MAR.
2021

ARPA CANADA'S LEGAL ARGUMENTS

IN

BEAUDOIN V. BRITISH COLUMBIA

THE CASE TO PROTECT CORPORATE WORSHIP IN BRITISH COLUMBIA

LOWER COURT

ARPA CANADA

NO. S210209
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

Petitioners

AND:

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

Respondents

WRITTEN SUBMISSIONS FOR THE HEARING OF THE PETITION OF THE INTERVENER ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

Geoffrey Trotter **André Schutten**

Co-Counsel for the Intervener,
Association for Reformed Political Action (ARPA) Canada

Contents

I. Overview

1. The orders under constitutional review in this proceeding are unprecedented. Never before has any branch of government in British Columbia imposed a blanket prohibition on in-person worship services. There is no question that the impugned public health orders infringe *Charter* freedoms. However, the constitutional significance of these orders is greater than the sum of infringements on the fundamental freedoms of individual churches, pastors, or congregants. The impact of the impugned orders includes the 'macro' significance of the orders for the fundamental structure of our "free and democratic society" as described and protected by the *Charter* as the "supreme law" of Canada.[1] In order for this court to grapple with what is threatened by these orders and thereby fully assess the Respondents' justificatory burden, it is necessary to begin with an examination of the nature of a "free and democratic society."

2. Once this constitutional groundwork has been laid, this argument will turn to specific aspects of the *Charter* analysis where this intervener's perspective can make a unique contribution, particularly on the following:
    a. Freedom of peaceful assembly in section 2(c) is directly and uniquely engaged and the assessment of this infringement (necessary for the section 1 analysis, despite the infringement being admitted) will benefit from recent academic commentary;
    b. In order to fully assess the constitutional deprivations imposed by the impugned orders, again for the purpose of section 1, the intersectional impacts of the orders on multiple section 2 fundamental freedoms must be considered as a "compound violation";
    c. The second branch of the equality analysis – substantive discrimination – must account for how the impugned Order disproportionately impacts individuals from certain religious groups who suffer a differential impact which is not related to the *relevant* characteristics of those groups (which are limited to Covid-19 transmission risks);
    d. The infringements cannot be minimally impairing if the court finds that the impugned orders ban constitutionally protected activity while leaving non-constitutionally protected activity of similar Covid-19 transmission risk regulated but permitted; and
    e. That, to demonstrably justify the orders, it is not sufficient for government to simply point to *some* evidence that banning religious assemblies will reduce Covid-19

[1] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s.52.

transmission. Rather, it must *demonstrate* that the reduced transmission from such a ban is significant enough (when compared to the baseline transmission rate in non-constitutionally protected activities which government permits to continue) to weigh more heavily than the severe infringements of constitutional rights.

II. A Free and Democratic Society is Institutionally Pluralist

3. Although extraordinary times can call for extraordinary measures, such times do not alter the constitutional nature of our province. The civil government does not become ultimate with the declaration of a state of emergency, but continues to share constitutional space with the other institutions, including religious institutions, which are integral to the lives of many British Columbians and may become all the more important to them (and, indeed, to a healthily functioning democracy) during times of emergency.

A. The *Charter's* Preamble Supports Limited Government and Institutional Pluralism

4. Early modern thinkers such as Hobbes and Rousseau "tried in different ways to subordinate religious claims to the sovereignty of politics."[2] William Galston describes this tradition as an effort to return to the "civic totalism" of ancient Greece and Rome, in which "intermediate associations existed only as revocable 'concessions' of power from the sovereign political authority."[3] Civic totalism has not triumphed in Canadian legal history, thanks in large part to the judiciary. Liberal democracy and constitutionalism qualify and limit state power. A free and democratic society is pluralist, not statist.

5. While Christian understandings of the proper relationship between civil and spiritual authority differ, a basic emphasis of Reformed Christian thought offers guidance. This foundational emphasis is that all authority belongs to God, who delegates limited authority to the different institutions in society, including the state. The state's authority is thus inherently limited by its original grant: authority is neither unlimited nor self-defined, and the state cannot arrogate to itself additional authority based on what a frightened citizenry might acquiesce to.

6. The limits on the state are affirmed in the preamble to the *Canadian Charter of Rights and*

---

[2] William Galston, "Religion and the Limits of Liberal Democracy" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society* (Quebec City: McGill-Queen's University Press, 2004) 12, at 44.
[3] *Ibid*.

