face & voice behind Culture Guard, a well known anti-LGBTQ group in the Lower Mainland.
>
> I urge you to rethink allowing this event to take place at your venue. They are spreading misinformation and lies, and by allowing this event to take place, you are effectively endorsing their stance.

[15] At 9:35 a.m. the next morning, Anvil Centre’s Director of Sales and Marketing, responded as follows:

> Thank you for your email and for making us aware. We are looking into the matter and will get in touch with you again once we have had a chance to review the situation.

[16] Later on during the morning of June 21, 2018, the Director of Marketing and Sales for the Anvil Centre sought advice from, Ms. Marling, in her capacity as the Anvil Centre’s General Manager, as well as the advice of Mr. Fryer, the Manager of Communications and Economic Development at the City of New Westminster. Ms. Marling deposes:

> We noted the graphics used to publicize the event were almost identical to LGBTQ branding. We researched Ms. Simpson’s online presence and noted her large profile on social media and recent Facebook posts that expressed anti-LGBTQ views.

A 42-page exhibit was attached to Ms. Marling's affidavit, which she describes as "some of the online content we considered". Ms. Marling further deposes:

> We formed the view that the Event contravened the Agreement and the Policy. Specifically, we formed the view that the petitioner had misrepresented the purpose of the Event to the Anvil Centre in its communications. Further, the publicity for the Event could misrepresent the scope or purpose of the function. We understood the function to be, in part, a platform for Ms. Simpson to disseminate her anti-LGBTQ views and we formed the opinion that this activity was discriminatory, promoted hatred against this group and discrimination, which was an unethical pursuit. The Event was otherwise immoral, improper, and may disrupt other users of the Anvil Centre or cause a public disorder. We further formed the opinion that the Event was incongruent with the Mission and Vision of the City and the Anvil Centre, both of which value inclusivity.
> [emphasis added].

[17] The Chief Administrative Officer of the City was briefed, following a discussion between the Director of Marketing and Sales of Anvil Centre, the Manager of Communications and Economic Development at the City, and Ms. Marling. Ms. Marling deposes that Ms. Hughes, Director of Marketing and Sales of Anvil Centre:

> …provided Lisa Spitale, Chief Administrative Officer with our collective recommendations based on the advice we gave that the Event be cancelled and sought approval form Ms. Spitale to cancel the Event. Ms. Spitale concurred with that recommendation.

[18] This conversation is referenced in Ms. Hughes' email to Ms. Spitale at 11:58 a.m. on June 21, 2018. That email states in part:

> I am writing to you this morning to ask for your approval to CANCEL an event at the Anvil Centre. We have booked a Church Special Event for the Redeemed Christian Church of God – a local New Westminster Church Group – which is scheduled to take place on July 21st, 2018. One of the speakers featured on their playbill promoting this free event open to members of the public is Keri Simpson, the Founder of CultureGuard (an anti-LGBT group) and a well known anti-LGBT activist. Her social media presence is quite extensive and I've included some links to her posts below.
>
> Simpson is also anti SOGI 123 (SOG 1 2 3 helps educators make schools inclusive and safe for students of all sexual orientations and gender identities (SOGI). At a SOGI-inclusive school, students biological sex does not limit their interests and opportunities, and their sexual orientation and how they understand their gender are welcomed without discrimination). The provincial

> government is firmly on record defending SOGI 123 and its importance to BC schools.
>
> Our Anvil Centre Booking and Space Allocation Policy (EDMA 474125) states that:
>
> > User groups will be restricted or prohibited if they:
> >
> > a) Promote racism, hate violence, censorship, crime or other unethical pursuits;
> >
> > …
> >
> > c) disrupts other facility patrons or operations;
> >
> > …
> >
> > e) misrepresent the scope and/or purpose of the booked function;
> >
> > f) intend to conduct activities in City facilities that are incongruent with the Mission and Vision of Anvil Centre and the City of New Westminster;
> >
> > ….
>
> Our License agreement for the Anvil Conference Centre states the following:
>
> > g) Not to use or permit the Premises to be used for any performance, exhibition, entertainment or any other purpose that is illegal or which, in the reasonable opinion of the Anvil Centre, is immoral, improper or may cause public disorder in or near the Premises.
>
> Blair, Vali and I have discussed and, given the information above and our belief that allowing this event to proceed would be in contravention of our Anvil Centre Booking and Space Allocation Policy, our recommendation is that we cancel this event immediately. Please let us know if you concur with this course of action and we'll contact the group in question.

[19] Ms. Spitale responded to Ms. Hughes' email at 12:05 p.m. on June 21, noting that she had spoken to Blair Fryer, the Manager of Communications and Economic Development at the City of New Westminster, and concurred with the recommendation. Part of Ms. Spitale's email was redacted by the City on the basis of privilege; the portion of Ms. Spitale's email that was disclosed states:

> I just spoke to Blair
>
> [portion of email redacted by City as privileged communication] and brief the Mayor
>
> And I concur with your recommendation

[20] At 12:41 p.m. on June 21, 2018, Ms. Hughes sent an email to Mr. Brown, which stated:

> We became aware today, that one of your event speakers/facilitators, Kari Simpson, highlighted for your July 21st, 2018 event, vocally represents views and a perspective that run counter to City of New Westminster and Anvil Centre booking policy.
>
> Specifically, Anvil Centre booking *policy restricts or prohibits user groups if they promote racism, hate, violence, censorship, crime, or other unethical pursuits.* In accordance with our policy we are informing you that we are cancelling your booking and will immediately process a refund for the entirety of your booking fee.
>
> [Emphasis original]

[21] Mr. Brown deposes that he was "surprised by Ms. Hughes' sudden decision to renege on the License Agreement and cancel the Rental." He states in his affidavit:

> I telephoned her [Ms. Hughes] at approximately 1:00 PM on June 21, 2018. I asked her to reconsider her decision, but she refused. I explained to Ms. Hughes that no hate, racism or violence would be promoted at the Conference.

[22] Mr. Brown explains that on that same afternoon, he sent Ms. Hughes an email at 1:19 p.m., requesting the opportunity for "due process" and to discuss the matter further. This email stated:

> Hi Heidi,
>
> Good day to you. As discussed in our telephone conversation a short time ago, it is unfortunate that the Anvil Centre has taken the decision to cancel the event without first discussing the matter with us. If there are queries or concerns from the centre, we believe that due process should prevail and the centre should give us an opportunity to explain what our intentions are.
>
> We are happy to meet with the Anvil Team to discuss the focus of the conference and to further highlight that there will be no hate, racism or violence promoted at our conference. This is a Christian conference for Teens and Youths and is opened to the general public.
>
> We would be happy to meet with your team sometime next week to discuss this matter further. Please let us know which day and time is doable for you and your team.

[23] Ms. Hughes responded by email within the hour at 2:15 p.m., indicating a willingness to meet with Mr. Brown "to further discuss our policy" and stated: "Please understand that this does not change our decision and the event is cancelled."

[24] Mr. Brown deposes that "Ms. Hughes did not explain how she thought Grace Chapel had contravened or would contravene either the License Agreement or the [Booking Policy]". It is clear that the concerns set out in the email to Ms. Spitale where not disclosed or addressed with Grace Chapel prior to the City's Decision to cancel the License Agreement. Further, the online content that the City found as a result of it's staff's research, as well as the City's concerns about Ms. Simpson's online presence, were not disclosed to Grace Chapel before the City's Decision.

[25] Mr. Brown did not respond to Ms. Hughes' last email to him. Instead, on July 6, 2018, counsel for Grace Chapel, Mr. James Kitchen, wrote to Ms. Marling, with copies to Ms. Hughes as well as the Mayor and City Councillors, requesting that the Decision be reversed ("Letter").

[26] On behalf of Grace Chapel, the Letter underscored that Grace Chapel's vision "is a church were people from every nation in our community will worship God together in unity of the Spirit and will in turn impact their communities for Christ." The Letter clarified that the focus of the conference "is to consider Biblical views regarding sexuality and identity issues" and that "the conference is to be attended by youth and young adults aged 13-25." The Letter also: underscored that the "fundamental freedoms" of expression, association, conscience, and religion in the *Charter*; noted that the Anvil Centre was a government facility that is regularly used for expressive and associative activities, such as conferences; and asserted that it could not "deny use of its facilities in a manner that unjustifiably infringes the freedoms protected in section 2 of the *Charter*."

[27] Before reiterating its request for the City to reconsider its Decision to cancel the License Agreement, the Letter stated:

> It is not against the public interest to hold and express diverse views regarding sexuality. Further, governments at all levels are precluded from

> favouring any one belief system over another, including beliefs regarding sexuality and gender, and from discriminating against minority beliefs.

The letter requested a response by July 11, 2019. The City did not respond to this letter.