Freedoms (*"Charter"*) which invokes "the supremacy of God and the rule of law" as principles upon which Canada is founded. The former principle signifies that the state is neither the sole nor the highest authority, nor the ultimate source of rights and freedoms.[4] The latter principle means that all state actors must have intelligible sources for, and limits on, their authority.[5]

7. The preamble to the *Charter* signals "a kind of secular humility, a recognition that there are other truths, other sources of competing worldviews, of normative and authoritative communities that are profound sources of meaning in people's lives that ought to be nurtured as a counter-balance to state authority."[6]

B. Section 1 Justification as an Expression of Institutional Pluralism

8. Civil government is not the only social institution with a constitutional right to exist, function, or have responsibility for public welfare. Therefore, section 1 only permits limits on fundamental freedoms that can be demonstrably justified "in a free and democratic society," meaning an institutionally pluralist society. This applies even in the case of a judicial review where the *Doré* framework is followed.[7]

9. In *Oakes*, Dickson C.J. identified the "values and principles essential to a free and democratic society" as including "accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[8] In discussing the meaning of a "democratic society" the Supreme Court has repeatedly emphasized similar themes – i.e. that the Canadian understanding of "democratic society" rejects majoritarian discrimination and protects minority rights.[9]

10. A "free and democratic society" is therefore robustly pluralistic. The burden of demonstrable

---

[4] Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005), 29 SCLR (2d); Iain T Benson, "The Limits of Law and the Liberty of Religion Associations" in Iain T Benson and Barry W Bussey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis Canada Inc, 2017), at xxiii, n 5.
[5] *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para 71; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 60.
[6] Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005), 29 SCLR (2d).
[7] *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, at para. 63.
[8] *R. v. Oakes*, [1986] 1 SCR 103 at p 136. Emphasis added. See also Dickson, C.J. in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at p 336, where he described a "free society" as "one which can accommodate a wide variety of beliefs ... and codes of conducts."
[9] *Andrews v. Law Society (British Columbia)*, [1989] 1 SCR 143, at para 17; *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 92; *Reference re Secession of Québec*, *supra* note 5 at paras 32, 49-52, 79-82.

justification restrains the power of the state to achieve its goals in ways that shut down the institutions or institutional practices of a religious minority. Religious individuals and institutions are constitutionally protected actors in the public sphere who are afforded equal treatment and benefit under the law through disciplined state neutrality towards religious vs. non-religious modes of life.[10] The state's burden to demonstrably justify a limit on freedom of religious assembly in this case is very high because it is fundamentally incompatible with being a free and democratic society to sacrifice religious communities' freedom to assemble, thus deeply injuring their vitality, while permitting similar non-religious gatherings to continue.

III. Institutional Pluralism Reflected in our Current Law

11. The foregoing basic principles of institutional pluralism continue to be reflected in our law today. Religious bodies may not exercise coercive power, yet they have a sphere of independent spiritual authority, at the core of which is the authority to determine their own membership, doctrines, and religious practices, including manner of worship (which these interveners submit includes the question of whether in-person attendance is required).[11] The Supreme Court has affirmed these points unequivocally in *Amselem* and in *Wall*.[12]

12. The Supreme Court of Canada acknowledges institutional pluralism when, for example, it writes, "a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."[13] The vitality of non-state actors and communities is essential for societal health; it is a characteristic of a free and democratic society.

13. In the same case addressing the unwritten constitutional principle of protection for minority rights, the Supreme Court writes of "the delineation of spheres of jurisdiction… and the [limited] role of our political institutions."[14] In the Reformed Christian tradition, the delineation of spheres of jurisdiction is not just between different levels of civil government,

---

[10] Zagorin, P., *How the Idea of Religious Toleration Came to the West* (Princeton U.P. 2003) at p 233; *Mouvement laïque québécois v Saguenay (City)*, [2015] SCJ No 16, at para 137.
[11] M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 4th ed. (Toronto: Irwin Law, 2017), at 95, writes that Christian assertions of the "independence of spiritual authority … have enjoyed tacit acceptance in practice" in our law.
[12] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para 50 and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para 24.
[13] *Reference re Secession of Québec*, *supra* note 5, at para 74 [emphasis added].
[14] *Ibid.*, at para 52.

but also between the state and other spheres of society, including the church. These spheres of jurisdiction should not be understood as mutually exclusive territorial boundaries, but rather as overlapping *aspects* of life lived together.