III. PROCEDURAL ISSUES

A. Is the Decision subject to Judicial Review?

[28] Grace Chapel seeks three administrative law remedies:

a) A declaration pursuant to s. 2(2)(b) of the *JRPA* that the Decision was "procedurally unfair, biased, unreasonable, and unjustifiably infringed" several *Charter* rights;

b) An order quashing the decision pursuant to s. 2(2)(a) of the *JRPA*; and

c) An order of prohibition preventing the City from "denying the use of its facilities to the Petitioner on the basis of [its] ideas, views, opinions, perspectives, value or beliefs…."

[29] The core issue here is whether the petitioner's claim is the proper subject of a judicial review under the *JRPA*. Grace Chapel asserts that ss. 2(2)(a) and 2(2)(b) are both engaged. The City says that neither apply.

[30] The following provisions of the *JRPA* are at issue:

> 1. In this Act:
>
> …
>
> "decision" includes a determination or order;
>
> "licence" includes a permit, certificate, approval, order, registration or similar form of permission required by law;
>
> …
>
> "statutory power" means a power or right conferred by an enactment
>
> (a) to make a regulation, rule, bylaw or order,
>
> (b) to exercise a statutory power of decision,

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

[31] Section 2 of the *JRPA* defines the procedural ambit of judicial review by way of the available remedies. In *Western Stevedoring Co. Ltd. v. W.C.B.*, 2005 BCSC 1650, Groberman J. (then of this Court) discussed the two categories of remedies available under the *JRPA*:

> [21] The Board's argument must also be rejected on a more fundamental ground. The *JRPA* defines the scope of judicial review only by indicating the types of remedies that are available in judicial review proceedings. Two categories of remedies are available. The first consists of remedies set out in s. 2(2)(a): remedies that were historically granted by way of the prerogative writs of *certiorari*, *mandamus*, and prohibition. These remedies comprise the core of the superior courts' inherent supervisory jurisdiction over inferior tribunals. Modern developments in administrative law have given these remedies very broad scope.
>
> [22] The second category of remedies available in judicial review proceedings consists of remedies that owe their origins to private law, but which are now important public law remedies. These remedies – injunctions and declarations in respect of statutory powers – are provided for in s. 2(2)(b) of the *JRPA*. 'Statutory powers' include, but are not limited to, statutory

> powers of decision. Almost all powers exercised by public authorities today have a statutory basis, so s. 2(2)(b) is also broad in scope.

[32] In *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)* 2019 BCCA 207, Groberman J.A. further identified two additional nuances. First, remedies in the nature of *certiorari*, *mandamus*, and prohibition are unavailable where the impugned state activity is not of a "public character" (para. 21). Second, public authorities can also function based on powers that do not owe their existence to enactments. Justice Groberman concluded, at para. 24, that where a public authority is exercising a power that does not arise from an enactment, the remedies under s. 2(2)(b) of the *JRPA* are unavailable. However, remedies under s. 2(2)(a) are still available if the public authority's activities have a sufficiently public character (*Strauss,* at para. 24). The threshold question for s. 2(2)(a) is whether there was an exercise of state authority that is of a sufficiently public character: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 14 [*Highwood*].

[33] I will discuss the applicability of s. 2(2)(b) before turning to s. 2(2)(a).

1. Section 2(2)(b) of the *JRPA* is not engaged

[34] Section 2(2)(b) requires "the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power". Unless the City was exercising a statutory power, the declaratory relief sought by the petitioner under the *JRPA* is unavailable. Accordingly, during the hearing, I asked the parties for supplemental written submissions on the interaction between the *Community Charter*, S.B.C. 2003, c. 26 and the Agreement. I have considered those submissions carefully in light of the parties' original arguments.

a) Position of the parties

[35] Grace Chapel argues that the Decision was an exercise of statutory power pursuant to the City's licencing authority under s. 15 of the *Community Charter* because the "nature of the interest conferred upon Grace Chapel within the Anvil Centre is a 'license'…." Simply put, it says the termination decision was made

pursuant to the City's licencing authority via the Booking Policy. Counsel points to the City's reliance on the Booking Policy in the termination email to support this argument, specifically noting the following sentence: "In accordance with our policy we are informing you that we are cancelling your booking and will immediately process a refund for the entirety of your booking fee".

[36] Grace Chapel also points to s. 8(1) of the *Community Charter* for the proposition that the City's power to contract as a natural person necessarily flows from the statute. Furthermore, it highlights the City's authority under s. 12(2) of the *Community Charter* to "establish any terms and conditions it considers appropriate" when exercising its powers as a natural person under s. 8(1). Finally, it relies on s. 147(b) of the *Community Charter* to say that the Decision was an exercise of Ms. Spitale's statutory duty "to ensure that the policy, programs, and other directions of the council are implemented." Grace Chapel argues that she was thus empowered by s. 147(b) "to make decisions concerning the terms and conditions of Grace Chapel's License under the Policy, as was adopted by the City Council pursuant to the City's licensing authority…." In sum, Grace Chapel says the Decision was an exercise of a "statutory power of decision'", founded in public law rather than private contractual discretion.

[37] The City submits that s. 15 of the *Community Charter* has no application when properly interpreted. Section 15 includes the caveat of "in regulating under this Act" when setting the ambit of the statutory licencing authority. Accordingly, the City points to the statutory definition of "regulate" in Schedule, s. 1 of the *Community Charter*: "'regulate' includes authorize, control, inspect, limit and restrict, including by establishing rules respecting what must or must not be done, in relation to the persons, properties, activities, things or other matters being regulated." It then points to the scope of the regulatory authority espoused in ss. 8(3)–(6) of the *Community Charter*. The City says when s. 8 and s.15 are read together, it creates "a comprehensive authority" to establish a system of licences, permits, and regulations by way of bylaw, and bylaw alone. It relies on the restrictive wording of "by bylaw" in ss. 8(3)–(6) (e.g., subsection (3) "A council may, by bylaw, regulate,

prohibit and impose requirements in relation to the following [emphasis added].” As the Booking Policy is not a bylaw, the City submits that this is a purely contractual dispute that involves no exercise of a statutory power.

b) Analysis

[38] I agree with the City that s. 2(2)(b) of the *JRPA* does not apply. The City was not exercising a statutory power when it terminated the contract. There is no statute or bylaw that compels or enables the City to cancel a private contract. While the City’s decision was informed by the Booking Policy and its overall vision statement, its ability to terminate the contract flowed from its contractual rights, not a statutory power. It was an exercise of a contracting party’s common law right to abrogate its contractual obligations, and to pay damages if the termination was a repudiatory breach.

[39] Clause 7(b) of the Agreement expressly provides that “Anvil Centre shall have the right, at its sole option, to revoke the License” in the event of a default. Moreover, clause 8(j) provides that the licensee shall “[n]ot use or permit the Premises to be used for any performance, exhibition, entertainment or any other purpose which is illegal or which, in the reasonable opinion of Anvil Centre, is immoral, improper or may cause public disorder in or near the Premises.” Whether or not Anvil Centre properly invoked its contractual right to terminate pursuant to clause 7(b) without giving Grace Chapel a chance to cure any alleged default is of no import here. It either wrongfully repudiated the contract or terminated it pursuant to its terms. Both of these options arise from its contractual rights and the law of contract, not a statutory power. There was no “power or right conferred by an enactment” permitting or compelling the City to terminate the contract.

i. The power to contract

[40] Grace Chapel is correct to point out that the City’s power to enter into contractual relations as a natural person flows from s. 8(1) of the *Community Charter*. However, a statutory power to contract is to be distinguished from the exercise of a statutory power under a legislative enactment. That is, the statutory

power to contract is not in itself sufficient to engage the exercise of a "statutory power" as contemplated by the *JRPA*. For example, in *BC Govt Serv. Empl. Union v. British Columbia (Minister of Health Services)*, 2005 BCSC 446 at para. 28 [*BCGEU*], aff'd on other grounds 2007 BCCA 379, this Court held that the statutory capacity to negotiate and enter into a contract "does not fall within the definition of statutory power." This principle was reaffirmed by the Court of Appeal in *Eagleridge Bluffs & Wetlands Preservation Society v. H.M.T.Q.*, 2006 BCCA 334 at para. 19 [*Eagleridge*]. Justice Giaschi recently held that "*BCGEU* and *Eagleridge* stand for the proposition that decisions by a minister acting under a general statutory power to contract are not decisions made in the exercise of a statutory power within the meaning of the *JRPA*": *Independent Contractors and Businesses Association v. British Columbia (Transportation and Infrastructure)*, 2019 BCSC 1201 at para. 52, aff'd on this point, but rev'd in part on other grounds 2020 BCCA 243 at para. 67. If a governmental body's decision to enter into a contract in its capacity as a natural person pursuant to statute does not fall within the ambit of s. 2(2)(b) of *JRPA*, then it follows that the decision to terminate a contract cannot be an exercise of statutory power: see e.g., *Wise Elephant Family Health Team v. Ontario (Minister of Health)*, 2021 ONSC 3350 at para. 71.

[41] The *Community Charter* permits the City to act as a natural person. However, the City is not exercising a statutory power when it terminates a contract. The City's decision to end the contract was either an exercise of discretion made in accordance with the terms of the Agreement or a repudiation at common law.