14. In the case at bar, as in all of life, there is overlap. The civil government's responsibility and authority with respect to religious gatherings is legitimately engaged with respect to matters of public safety (e.g., overseeing fire safety, building safety, sanitation requirements, zoning, and on this occasion, Covid-19 transmission risk). However, this state authority co-exists with the church's own constitutionally recognized responsibility and authority over assembled worship as a requirement and manifestation of religious faith. Government must pursue public safety objectives in a manner that respects the core religious responsibility and authority of the church.[15] The civil government shutting down the core function of another sphere of society, the church (which word is derived from the Greek *ecclesia*, which literally means "the assembled"[16]), would be justified only in the most extreme of cases. But, as addressed under minimal impairment later in this submission, government has clearly decided that this is not the most extreme of cases, because it is permitting other in-person, non-constitutionally protected gatherings to continue.

15. Civil government and religious institutions fulfil different, but equally crucial, roles in a free and democratic society. With the prolonged ban on assembling for religious worship, the implicit if not intentional message from the government to religious bodies is that the latter's core functions need not be respected, even as other commercial and recreational activities continue. It is often the courts which must remind the executive or legislative branches of government of their obligation to consider not only their statutory objective, but also their constitutional duties in pursuing them, manifested here as respect for the role of other spheres.

16. Churches' ability to fulfil their responsibilities and religious duties may be legitimately

---

[15] See Alvin Esau, "Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups," in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at 111, where he writes, "When we affirm legal pluralism, we do not automatically think in *hierarchical* ways about the outside law of the state as superior and sovereign to the inside law of the church; rather, we think in more *horizontal* ways." [emphasis in original].

[16] See Koopman December 23, 2020 Affidavit, para 10, where he states, "Coming together as a congregation is an essential component of the exercise of our faith. In fact, we speak of our members as the 'congregation' because congregating together before our God is of the essence of our faith. We call our assemblies 'worship services' because we gather there to give our worship and praise to God together as a congregation. In fact, unless we come together as a congregation it is not a worship service."

inconvenienced by laws or regulations of general application, subject to the state's duty under the *Charter* to accommodate religious freedom under s. 2(a) and avoid adverse effect discrimination under s. 15. By the same token, government's ability to fulfill its responsibilities may be legitimately 'inconvenienced' by its obligation to respect religious institutions and practices (as in *Multani*[17] or *Hutterian Brethren*[18]). This is the nature of being a free and democratic society. In this mutually respectful relationship between state and non-state actors:

> state actors [must] be attentive to the capacity of the state to harm associational life. The state might cause harm when it acts… on behalf of a purportedly homogeneous "public interest." […] there can never be an all-encompassing "we" without an already present "them"; every consensus is, to some extent, based on antecedent acts of exclusion. It is not enough, then, to insist on mere neutrality regarding associational activities; we must be attentive to the possibility that state action will work to oppress group objects.[19]

A. The Manner and Practice of Worship is at the Core of the Church's Sphere

17. The manner and practice of worship is at the core of what it means to be religious. For many religious individuals this specifically means gathering in religious assemblies for worship. The state's interests may well impact these assemblies but must do so cautiously and with humility, weighing the constitutional importance and priority of religious practices in the life of religious citizens. For Reformed Christians, the church is not a building, but rather the in-person assembly of worshippers.[20] Corporate worship and partaking in the sacraments are the manifestation of the church's doctrines and the essence of its members' practices. All of these are based on core doctrines of the church.

18. While the state can enact demonstrably justified restrictions on such gatherings in pursuit of other civic aims, to enact a blanket ban is the most severe infringement possible at law, which could be justified only if all alternative courses were insufficient.

19. The Supreme Court of Canada's jurisprudence is unequivocal that it is not up to the state to become the arbiter of religious dogma.[21] Where, as here, the parties' evidence of their sincere religious beliefs is unchallenged, government cannot suggest that the infringement is of a lesser

---

[17] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.
[18] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.
[19] David Schneiderman, "Associational Rights, Religion, and the Charter" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at 72.
[20] See footnote 16, *supra*.
[21] *Amselem*, *supra* note 12, at para 50.

severity because it regards virtual attendance as equivalent to in-person corporate worship.[22] It is for religious individuals or institutions, not the state, to make this decision.