[42] The City's powers pursuant to the *Community Charter* to contract under s. 8(1) and negotiate the terms of its contracts under s. 12(1) are permissive. Again, there is no statutory authority governing the termination of the Agreement. Certainly, the City's policies informed its decision to terminate the Agreement. However, that does not transform its private contractual right into an exercise of a statutory power as defined under the *JRPA*.

[43] I reject Grace Chapel's contention that Ms. Spitale was exercising a statutory power under s. 147(b) of the *Community Charter* when making the Decision. Even if Ms. Spitale had a duty to ensure the City's policies and programs were implemented, that did not afford her a statutory power to cancel the contract. The Agreement could be terminated with or without s. 147. Moreover, Grace Chapel's argument regarding s. 147(b) depends on the existence of a valid regulatory licencing regime for Anvil Centre. Yet, none exists.

ii. Licencing authority

[44] I do not accept Grace Chapel's claim that the Decision was really an exercise of a statutory licencing authority under s. 15 of the *Community Charter*, and therefore an exercise of statutory power. Its submission turns on the conflation of a licence agreement with a regulatory licence. A licence agreement for real property is a contract. The owner, the licensor, agrees to licence the use of the property to the licensee for a specified duration in exchange for a licence fee. In contrast, a regulatory licence is granted as part of a public regulatory system to permit conduct that is otherwise restricted or prohibited by law.

[45] This case deals with the termination of a licence agreement, not a regulatory licence. The Agreement at issue is not akin to a fishing licence or a liquor permit. Regulatory licences typically do not contain indemnities (see clause 5 of the Agreement) or waivers of liability (see clause 6 of the Agreement). Nor do they usually charge for extra services, such as labour or audio-visual equipment rentals (Schedule A). On a plain reading of the Agreement, it was a private contract for the use of a ballroom for a specified window of time on July 21, 2018.

[46] While the City owns Anvil Centre, it is not public property such that anyone can use its ballrooms as they see fit. Would-be licensees need to rent the property for a fee. As the record shows, rental is subject to availability before the event date. Members of the public are prevented from freely using the space by the City's private property rights at common law or as enshrined in the *Trespass Act,* R.S.B.C. 2018, c. 3. In other words, if a group just "showed-up" to host a function at one of

the Anvil Centre's ballrooms they would be potentially liable for trespass at common law or a statutory offence under the *Trespass Act* (provincial, not municipal, legislation). This is analytically distinct from a municipal regulatory regime.

[47] In the circumstances of this case, the City did not prohibit a given activity by way of a bylaw, require a regulatory licence to engage in that activity, and then revoke that licence pursuant to its licencing authority. The City has not created a regulatory regime that restricts access to the Anvil Centre as contemplated by s. 1 of the *JRPA.* For example, there is no "right or power conferred by an enactment" 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."

[48] While the definition of a "licence" under the *JRPA* is not exhaustive, it is not designed to include private licencing contracts; rather, it references "a permit, certificate, approval, order, registration or similar form of permission required by law" [emphasis added]. A licence, in the regulatory sense of the word, is something that is required by law to engage in a specific pursuit that is otherwise prohibited. In contrast, a licencing agreement has no such requirement imposed by law. Rather, a licencing agreement removes potential liability between the parties for the impugned activity or use. It also has a consensual element. There is no positive legal requirement that the would-be licensee obtain a licence to engage in the behaviour. If they do not obtain the licensor's permission, then they risk potential legal liability to the property owner. This creates a chose in action in tort, which the property holder may or may not pursue. This is a very different legal relationship than a strict liability licencing regime created by government, which automatically results in a fine or some other form of penalty.

[49] Nor does this case involve a "power or right conferred by an enactment" to exercise a "statutory power of decision," as set out in s.1 of the *JRPA.* That power or right is defined in s. 1 as a "power or right conferred by an enactment to make a decision or deciding or prescribing" the "eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled

to it…." As was recently held in *Wise Elephant Family Health Team v. Ontario (Minister of Health)*, 2021 ONSC 3350 at para. 71, the decision to terminate a contract does not equate to an exercise of a statutory power of decision.

[50] Furthermore, the decision to terminate a private contract is not intertwined with the City's licencing authority under s. 15 of the *Community Charter*. A licence to use real property is distinct from the "system of licences, permits or approvals" that is contemplated under s. 15. The City has the private capacity to rent its space by way of licencing agreements if it sees fit to do so. This is not an exercise of its statutory licencing authority. There was no statutory or regulatory power to revoke the Agreement. Even if the Booking Policy was created pursuant to the City's s. 15 licencing authority, which I do not accept, it does not follow that the contractual termination was itself an exercise of a statutory power. Section 15(d) is permissive—it allows the City to create regulatory licences and set their terms. While s. 15(e) says that the City may provide for the cancelation of a regulatory licence for failure to comply with a term or condition of the licence, I see no enactment that affords the City the statutory power to revoke the Agreement at issue. Grace Chapel has not, and in my view cannot, point to any statute, regulation, bylaw, or policy that affords a statutory power to terminate the Agreement within the meaning of the *JRPA*. The rationale for a decision (i.e., the Booking Policy) does not equate to the power to make that decision.

[51] In sum, I find that s. 2(2)(b) is not engaged in this case because there was no exercise of a statutory power. The Decision to terminate the Agreement between the parties was made under the contract itself. The necessary implication of this finding is that Grace Chapel's request for a declaration pursuant to s. 2(2)(b) must fail: *Strauss*, at para. 24.

2. Is s. 2(2)(a) of the *JRPA* engaged?

[52] Notwithstanding the above analysis, just because a case involves a contract does not axiomatically make it is immune from judicial review. As the Supreme Court of Canada held in *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at

para. 49 [*Mavi*], where a contract is closely controlled by statute it can be enforced as a matter of public law. Simply put, where the contract itself is a creature of statute, judicial review may be permissible.

[53] In *Mavi*, for instance, the Court found that immigration sponsorship contracts were structured, controlled, and supplemented by federal legislation and as such their enforcement was not exclusively governed by the law of contract (para. 2). Some contractual matters are clearly subject to judicial review (see e.g., *A. Dane Developments Ltd. v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCSC 1663 at paras. 4–7). Nevertheless, the threshold question for s. 2(2)(a) still remains whether the impugned decision was of a "sufficiently public character".

[54] Relationships that are in essence private in nature are best redressed by private, not public law: *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at para. 53, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9. However, the public versus private distinction is multi-faceted and context-specific.

[55] In *Air Canada*, Stratas J.A. identified a number of factors that may be relevant to the inquiry of whether a public authority's decision has a sufficiently public character to engage judicial review remedies. As noted by Groberman J.A. in *Strauss*, these factors were reduced to a list in *Setia v. Appleby College*, 2013 ONCA 753, at para. 34, as follows:

> i. the character of the matter for which review is sought;
> ii. the nature of the decision-maker and its responsibilities;
> iii. the extent to which a decision is founded in and shaped by law as opposed to private discretion;
> iv. the body's relationship to other statutory schemes or other parts of government;
> v. the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
> vi. the suitability of public law remedies;
> vii. the existence of a compulsory power; and

> viii. an "exceptional" category of cases where the conduct has attained a serious public dimension.

[56] Our Court of Appeal has clarified that these factors should not be used as a checklist or examined point-by-point; rather, it is appropriate to use them as guidelines in discerning whether the decision of a public official or tribunal has a sufficiently public character to engage a judicial review. In *Strauss*, Groberman J.A. reasons (at para. 42):

> [T]he [*Air Canada*] factors are merely guidelines in deciding whether a decision made by a public official or tribunal has a sufficiently public character to be amenable to judicial review. Some will be applicable and important in particular contexts while, in those contexts, others may be irrelevant and unhelpful.

Whether one or more of these factors tips the balance either way is a context-dependent question: *Air Canada*, at para. 60.

[57] In my view, the most germane *Air Canada* factors in this case are: 1) the character of the decision; 2) the nature of the decision-maker; 3) the extent to which a decision is founded in, and shaped by law, as opposed to private discretion; 4) the suitability of public law remedies; and 5) whether the decision falls within the exceptional category of cases. I address these guidelines below.

[58] In regard to the character of the decision and the nature of the decision-maker, there is no dispute the City is a public body and that Anvil Centre is operated by the City. This does not, however, mean that all of its decisions are public in nature or that administrative law duties and remedies should apply. As Justice Rowe aptly noted, albeit in *obiter*, in *Highwood*, at para. 14, "[e]ven public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review…."

[59] In regard to the third factor, this matter and the City's decision, as discussed above, involves a contractual dispute over the City's Decision to terminate the Agreement. Grace Chapel paid consideration to book a ballroom for its Youth Conference at the Anvil Centre. It was a private contract between the parties.

Members of the public could attend the Youth Conference if they registered. However, only Anvil Centre and the Redeemed Christian Church of God (aka Grace Chapel) were parties to the Agreement. The City decided to end the Agreement and, consequently, the space at Anvil Centre was no longer available.

[60] When making contractual decisions such as renting property, as noted in *Highwood*, at para. 14, a "public body is not exercising 'a power central to the administrative mandate given to it by [legislature]', but is rather exercising a private power". The Anvil Centre was not required to licence or rent space to Grace Chapel by any statute or law. The Booking Policy clearly states that "bookings may be canceled, at any time, based on violations of the rental agreement…." However, as noted above, it did not confer Anvil Centre with the power to terminate the contract; this ability flowed from the contract alone. The termination Decision, while informed by the Booking Policy, was not based on the exercise of a statutory power.

[61] The City placed considerable weight on *Weld v. Ottawa Public Library*, 2019 ONSC 5358 in oral submissions. In that case, a public library abrogated its agreement to rent a room for a movie screening after its "senior management team concluded that the movie was likely to promote hatred and discrimination on the basis of race, ethnic origin and religion, and that it may contain gratuitous sex and violence" (para. 3). This decision was made after public complaints about the content of the film. As in this case, the library had reserved the contractual right to cancel the contract in circumstances which compromised its overarching political policy objectives. The would-be renter sought to judicially review the library's decision to terminate the rental agreement on the basis that it "breached their entitlement to procedural fairness, violated their section 2(b) *Charter* rights to freedom of expression and was unreasonable" (para. 5). The library limited its claim to the inapplicability of judicial review to the decision to terminate a private rental agreement. Applying the *Air Canada* factors, the *dicta* in *Highwood*, and the Ontario Court of Appeal's reasoning in *Setia*, the reviewing division held that the contractual termination decision was unsuitable for judicial review.

[62] Grace Chapel tries to distinguish *Weld* on the basis that a public library is further removed from a municipality, and also on the basis that the municipal government was not involved in that cancelation. It also says that the "applicability of the *Charter…* was unresolved" in *Weld*. Finally, it contends that "to the extent that *Weld* stands for the proposition that judicial review is not available for an administrative decision limiting *Charter* rights in a commercial context, it is contrary to the BC Court of Appeal's decision in *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia* [2018 BCCA 344]".

[63] I am unable to accept Grace Chapel's objections to the reasoning in *Weld*. Whether a party is dealing with a municipal government, or with a public library created by statute, that party is nevertheless dealing with a public entity in a private capacity (i.e., renting property). The decision-maker here, Ms. Spitale, was the City's Chief Administrative Officer. The fact that she held a high-ranking position at City Hall, and even briefed the Mayor before making her decision, may slide the scale slightly, but it is not determinative on its own. The same can be said for the distinction between purchasing a ticket to see a film (as in *Weld*) and free registration for a Youth Conference.

[64] There is no dispute that the *Charter* applies to the City. The parties agree and the law makes this clear: *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 at 657–59, 611—62; *Godbout v. Longueuil*, [1997] 3 S.C.R. 844 at 881–83; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paras. 12–24 [*GVTA*]. However, as I have already held above, this case does not involve the exercise of a statutory power and no declaratory relief can be made with regard to the *Charter* under s. 2(2)(b) of the *JRPA*. I will address the procedural issue of whether declaratory relief is available under s. 24(1) of the *Charter* by way of petition later in these Reasons.

[65] Further, Grace Chapel's overstates the rule the City seeks to extract from *Weld*. The question is not whether administrative remedies should never be "available for an administrative decision limiting *Charter* rights in a commercial

context"; the general proposition is that in most cases the contractual termination of a single-day rental agreement will not fall within the ambit of judicial review.

[66] While *Weld* is not binding on this Court and the alleged public character of each case must be assessed in its own context, I agree with the City that the Division's legal reasoning in *Weld* is compelling and persuasive. In many ways, the reasoning in *Weld* provides an almost complete answer to the unsuitability of this case for judicial review, particularly when it comes to the application of administrative remedies for contractual terminations.

[67] As regards the *Air Canada* factor relating to the suitability of private law remedies, Grace Chapel seeks to quash the Decision. As Rowe J. noted in *Highwood*, at para. 15, "[p]ublic law remedies such as *certiorari* may not be granted in litigation relating to contractual or property rights between private parties…." A remedy in the nature of *certiorari* in context of a contractual termination is problematic for three reasons.

[68] First, and foremost, quashing the City's decision to terminate the Agreement in effect resurrects the parties' bargain after it is repudiated and ended, thereby binding the parties to obligations they have already eschewed. Counsel has not provided any authority outside of the public employment context wherein a supervisory court has quashed a contracting party's decision to abrogate their existing contractual obligations and to treat the agreement at an end. Furthermore, the effect of applying such a public law remedy to the private sphere of real property licencing contracts could be fraught with problems. For example, if a licensor terminates its agreement with one licensee in favour of renting the venue to another party on the same date, quashing the initial termination would put the licensor in breach of its obligations with at least one of the licensees. It would be impossible to rent the same space to two different parties on the same date, at the same time. This is at odds with freedom to contract and first principles of contract law, such as certainty and efficient breach. Apart from the rare scenarios where equity intervenes to compel specific performance, a repudiating party is entitled to treat its obligations

at an end. As Oliver Wendell Holmes famously put it in "The Path of Law" 1887:10 Harvard LR 457, "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else." It would be highly unusual to resurrect a contract years after its termination.

[69] Second, resurrecting a contract by way of *certiorari* is akin to an order in the nature of *mandamus* in disguise. The full force of the contract's terms will be thrust upon the terminating party by way of court order. While this is slightly different than ordering a public body to perform a specific action, it still comes with very real consequences. If the party fails to subsequently perform those obligations, they will be liable for breach of contract. *Mandamus*, however, is only appropriate where a public body has a statutory or public duty to do a specific thing not performed, where that duty is owed to the party seeking relief, and that party has a clear right to the performance of that duty: *Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District)*, 2014 BCCA 335 at para. 56, quoting from *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at 766–769. *Mandamus* cannot be used to compel a contractual obligation: *Devil's Gap Cottagers (1982) Ltd. v. Rat Portage Band No. 38B*, 2008 FC 812 at paras. 72–75. There is no public obligation on the City to licence its property to Grace Chapel.

[70] By quashing the termination Decision, the supervisory court would in effect compel the repudiating party to perform its obligations under the bargain once again. Though that party may find another route to terminate the contract, this verges on the equitable remedy of specific performance in circumstances in which it was never intended to apply

[71] Third, quashing the Decision to resurrect the Agreement would be an academic remedy in the sense that the Agreement was a one-time licence to use a ballroom at Anvil Centre on July 21, 2018. That time has come and gone. There is nothing for the City to reconsider even if the contract is resurrected, as the subject of the Agreement is now moot. Anvil Centre is not under a positive obligation to contract with Grace Chapel. A court cannot compel historic performance when the

contract itself cannot be performed. Nor can an order of *mandamus* be made to compel the City to enter into a new contract or amend the Agreement for some future event. In these circumstances, quashing the Decision is wholly inappropriate. Issuing such an order would expand the boundaries of administrative law, well-beyond its proper public law confines, into the private realm of contract law.

[72] The prohibition order sought by Grace Chapel is equally unsuitable. There is no ongoing contractual relationship between Anvil Centre and Grace Chapel. A prohibition order would be a speculative order to govern future contractual relations. In effect, Grace Chapel is asking for a permanent injunction against the City. This falls outside of the historic confines of a prohibition order as an administrative law remedy.

[73] As a prerogative remedy, prohibition aims to prevent proceedings or orders from being made. It is only available where there is an act or order that remains outstanding. As Donald Brown and John Evans accurately point out in *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Carswell, 2021), ch.2, s. 1.4, "prohibition is invoked at an earlier stage of the administrative proceedings before a final decision has been made." Prohibition thus stands in contrast to *certioriari* in that it can only be invoked before the administrative proceeding has affected the applicant's rights or interests, where as *certiorari* applies only after such a determination is made.

[74] The City has no present contractual obligations with Grace Chapel and the Decision has already been rendered. As noted above, even if the Agreement were to be resurrected by an order quashing the Decision, the contract itself is spent. As *mandamus* cannot be used to compel the City to contract with Grace Chapel, there is nothing to prohibit.

[75] In sum, the administrative law remedies sought under s. 2(2)(a)—prohibition and *certiorari*—are unsuitable in addressing the issue before me. This also indicates that this matter is not of a "sufficiently public character" such that it should fall within the ambit of s. 2(2)(a).

[76] Finally, this case falls outside of the "exceptional cases" category contemplated in *Air Canada*. The Youth Conference as planned, and as a single event, does not meet the threshold of an "exceptional effect on the rights or interest of a broad segment of the public": *Air Canada*, at para. 60. In any event, while I am mindful that this matter is undoubtedly of importance to Grace Chapel's members and perspective attendees, I am not satisfied that this factor alone shifts this matter from the realm of contract into a one of a "sufficiently public character".