20. The state is imposing on minority groups the view that assembling as the church for worship, even in limited and safe ways (that is, in ways deemed sufficiently safe for non-religious entities), is just not important enough to be worth the risk. In doing so, the civil government is dictating acceptable priorities to British Columbians: exercise in gyms, social entertainment (in restaurants and art galleries), education (in full classrooms), and economic participation (through in-person business meetings) are all "worth the risk", but deeply-held religious practices like assembling together for worship or partaking in communion are not. These are plainly moral-political judgments, for which the *Charter* sets certain fundamental boundaries.

IV. The Fundamental Freedoms within a Free and Democratic Society

A. The Fundamental Freedoms Preserve Institutional Pluralism

21. As laid out above, Canada is founded upon principles that recognize the supremacy of God and the rule of law.[23] Professor Dwight Newman writes, "That there would be rights and freedoms based on this preambular phrase could be read as implying that rights and freedoms were rooted in both eternal truths and in inherent features of law."[24] We enjoy various fundamental freedoms and rights, and any limitations of those rights by government are legitimate only to the extent that they are demonstrably justified by evidence that the infringement is necessary to the achievement of an even more pressing public good.

22. The fundamental freedoms enacted in section 2 of the *Charter* protect "social space" for an institutionally pluralistic society against usurpation by an ever-expanding state, particularly in times of societal urgency where the political majority is at greater risk of overlooking how minorities disproportionately bear the unintended harms of the majority's well-intentioned actions. "The guarantees of freedom of conscience and religion, the freedoms of expression, assembly, and association, all speak to the aim of dispersing power to civic and religious

[22] The government appears weigh in on "virtual worship" as an alternative. See Van Muyen Affidavit, at para 25.
[23] *Canadian Charter of Rights and Freedoms*, Preamble, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[24] Dwight Newman, "Recovering Forgotten Freedoms", (2020) 98 SCLR (2d) 47 – 62, at para 22.

associations while bringing groups together in the generation of public policy outcomes."[25] The Supreme Court acknowledged this, saying, "Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities…"[26]

23. Dickson C.J. writes that the uniting feature of the fundamental freedoms "is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation."[27] Continuing on the theme, Dickson C.J. writes:

> the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system […] underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*."[28]

24. The Supreme Court has likewise held that these individual rights are manifest in religious institutions, which also receive constitutional protection.[29] The fundamental freedoms in the *Charter* protect the manifestation of Canadians' beliefs, including the reasonably safe assemblies of citizens for religious purposes.

B. Freedom of Peaceful Assembly is Directly Engaged in the Case at Bar

25. The *Charter* guarantee of the fundamental freedom of peaceful assembly has received little attention in Canadian jurisprudence, often being subsumed by other fundamental freedoms.[30] While there are undoubtedly religious beliefs at issue in this case, ARPA Canada submits that the crux is not religious beliefs or associations *per se*, but the right to *peacefully assemble in person* in accordance with sincerely held religious beliefs, in order to carry out mandatory religious practices. There is overlap between the fundamental freedoms in this case, as religious freedom under section 2(a) has been interpreted as including the right "to manifest

---

[25] David Schneiderman, "Associational Rights, Religion, and the Charter" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at 73.
[26] *Reference re Secession of Québec*, *supra* note 5, at para 81.
[27] *Big M Drug Mart*, *supra* note 8, at p 346.
[28] *Ibid*, at p 346. Anoother unifying feature of the fundamental freedoms is the protection of the search for truth: Derek Ross, "Truth-Seeking and the Unity of the Charter's Fundamental Freedoms", (2020) 98 SCLR (2d) 63 – 107.
[29] See *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para 60 and *Mounted Police Assn. Of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para 64.
[30] In the only two paragraphs Peter Hogg devotes to this fundamental freedom he notes that picketing has been protected under 2(b) Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2007) (loose-leaf updated 2019, release 1) vol 2 at 44-2.

religious belief by worship and practice".[31] This overlap, however, should not obscure the fact that the *Charter* grants separate and meaningful protection to freedom of assembly. While the impugned orders may result in a less severe section 2*(a)* infringement for *some* persons whose religious beliefs (unlike those of the Petitioners) permit virtual attendance at services, the section 2*(c)* rights of *all* religious individuals who would otherwise have attended in-person services are infringed by the orders which prohibit peaceful religious assemblies. This case requires a distinct and robust examination of the fundamental freedom of peaceful assembly guaranteed by section 2(c).