[77] On the whole and in light of the above considerations, I am unable to conclude that this matter is of a sufficiently public character such that it falls within the ambit of s. 2(2)(a) of the *JRPA*. Nor does this case involve the exercise of a statutory power in accordance with s. 2(2)(b). It follows that no duty of procedural fairness was owed in these contractual circumstances: see e.g., *Air Canada* at para. 53, and *Dunsmuir* at paras. 74, 95 -111. The same holds true for Grace Chapel's allegations of bias by the decision-maker, as the Decision itself falls outside the ambit of judicial review.

[78] Notably, the law already affords aggrieved parties a remedy for discrimination under s. 8 of the *HRC*. The BC Human Rights Tribunal ("*BCHRT*") provides a forum to expressly deal with alleged discrimination. If Anvil Centre refuses to rent space to Grace Chapel in the future on the basis of its members' beliefs or expressions, then presumably those individuals can advance their alleged grievances before the *BCHRT*. If Grace Chapel is unsatisfied with the result before the *BCHRT*, then judicial review is available in those circumstances.

B. If the underlying subject matter is not suitable for judicial review, is s. 24(1) *Charter* relief nevertheless available by way of petition?

[79] Grace Chapel argues that, even if the remedies under the *JRPA* are not available, this Court nevertheless has the jurisdiction to issue *Charter* remedies under s. 24(1) on this petition. It relies principally on the following authorities for the proposition that *Charter* relief can be sought by way of petition: *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-*

Britannique, 2011 BCSC 89 [*Conseil*]; *Noyes v. South Cariboo School District No. 30* (1985), 64 B.C.L.R. 287 (S.C.); *South Coast British Columbia Transportation Authority*, 2016 BCSC 1802 [*South Coast*], aff'd 2018 BCCA 344.

[80] I have already found the administrative remedies of *certiorari* and prohibition are inappropriate in the circumstances of this case. Therefore, the only potentially applicable relief under s. 24(1) of the *Charter* on the pleadings is a declaration.

[81] The City says the *Supreme Court Civil Rules* mandate that both pure *Charter* or contract claims must be brought by way of notice of civil claim. It points to Rules 2-1(1) and 2-1(2), which provide as follows:

> **Commencing proceedings by notice of civil claim**
>
> (1) Unless an enactment or these Supreme Court Civil Rules otherwise provide, every proceeding must be started by the filing of a notice of civil claim under Part 3.
>
> **Commencing proceedings by petition or requisition**
>
> (2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:
>
> (a) the person starting the proceeding is the only person who is interested in the relief claimed, or there is no person against whom relief is sought;
>
> (b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;
>
> (c) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document;
>
> (d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee, or the determination of the persons entitled as creditors or otherwise to the trust property;
>
> (e) the relief, advice or direction sought relates to the maintenance, guardianship or property of infants or other persons under disability;
>
> (f) the relief sought is for payment of funds into or out of court;
>
> (g) the relief sought relates to land and is for
>
> (i) a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,

> (ii) a declaration that settles the priority between interests or charges,
>
> (iii) an order that cancels a certificate of title or making a title subject to an interest or charge, or
>
> (iv) an order of partition or sale;
>
> (h) the relief, advice or direction sought relates to the determination of a claim of solicitor and client privilege.

The thrust of these sections, the City argues, is that since *Charter* and contractual relief are not enumerated under R. 2-1(2), Grace Chapel case must be brought by way of civil claim pursuant to R. 2-1(1). The City concedes that a judicial review must be brought by petition by virtue of s. 2(1) of the *JRPA* and that *Charter* relief may be requested alongside a properly constituted judicial review proceeding because s. 2(1) of the *JRPA* mandates that a judicial review proceed by way of petition. However, the City submits that where the underlying subject matter is not suitable for judicial review, any attached *Charter* claim must proceed by way of an action.

[82] I cannot accept the City's procedural argument in light of the relevant authorities and the operative wording of the *Rules*. It is trite law that a conventional claim for breach of contract must be brought by way of an action. However, as Grace Chapel points out, it does not seek any contractual remedies. It advances an independent claim for a declaration pursuant to s. 24(1) of the *Charter*. This does not require a notice of civil claim.

[83] Grace Chapel relies on the following passage from Bouck J. in *Noyes*:

> [A] person complaining about interference with his legal rights may take one of three steps:
>
> (1) He may petition the court under the Judicial Review Procedure Act in which event the court is confined to an examination of any breaches of his common law rights and the remedies available thereunder, or
>
> (2) He may petition the court under the Charter in which event the court is confined to an examination of a breach of his constitutional rights and the remedies available thereunder, or
>
> (3) He may combine his petition under the Canadian Charter of Rights and Freedoms with a complimentary request for relief

> under the Judicial Review Procedure Act. In that event, both common law rights and constitutional rights may be looked at and the remedies available invoked.
>
> However, in this instance, the petitioner chose to follow step 2 above and so he is tied to the question of whether his Charter rights were infringed and, if so, what is the remedy under the Charter.

[84] This passage was endorsed by Willcock J., as he then was, in *Conseil,* at para. 28. Justice Willcock also referenced another decision by Bouck J., in *R. v. S.B.* (1982), 142 D.L.R. (3d) 339 at 355, rev'd on other grounds 43 B.C.L.R. 247 (C.A.), in support of the proposition that a "a person seeking a declaration in accordance with s. 24(1) of the *Charter* may apply to this Court [i.e., the Supreme Court of British Columbia] by way of Petition…." The applicable *ratio* from *Conseil* is found in Willcock J.'s holding that it "is permissible to seek both declaratory relief under s. 24 of the *Charter* and a remedy under the *JRPA* in the same petition".

[85] The distinction here is that Grace Chapel's *JRPA* claim is not the proper subject of a judicial review and falls outside of the relief available under the *JRPA*. This leaves Grace Chapel's remaining request for relief under s. 24(1) of the *Charter*.

[86] The earlier cases cited in *Conseil*, such as *S.B.* and *Noyes*, still stand for the proposition that a s. 24(1) declaration claim may be brought by way of a stand-alone petition. In *Noyes,* for example, only *Charter* relief was sought.

[87] Section 24(1) permits "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Putting aside the issue of standing under the *Charter*, s. 24(1) allows an aggrieved party to make an application for relief. This Court is undoubtedly a court of competent jurisdiction for the purposes of s. 24(1) of the *Charter*.

[88] The petitioner's request for declaratory relief pursuant to s. 24(1) of the *Charter* is, therefore, properly before the Court by way of petition: R. 1-2(4), R. 1-

2(5), *Banks v. Canada* (1983), 12 Imm. L.R. (2d) 305 (F.C.); *MacKenzie v. Canadian Human Rights Com'n* (1985), 33 A.C.W.S. (2d) 254 (F.C.); *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 at para. 39 [*Saputo*].

IV. *CHARTER* CLAIMS

A. Section 2(b) of the *Charter*

[89] The City has not challenged Grace Chapel's standing to argue that its right to freedom of expression has been infringed. I am satisfied that Grace Chapel has the right to assert its own s. 2(b) *Charter* rights.

[90] A corporation has personal standing to argue that its s. 2(b) rights have been infringed by a governmental decision: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; see also *R. v. CIP Inc.,* [1992] 1 S.C.R. 843 at 852–53. Grace Chapel is a registered society, which although not a business corporation, is an incorporated entity: *Farrish v. Delta Hospice Society*, 2020 BCCA 312 at para. 45; *Societies Act*, ss. 6, 13–14. Section 6 of the *Societies Act* affords an incorporated society "the capacity, rights, powers and privileges of an individual of full capacity". It follows that a society, like a corporation, has its own s. 2(b) rights.

[91] The law is also clear that the *Charter* always applies to governmental actors like the City: e.g., *GVTA*, at para. 24; *Eldridge*, at paras. 40–42. As noted in *Eldridge*, the *Charter* even applies to a government's private or commercial actions such as contractual relations:

> 40 In *Douglas* and *Lavigne*, the argument was made that even if the entities in question were generally part of "government" for the purposes of s. 32, the Charter should not apply to the "private" or "commercial" arrangements they engage in. In each case, the Court rejected this contention, holding that when an entity is determined to be part of the fabric of government, the *Charter* will apply to all its activities, including those that might in other circumstances be thought of as "private". The rationale for this principle is obvious: governments should not be permitted to evade their *Charter* responsibilities by implementing policy through the vehicle of private arrangements. I put the matter thus in *Lavigne*, at p. 314:

> It was also argued that the *Charter* does not apply to government when it engages in activities that are . . . "private, commercial, contractual or non-public (in) nature". In my view, this argument must be rejected. In today's world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare. In such circumstances, government activities which are in form "commercial" or "private" transactions are in reality expressions of government policy, be it the support of a particular region or industry, or the enhancement of Canada's overall international competitiveness. In this context, one has to ask: why should our concern that government conform to the principles set out in the *Charter* not extend to these aspects of its contemporary mandate? To say that the *Charter* is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the *Charter* was enacted.
>
> See also *Douglas*, at p. 585.
>
> 41 …[I]t is well established that the *Charter* applies to all the activities of government, whether or not those activities may be otherwise characterized as "private"….

[92] The question here is whether the Decision infringed Grace Chapel's right to freedom of expression and, if so, whether that infringement is justified under s.1 of the *Charter*.

[93] The legal test for finding an infringement of the right to freedom of expression under 2(b) of the *Charter* was succinctly summarized in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 at para. 38:

> [38] In sum, to determine whether an expressive activity is protected by the Charter, we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(*b*) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action? (*Criminal Lawyers' Association*, at para. 32, summarizing the test developed in *City of Montréal*, at para. 56).

1. Expressive content

[94] The City rightly acknowledges that Grace Chapel's freedom of expression has been curtailed in this case, submitting "the Youth Conference had expressive content so as "to be protected under s. 2(b) of the *Charter*." I agree. There is no dispute that the singing and the discussion contemplated at the Youth Conference had expressive content.

2. Is the activity excluded from protection as a result of either the location or the method of expression?

[95] The threshold for exclusion under this limb was refined in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 [*City of Montréal*]. The instructive excerpts from *City of Montréal* are:

> [72] Expressive activity should be excluded from the protective scope of s. 2(*b*) only if its method or location clearly undermines the values that underlie the guarantee. Violent expression, which falls outside the scope of s. 2(*b*) by reason of its method, provides a useful analogy. Violent expression may be a means of political expression and may serve to enhance the self-fulfillment of the perpetrator. However, it is not protected by s. 2(*b*) because violent means and methods undermine the values that s. 2(*b*) seeks to protect. Violence prevents dialogue rather than fostering it. Violence prevents the self-fulfillment of the victim rather than enhancing it. And violence stands in the way of finding the truth rather than furthering it. Similarly, in determining what public spaces fall outside s. 2(*b*) protection, we must ask whether free expression in a given place undermines the values underlying s. 2(*b*).
>
> [73] We therefore propose the following test for the application of s. 2(*b*) to public property; it adopts a principled basis for method or location-based exclusion from s. 2(*b*) and combines elements of the tests of Lamer C.J. and McLachlin J. in *Committee for the Commonwealth of Canada.* The onus of satisfying this test rests on the claimant.
>
> [74] The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (a) the historical or actual function of the place; and
>
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

In light of the above reasoning and analytic framework, it is necessary to consider the location and method of expression at the Youth Conference.

a) Method of Expressive Activity

[96] Singing and speaking at a religious youth conference are not likely to be sufficient to revoke the free speech protections. There is no evidence before me of violence or other forms of prohibited expression.

b) Location

[97] There is nothing about the Anvil Centre's ballrooms that suggests that singing and speaking are at odds with the public usage of renting that space. I do not see an issue here. Perhaps if the City had agreed to meet with Grace Chapel representatives, the City would have been better informed in this regard. As Grace Chapel indicated in its letter, the purpose of this expression was "to consider Biblical views regarding sexuality and identity issues". This is not axiomatically at odds with the values of democratic discourse, self-fulfillment, and truth finding that s. 2(b) seeks to protect: *City of Montréal*, at para. 74.

[98] I am mindful of the City's argument that Anvil Centre's ballrooms are private places, rather than public ones in the sense that one must contract for the use of that property, and renting space is a private contractual matter. However, the distinction between private, publicly-owned property and public property was rejected by the Supreme Court of Canada in *GVTA*. As Justice Deschamps reasoned for the majority at para. 43:

> TransLink submits that its buses should be characterized as *private* publicly owned property, to which one cannot reasonably expect access. This position is untenable. The very fact that the general public has access to the advertising space on buses is an indication that members of the public would expect constitutional protection of their expression in that government-owned space. [emphasis original]

In my view, the present circumstance is similar; Anvil Centre's ballrooms are government-owned property that is open to the public for rent. It would be similarly

reasonable for members of the public to expect that their expressive activity in that government-owned space would receive constitutional protection.

[99] The City itself does not argue that the Anvil Centre (i.e., as a facility) is private property. Indeed, the evidence before me is that this facility is viewed by the City as a gathering place for its community. It is a place where renters can potentially engage in a broad range of expressive activities. I am satisfied this factor also militates in favour of s. 2(b) protection under the *Charter.*

[100] In sum, I find that the expression contemplated at the Youth Conference falls within the sphere of protection of s. 2(b) of the *Charter.*

3. Does an infringement of the protected right result from either the purpose or the effect of the government action?

[101] Having considered the evidentiary matrix before me, I am also satisfied that there has been an infringement of the protected right that resulted from the impact of the City's actions. The City cancelled the Agreement and prevented Grace Chapel from engaging in expressive activity in a facility it owned and operated.

4. Is the City's infringement justified under s. 1 of the *Charter*?

[102] In light of the particular facts before me, this case falls within relatively novel legal territory. The "*Oakes*" test governs the s. 1 analysis when dealing with a piece of legislation or some other government enactment that infringes a *Charter* right: *R. v. Oakes*, [1986] 1 S.C.R. 103. In contrast, a judicial review of an administrative decision that impacts *Charter* rights is governed by the proportionality framework in *Doré v. Barreau du Québec*, 2012 SCC 12. Neither of these tests readily apply in this case: that is, the Decision of the City falls outside of the ambit of the *JRPA* and, further, there is no impugned legislative enactment underpinning the Decision. This is neither a case with impugned legislation (i.e., Grace Chapel does not challenge the Booking policy) nor a truly administrative decision (i.e., it is not of a sufficiently public character and does not involve the exercise of a statutory power).

[103] As summarized at para. 37 of *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12, the *Doré* analysis asks whether the decision was reasonable and proportional:

> [37] On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate: *Doré*, at para. 57. Reasonableness review is a contextual inquiry: *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at para. 18. In the context of decisions that implicate the *Charter*, to be defensible, a decision must accord with the fundamental values protected by the *Charter*.

[104] The *Doré* framework of analysis is not strictly applicable in this case. *Doré* itself was confined to the question of how "to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions [my emphasis]" (para. 3). That is not the context here. *Doré* does not appear to have been designed to be applied to a contractual decision that falls outside of the ambit of administrative judicial review.

[105] The *Oakes* test is also inapt or difficult to apply in the context of this case. It creates the test for the s.1 analysis when dealing with impugned legislation, not state action by way of discretionary decisions. The elements of the *Oakes* test are not amenable to administrative decisions, let alone contractual terminations. This appears to be the underlying rationale for the Supreme Court of Canada's departure in *Doré* from its previous holdings in *Slaight Communications* and *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, where the Court had applied the *Oakes* test to administrative law decisions. However, as the Court noted in *Doré*, at para. 37:

> Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be 'prescribed by law' has been held by this Court to apply to norms where 'their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply' [*GVTA*, at para. 53].

[106] The analytical framework in cases such as *Dore, Loyola,* and *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*Trinity Western*] applies where there is an administrative decision. As noted in *Loyola*:

> [3] This Court's decision in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, sets out the applicable framework for assessing whether the Minister has exercised her statutory discretion in accordance with the relevant *Canadian Charter of Rights and Freedoms* protections. *Doré* succeeded a line of conflicting jurisprudence which veered between cases like *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, that applied s. 1 (and a traditional *Oakes* analysis) to discretionary administrative decisions, and those, like *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, which applied an administrative law approach. The result in *Doré* was to eschew a literal s. 1 approach in favour of a robust proportionality analysis consistent with administrative law principles.

[107] Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter,* the *Charter*'s guarantees and the foundational values they reflect, require a proportionate balancing of *Charter* protections to ensure that they are limited no more than is necessary, given the applicable statutory objectives that the decision-maker is obliged to pursue: see *Loyola*, at para. 4.

[108] A preliminary issue in such cases is whether the decision in question triggers the *Charter's* protections. In this regard, the Court in *Loyola* reasons:

> [39] The preliminary issue is whether the decision engages the *Charter* by limiting its protections. If such a limitation has occurred, then "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": *Doré*, at para. 57. A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review: *Doré*, at paras. 43-45.
>
> [40] A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing. Both *R. v. Oakes*, [1986] 1 S.C.R. 103, and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160. As such, *Doré*'s proportionality analysis is a robust

> one and "works the same justificatory muscles" as the *Oakes* test: *Doré*, at para. 5.

[109] Recently, in *Beaudoin v. British Columbia*, 2021 BCSC 512 at paras. 212–218, Chief Justice Hinkson clarified the divide between *Oakes* and *Doré*:

> [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 *Oakes* 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.*

[110] In the instant case, which is neither a challenge to a law of general application nor a judicial review of an administrative decision, I am of the view that "analytical harmony" can be found by upholding the *Charter* values at play, through applying the criteria of minimal impairment and the proportionate balancing of *Charter* protections, viewed through the lens of reasonableness. On the specific facts before me, I find that neither criterion has been satisfied; as such, the City's infringement of Grace Chapel's freedom of expression was unjustified.