26. In a recent Supreme Court Law Review article on freedom of assembly, Nnaemeka Ezeani suggests "governments might as a result of the outbreak of [a] virus place restrictions on the gathering of … groups to curtail the spread. Freedom of assembly may be valuable in at least providing a way we could scrutinize the restrictions placed by the government were they to become too stringent."[32] Ezeani quotes American law professor John Inazu on the importance of freedom of assembly as distinct from expression and association:

> Many group expressions are only intelligible against the lived practices that give them meaning. The ritual and liturgy of religious worship often embody deeper meaning than an outside observer would ascribe them. The political significance of a women's pageant in the 1920's would be lost without knowing why these women are gathered.[33]

27. Each of the examples mentioned by Inazu are manifestations of institutional pluralism protected by the *Charter*. Individuals may hold political beliefs, but they are worth little without the freedom to associate as an advocacy group and physically assemble in protest. Likewise, religious beliefs may be held by individuals, but they are worth little without the freedom to associate as a church and physically assemble together to manifest those beliefs.

C. Freedom of Peaceful Assembly Protects Peaceful Physical Gatherings

28. In their volume *The Law of the Canadian Constitution*, Régimbald and Newman summarize the fundamental freedom of peaceful assembly as follows:

---

[31] *Big M Drug Mart Ltd*, *supra* note 8, at p 336.
[32] Nnaemeka Ezeani, "Understanding Freedom of Peaceful Assembly in the Canadian Charter of Rights and Freedoms", (2020) 98 SCLR (2d) 351-376, at para. 24. At footnote 58, Ezeani goes into more analysis of how s. 2(c) would be implicated, explicitly in a Covid-19 context.
[33] John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly,* (New Haven, CT: Yale University Press, 2012) at pp 2-3. Cited in Ezeani, *ibid.*, at para 28.

> The dividing line concerning which right is at issue relates to what precisely is at issue: section 2(b) freedom of expression concerns the actual or attempted conveyance of meaning, section 2(c) freedom of assembly concerns the physical dimensions of assembling for protest or other constitutionally pertinent reasons, and section 2(d) freedom of association concerns the non-physical organizational dimensions of the association of individuals.[34]

29. A gathering may have an expressive or religious element, but the protection of the gathering itself properly falls under section 2(c). In his judgment in dissent (but not on this point) at the Federal Court of Appeal in *Roach*, Linden J.A. explains that "freedom of peaceful assembly is geared towards protecting the physical gathering together of people."[35]

30. Section 2(c) does contain the internal limit that such an assembly must be peaceful. The mere fact that a physical assembly may have potential, unintended, negative impacts cannot remove section 2(c) protection.[36] Any time there is an assembly of people, there is risk. If the risk of an accident or viral spread were sufficient to defeat the *Charter* claim, then section 2(c) would be practically meaningless. Instead, any possible unintentional risks created by the assembly should be addressed under section 1. It is unnecessary to decide in this case precisely where to draw the line between "peaceful" and "non-peaceful" assemblies. There can be no serious question of whether the Petitioners' religious worship services are peaceful. Similarly, and in contrast to this court's decision in *Abbotsford (City) v. Shantz*, the location of the proposed religious assemblies in this case is in a space historically utilized for exactly that purpose.[37]

D. The Court should Consider "Compound Violations" of Fundamental Freedoms

31. Where more than one fundamental freedom is infringed, the court must give due weight and attention to each, as well as to the intersectional impact upon all of them collectively. In this case, the compound violation of both sections 2(a) and 2(c) (as well as of religious equality protected by section 15(1)) requires attention. The court must analyse the compound violation with a view to the constitutional imperative of preserving institutional pluralism.

---

[34] Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017) at p 645 [emphasis added].
[35] *Roach v. Canada (Minister of State for Multiculturalism and Citizenship*, [1994] 2 FC 406.at para. 69 (F.C.A.)
[36] Ezeani, *supra* note 32, at para 45. Enzeani notes that "An assembly will not fail the peaceful test simply because the conduct of the individuals has the potential to annoy or offend third parties or hinder their activities. This position is appropriate because it is difficult for people to converge without some annoyance to third parties, especially where the assembly occurs in a public space."
[37] *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 at para 162.