[111] The City submits that "s. 2(b) is engaged but it is low value speech and this affects the proportionality analysis." However, the City curtailed Grace Chapel's freedom of expression by essentially assuming it was "low value" without properly

informing itself. It relies on the Supreme Court of Canada's analysis in *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 730, and submits that Ms. Simpson, who was not slated as a speaker but rather as one of two facilitators, was a "notorious anti-Sexual Orientation and Gender Identity (SOGI) activist" who advocated for "sexual orientation therapy." The City further submits that "even if this expression does not rise to the level of hate speech, the low value of expression supports the reasonableness of the Cancellation." I do not agree.

[112] In a free and democratic society, the exchange and expression of diverse and often controversial or unpopular ideas may cause discomfort. It is, in a sense, the price we pay for our freedom. Once governments begin to argue that the expression of some ideas are less valuable than others, we find ourselves on dangerous ground.

[113] In this particular case, the City failed to proportionately balance competing *Charter* rights. The City took immediate steps to research and consider the concerns raised by the complaint it received that anti-LGBTQ views would be disseminated at the Youth Conference. Yet, before cancelling the Youth Conference the very next day, the City took no similar steps to more fully inform itself about the anticipated content or focal points of the speakers at the Youth Conference. There was a clear imbalance in the City's efforts to inform itself of the competing rights at stake, or to at least attempt to balance them. The failure to balance competing rights leads me to conclude that the City's Decision is an unreasonable and unjustified infringement.

[114] I am very aware that the City was attempting to protect LGBTQ rights when it made its decision to cancel the Youth Conference. This is laudable and such minority rights must be considered. Yet, an important step in the City's decision-making process was missed. The City did not reach an informed conclusion; rather, it proceeded to make its Decision on the basis of assumptions about the Youth Conference and what it would involve. It based its assumptions about the content of

that conference solely on one of the facilitator's ostensible views without considering what would actually be expressed at the Youth Conference.

[115] My conclusion that the City did not make sufficient efforts to inform itself in order to fairly consider and balance competing rights is buttressed by the fact that the City was asked by Grace Chapel to reconsider its decision and it declined to do so.

[116] I would also note that the City took no steps to consider how any infringement of Grace Chapel's freedom of expression might be minimized, while it considered the other interests it wished to protect. Its decision was quick and precipitous. Had the City, for example, at least explored or considered some possible accommodation, its Decision might have been reasonably justified. I note in this regard that the Decision of the City did not focus on the singers or speakers engaged to appear at the Youth Conference but, rather, seemed to turn on the reputation of one facilitator at that conference. Some accommodation may have been possible, but no effort was made to minimize the infringement.

[117] Accordingly, the City's Decision to cancel the Youth Conference unjustifiably and unreasonably infringed Grace Chapel's s. 2(b) right to freedom of expression, and a declaration to this effect is an appropriate remedy in light of the circumstances before me.

B. Section 2(d) of the *Charter*

[118] The Supreme Court of Canada revisited the protections afforded to freedom of association under s. 2(d) of the *Charter* in *Mounted Police Association of Ontario v. Canada (Attorney General),* 2015 SCC 1 at paras. 51–66, 121 [*Mounted Police*]. Section 2(d) 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": *Mounted Police*, at para. 66. The claimant alleging a s. 2(d) infringement must show a substantial interference with their freedom of association rights.

[119] Grace Chapel relies on this decision and underscores that the emergence of freedom of association as a fundamental freedom has its roots in the protection of religious minority groups. It argues the Youth Conference was to occur at the Anvil Centre:

> …for the purpose of individuals, many of whom belong to cultural and racial minorities, joining together for the collective exercise of freedom of religion: more specifically "to declare religious beliefs openly and without fear of hindrance and reprisal and to manifest religious belief by worship and practice or teaching and dissemination" [citing *R.v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 at para. 94].

[120] The City underscores that Grace Chapel's submission regarding the purpose of the Youth Conference is not based on any evidence before me. The City's point in this regard is well-taken. Furthermore, the evidence before me does not support the conclusion that there is substantial interference by the City of Grace Chapel's association with its members or with Ms. Simpson, as alleged. Grace Chapel meets every Sunday at a facility other than the Anvil Centre. It is also free to meet at any other time, at any other location of its choosing, to associate with its members or whomever else it chooses. This does not rise to the level of a substantial interference.

[121] In the circumstances of this case, and in light of the legal test in *Mounted Police*, I am not able to conclude that Grace Chapel's freedom of association was unjustifiably or unreasonably infringed.

C. Section 15 of the *Charter*

[122] This claim was pleaded but not argued. As it was not advanced by the petitioner, or argued in any form, the issue need not be addressed.

D. Section 2(a) of the *Charter*: Freedom of Religion

1. Standing

[123] The City submits that Grace Chapel, as an incorporated society, does not have standing to assert s. 2(a) rights under the *Charter.* In response, Grace Chapel relies on the decision of the Supreme Court of Canada in *Loyola*, at para. 34, to

establish its standing in this aspect of its case. It asserts that the Decision to cancel the Youth Conference did not respect the freedom of religion of the pastors and members of the Grace Chapel community involved in the Conference.

[124] The standing issue raised by the City in regard to s. 2(a) *Charter* rights has not been definitively decided. In *Loyola,* the Supreme Court of Canada stated:

> [33] Loyola, a non-profit corporation constituted under Part III of the Quebec *Companies Act*, CQLR, c. C-38, also argued that its own religious freedom had been violated by the decision. I recognize that individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice, such as the transmission of their faith: *Alberta v. Hutterian Brethren of Wilson Colony,* [2009] 2 S.C.R. 567, at para. 181; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650. I do not believe it is necessary, however, to decide whether corporations enjoy religious freedom in their own right under s. 2(a) of the *Charter* or s. 3 of the *Charter of human rights and freedoms*, CQLR, c. C-12 (the Quebec Charter), in order to dispose of this appeal.
>
> [34] In this case Loyola, as an entity lawfully created to give effect to religious belief and practice, was denied a statutory exemption from an otherwise mandatory regulatory scheme. As the subject of the administrative decision, Loyola is entitled to apply for judicial review and to argue that the Minister failed to respect the values underlying the grant of her discretion as part of its challenge of the merits of the decision. In my view, as a result, it is not necessary to decide whether Loyola itself, as a corporation, enjoys the benefit of s. 2(a) rights, since the Minister is bound in any event to exercise her discretion in a way that respects the values underlying the grant of her decision-making authority, including the Charter-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a *Catholic education: Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, at para. 71.

[125] Similarly, in *Trinity Western*, at para. 61, the majority of the Court declined to decide whether an institution could possess rights under s. 2(a):

> [61] TWU is a private religious institution created to support the collective religious practices of its members. For the reasons set out below, we find that the religious freedom of members of the TWU community is limited by the LSBC's decision. It is unnecessary to determine whether TWU, as an institution, possesses rights under s. 2(*a*) of the *Charter*.

[126] The difficulty in such cases is how to ascribe an artificial juridical entity, such as a corporation, with "religious beliefs", particularly when some other *Charter* rights,

personal in nature, have been found to not apply to corporations. For example, in *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at para. 1, it was recently held that cruel and unusual punishment protection under s. 12 only applies to real people, not corporations. Likewise, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 it was held that s. 7 protections do not apply to corporations.

[127] However, the concurring reasons in *Loyola*, at para. 100, set out an *obiter* test for determining if a corporation has personal standing under s. 2(a):

> [100] On the submissions before us, and given the collective aspect of religious freedom long established in our jurisprudence, we conclude that an organization meets the requirements for s. 2(a) protection if (1) it is constituted primarily for religious purposes, and (2) its operation accords with these religious purposes.

[128] I have also considered that a "person" includes a corporation under the general provisions of the *Interpretation Act*, R.S.C., 1985. As noted above, s. 6 of the *Societies Act* vests a society with the “rights, powers, and privileges” of an individual. The principle of legality is also of assistance. While this principle has been applied in the context of public interest standing, it has some application here: see *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241, at para.73; leave to appeal granted [2020] S.C.C.A. 403. Our Court of Appeal in that case reasoned that the legality principle lies at the heart of the issue of standing and that it encapsulates: 1) the idea that state action must conform to the Constitution and statutory authority; and 2) that there must be a practical and effective means to challenge the legality of state action in the courts. In the context of the s. 2(a) *Charter* right that protects religious freedom, providing churches with the standing to take legal action in cases that may unjustifiably infringe religious freedom would provide a practical and effective means to challenge the legality of state actions, as contemplated in *Council of Canadians with Disabilities*.

[129] A purposeful and remedial interpretation of the *Charter* also favours granting standing to churches in cases where the rights of their religious communities or congregations are at stake. Churches are principally incorporated to fulfill religious purposes. As Justices McLachlin, Moldaver, and Rothstein recognized in *Loyola*, at para. 99, "a religious organization may in a very real sense have religious beliefs and rights." In my view, this reality strikes at the core of the collective aspect of religious freedoms under s. 2(a) of our *Charter*. Accordingly, I am persuaded that I ought to follow the legal test these Justices set out in *Loyola*, at para. 100.

[130] Grace Chapel is a Christian church, a parish of the Redeemed Christian Church of God denomination, and is operating as such. As set out in its letter to the City, the Youth Conference was to "consider Biblical views". In my view, the two-part test set out in *Loyola* is satisfied: 1) Grace Chapel was constituted for religious purposes; and 2) its operations accord with those religious purposes.

2. Alleged 2(a) infringement

[131] Grace Chapel submits that the City violated its freedom of religion rights by: 1) infringing its religious beliefs by cancelling the Youth Conference; and 2) failing to honour the governmental duty of neutrality.

[132] The starting point for any s. 2(a) analysis, where a claim is made that a governmental act violates freedom of religion, is to determine whether the claim falls within the scope of the s. 2(a) protection. In *R v. Big M Drug Mart Ltd*. [1985] 1 S.C.R. 295, Justice Dickson famously reasoned:

> [94] The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> [95] Freedom can primarily be characterized by the absence of coercion or constraint… One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint…coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public

> safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

[133] This definition contains two components: 1) the right to hold a religious belief; and 2) the right to manifest those beliefs (*Loyola,* at para. 58; *Multani,* at para. 32; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54 at para. 61–63 [*Ktunaxa*]).

[134] Accordingly, the Supreme Court of Canada has held that s. 2(a) claimants must show: 1) that they sincerely believe in the practice or belief that has a nexus with religion; 2) that the impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with their ability to act in accordance with that practice or belief (see e.g., *Ktunaxa*, at para. 68*; Multani*, at para. 35; *Trinity Western,* at para. 63). If the claimants cannot meet this test, their s. 2(a) rights are not engaged and the analysis ends.

[135] When determining the sincerity of the belief, a court must "take into account" among other things, "the credibility of the testimony of the person asserting the particular belief and the consistency of the belief with his or her other current religious practices": *Multani,* at para. 35, citing *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 53 [*Amselem*]. This is a non-exhaustive question of fact. However, as Justice Iacobucci warned in *Amselem*, at para. 53, it is "inappropriate for courts to rigorously study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held." The operative timing of the sincerity of belief is at the impugned infraction or interference with that belief: *Amselem,* at para 53. Expert evidence is not required.

a) Should the matter be converted to an Action?

[136] The City challenges Grace Chapel's evidentiary foundation for a sincerely held belief. It submits there is no evidence of any belief on the record. Grace Chapel says that all it needs to show is that "it is a multi-ethic parish of the Redeemed Christian Church of God denomination". While I do not question that the

Youth Conference engaged the petitioner's religious beliefs, it bears the burden of proof. Its affidavit material does not articulate or unpack the religious beliefs in issue beyond saying Biblical views of sexuality are engaged. This poses a challenge for this Court, as it is faced with making assumptions it likely ought not, and cannot make, as a result of an incomplete factual matrix. However, *Charter* rights must be taken seriously and should not be easily cast aside.

[137] The City also argues in favour of converting this matter into and action. It submits that this case "has important impacts on the procedural rights of the parties including discovery and the development of the factual record through *viva voce* evidence and cross-examination." It adds that the full panoply of procedural rights is to be preferred in *Charter* adjudication.

[138] In reply, Grace Chapel submits that there is a sufficient factual basis subsumed within this petition proceeding to properly adjudicate the matter on *Charter* grounds. While I agree this is in fact the case with regard to the s. 2(b) *Charter* issue, the question of whether there has been a violation of Grace Chapel's s. 2(a) religious freedom or whether any infringement could be justified under s. 1 are significantly more complex questions, which require further factual explication.

[139] In *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City),* 2021 BCCA 160, our Court of Appeal recently clarified the law guiding the conversion of petitions into actions, as framed in *Saputo,* at para 51–52. The Court in *Beedie* states, at para. 74:

> [t]he ratio of *Saputo* was that the test was … "akin to that on application for summary judgment under R. 9 6 — i.e., whether there was 'no dispute as to the facts or law which raises a reasonable doubt or which suggests that there is a defence that deserves to be tried'"

The Court of Appeal also maintained, at para. 80, that *Saputo* "requires only the raising of an issue of fact or law that is not bound to fail — that is a "triable issue" for purposes of R. 22-1(7)".

[140] The rules of evidence informing the *Saputo* analysis were outlined by the Court of Appeal in *Kerfoot v. Richter*, 2018 BCCA 238 at paras. 29–31 and *Ghag v. Ghag,* 2021 BCCA 106 at paras. 41–44. They include:

- the court must not weigh evidence and is limited to assessing whether it establishes a triable issue; and
- in assessing whether the evidence establishes a triable issue, the court may draw inferences that are strongly supported by the undisputed facts.

[141] As noted in *Ghag,* in the context of the *Saputo* threshold:

> [43] Even applying the test derived from the summary judgment context, mere evidentiary conflicts alone will not preclude a decision on a petition. Instead, an evidentiary conflict will only prevent judgment if it relates to a material fact or raises a triable issue: *Canada (Attorney General) v. Lameman,* 2008 SCC 14 at para. 11.

[142] Of course, the object and purpose of the *Supreme Court Civil Rules* favour the speedy disposition of cases, where the evidence permits the court to decide the issues on the merits, without recourse to a trial. The *Rules* also require the fair and just disposition of issues before the Court.

[143] In this case, there is insufficient evidence before me relating to, in Grace Chapel's own words, the content of its "beliefs regarding sexuality and gender" or how those beliefs were to be engaged at the Youth Conference. The City says it cancelled the Youth Conference on the possibility that there would be anti-LGBTQ content. However, Grace Chapel has not addressed this point in its affidavit evidence relying only, and very generally, on unspecified beliefs writ large to advance its s. 2(a) claim. Succinctly put, the nexus between "sexuality and gender" and the petitioner's religious beliefs was not expressly addressed or unpacked in the evidence before me. This issue requires a trial; it is material and directly informs the question of whether this claim falls within the scope of the protection subsumed within s. 2(a) of the *Charter* or whether any infringement could be justified. Put differently, I am not satisfied the City's argument, that the s. 2(a) protection does not apply in this case, is an issue that is bound to fail.

[144] My conclusion in this regard is buttressed by another triable issue at play; that is, whether the impact of the Decision to cancel the Youth Conference had an objective impact that is more than trivial or insubstantial*: Trinity Western,* at para. 74, quoting *R. v. Edwards Books and Art Ltd.,* [1986] 2 S.C.R. 713 at 759. As reasoned in *Trinity Western,* "an objective analysis looks at the impact on the claimants, rather than the impact of the implicated practices or beliefs *on others*… [emphasis original]."

[145] Clearly, the City's Decision had no impact on Grace Chapel's ability to hold its religious views. The question is whether the City's Decision to cancel the Agreement impacted Grace Chapel's ability to manifest those beliefs (if they are made out) in more than a non-substantial or non-trivial manner. While I am mindful that Grace Chapel could have booked space elsewhere, the evidence before me does not address how straightforward or difficult this option was, in fact. For example, the Decision was made after the Conference had been advertised. Does this suggest the Decision objectively impacted Grace Chapel's right to manifest its religious beliefs and practices? Again, this is a triable issue in my view, which also justifies the conversion of this matter into an action, should Grace Chapel wish to proceed in this manner.

3. State neutrality

[146] Grace Chapel underscores that there is a general overarching duty on the government to remain neutral in religious matters, citing *S.L. v. Commission Scolaire des Chênes*, 2012 SCC 7 at paras. 17–21, 32, 54. I am unable to conclude that this principle applies to the facts before me. Even if the City was advancing a "pro-LBGTQ" view, I do not see how such a view falls within the definition of a religion. This branch of Grace Chapel's case is not about preferring one religious view over another; rather, it is about balancing religious freedoms with the protection of a minority group within society. Accordingly, I am not persuaded that the City breached its duty of state neutrality in this case.

V. DISPOSITION

[147] Grace Chapel's request for relief under the *JRPA* is dismissed for the reasons set out above.

[148] Grace Chapel is entitled to a declaration that the City unjustifiably infringed its right to freedom of expression under s. 2(b) of the *Charter*.

[149] Grace Chapel has standing to seek a declaration that the City breached its s. 2(a) *Charter* right.

[150] Grace Chapel is at liberty, should it choose, to convert its s. 2(a) *Charter* claim into an action under R. 22-1(7)(d).

[151] Grace Chapel's claim that the City breached its duty of state neutrality concerning religious matters is dismissed.

[152] Grace Chapel's request for a declaration that the City unjustifiably breached its s. 2(d) right to freedom of association is dismissed.

[153] The parties have leave to speak to the issue of costs should they wish to do so, provided they contact Supreme Court Scheduling within 45 days of the date of this judgment to set down a hearing date.

"MORELLATO J."