32. Professor Jamie Cameron recently critiqued the Supreme Court's missed opportunities to address compound violations of fundamental freedoms: "Minimizing the severity of the violation [by addressing only one freedom] demonstrated a lack of insight into the scope and severity of the breach and how it engaged section 2's guarantees as an integral whole…[This] can diminish the significance and severity of compound violations."[38] Likewise, Professor Dwight Newman opines,

> What could appear to be a trivial infringement of one freedom might actually be more appropriately recognized as a more substantial infringement in the context of an intersectionality of different freedoms […] The possibility of such intersectional freedom infringement is a further reason to carry out independent development of each of the freedoms recognized within the section 2 fundamental freedoms clause -- only in doing so can we fully identify the full depth of impacts on human freedom arising from certain state actions."[39]

33. Another recent Supreme Court Law Review article argues that an approach that decides a constitutional case by only analysing a single infringement, despite others alleged,

> unfairly puts the onus on claimants to pick their "best" *Charter* right or freedom and rely entirely on it. […] However, each and every *Charter* right or freedom raised should be given due attention because each one protects a distinct (though, at times, overlapping) good and each right or freedom has its own test. […] we cannot know whether the violations are justified unless the full analysis is completed.[40]

34. The Supreme Court acknowledges this in *Mounted Police*, ruling that freedom of association does not derive from freedom of religion but "stands as an *independent* right with *independent* content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests".[41]

35. This Court should apply the practice of criminal law courts when remedying multiple *Charter* breaches. As two criminal law scholars explain: "It is well established that courts are not to consider breaches of *Charter* rights in a vacuum. Rather, they should take into account the cumulative effect of multiple *Charter* breaches".[42] Where there are multiple *Charter* breaches of legal rights (in particular, sections 8, 9, and 10), courts routinely weigh the seriousness of

---

[38] Jamie Cameron, "Big M's Forgotten Legacy of Freedom", (2020) 98 SCLR (2d) 15 – 45, at para 41-42.
[39] Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms", (2019), 91 SCLR (2d) 107 – 122, at para 34-35.
[40] André Schutten, "Recovering Community: Addressing Judicial Blindspots on Freedom of Association", (2020) 98 SCLR (2d) 399 – 430 at para 27
[41] *Mounted Police*, *supra* note 29, at para 49, emphasis added.
[42] James Fontana and David Keeshan, *The Law of Search and Seizure in Canada*, 11th ed. (2019), Ch. 24, sec. 5.

the *cumulative* effect of the violations.[43]

36. Courts have also given particular consideration to the multiple *Charter* violations in a context where a criminal investigation interacts with the media. In a lower Court decision, overturned on appeal but not on this point, Benotto J. articulated the underpinnings of the broad protections against search and seizure for the media, intersecting sections 2(b) and 8:

> It is because of the fundamental importance of a free press in a democratic society that special considerations arise in applications to search media premises or to seize material from journalists […] the damaging effect of the search on the freedom and functioning of the press is highly relevant to the assessment of the reasonableness of the search.[44]

37. This intervener submits that, in an analogous way, the damaging effect of the Public Health Order on *religious* assemblies in particular is highly relevant to the assessment of the sufficiency of the justification of the Order.

38. Pronouncements by the Supreme Court of Canada emphasize the intersectional significance of religious assemblies, emphasizing the "socially embedded nature of religious belief"[45] and that freedom of religion protects "not merely a right to hold religious opinions but also an individual right to establish communities of faith, the autonomous existence of which is indispensable for pluralism in a democratic society."[46]

39. The cumulative effect of the compound *Charter* infringements, particularly of section 2(a) and 2(c) of the *Charter* in this case, is a "double-barrelled infringement" of the Petitioners' constitutional freedoms and ought to be weighed as such. The prohibition, not on peaceful assemblies generally (many of which remain permitted under the impugned orders), but on *religious* assemblies in particular, requires redress.

V. Equality for Members of Diverse Institutions in a Free and Democratic Society

40. When religious rights are implicated in a legal struggle between citizens and their civil government, the natural inclination is to look to the protection of religious freedom in section

---

[43] See, for example, *R. v. Simpson*, (1993), 79 CCC (3d) 482 (Ont. C.A.) at 507, where Doherty J.A. ruled evidence inadmissible due to "the double-barrelled infringement of the appellant's constitutional rights." And see *R. v. Young*, (1993), 79 C.C.C. (3d) 559 (Ont. C.A.) at 566, where Carthy J.A., excluding evidence for infringements of ss. 8, 9, and 10(b), commented, "the number of violations combined to form a larger pattern of disregard for the appellant's Charter rights."

[44] *National Post v. Canada*, [2004] 178 O.J. (Sup. Ct.), at para 45, [emphasis added].

[45] *Loyola*, *supra* note 29, at para 60.

[46] *Mounted Police*, *supra* note 29, at para 64.

2(a) of the *Charter*. The bulk of jurisprudence on religious freedom lies there. But, as legal scholar Iain Benson observes, there seems to be little "realization that there is also a corresponding equality right touching on religion within Section 15 itself."[47]

41. Section 15(1) of the *Charter* protects the equality rights of, *inter alia*, religious individuals. It states that every individual has the right to the equal protection and benefit of the law without discrimination based on religion. Proving a violation of section 15(1) requires the claimant to pass the two-stage section 15(1) analysis:

    (1) Does the impugned law, on its face or in its impact, create a distinction on the basis of an enumerated or analogous ground?

    (2) Does the impugned law fail to respond to the actual capacities and needs of the members of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage?[48]

42. The first step of the test ought to be resolved primarily on the medical evidence which will be argued by the parties, on which this intervener is not making submissions. Clearly, the impugned orders make a distinction between assemblies that are religious in nature, and assemblies whose nature is variously economic (business meetings), athletic (gyms and swimming pools), educational (schools are open for in-person learning),[49] social (restaurant gatherings),[50] mental health oriented (support group meetings),[51] or aesthetic (art gallery viewings, the film industry, bands playing at a restaurant).[52] *If* the court finds that the Covid-19 transmission risk in these (permitted but regulated) activities is similar to the Covid-19 transmission risk in prohibited in-person religious assemblies (while following similar public health precautions such as social distancing, masking, and contact tracing), then they constitute an appropriate comparator group. In-person worship assemblies are singled out for prohibition by the impugned orders on the very basis of their religious nature. But, unlike most of the forgoing examples, peaceful assemblies

---

[47] Iain T. Benson, "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities" (2007) 21 *Emory Int'l L. Rev.* 111 at p. 148.
[48] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at paras 19-20.
[49] For a list of gatherings exempted from the restrictions see *Order of the Provincial Health Officer: Gatherings and Events – December 15, 2020*, s(1)(a). Pursuant to Sections 30, 31, 32, and 39(3) of *Public Health Act*, SBC 2008, at K.
[50] *Order of the Provincial Health Officer: Food and Liquor Serving Premises and Retail Establishments which Sell Liquor – December 30, 2020* Part B, Pursuant to Sections 30, 31, 32, and 39(3) of *Public Health Act*, SBC 2008.
[51] *Gatherings and Events Order supra* note 49, s(1)(a).
[52] Live music at restaurants is expressly permitted in *Food and Liquor Serving Premises Order, supra* note 50, Part B, s (25).

that are religious in character and essence benefit from constitutional protection.

43. If the Court finds that the first step is met, then at the second step the Court must inquire "into whether the law works substantive inequality by [1] perpetrating disadvantage or prejudice, or [2] stereotyping in a way that does not correspond to actual characteristics or circumstances."[53]

44. The first way substantive inequality may be established is "by showing that the impugned law, in purpose *or effect*, perpetuates prejudice and disadvantage to members of a group based on personal characteristics within s. 15(1) of the *Charter*."[54] The Supreme Court directs us to not get lost in the language of stereotyping and prejudice. Rather, the important thing to demonstrate here is **impact or effect:** "There is no need to look for an attitude of prejudice motivating, or created by, the exclusion… What is relevant is not the *attitudinal* progress towards them, but… their discriminatory *treatment*."[55]

45. The second way substantive inequality may be established is "by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group."[56] The Public Health Order bans religious assemblies for in-person worship regardless of whether or not they present greater Covid-19 transmission risk than is tolerated in other assemblies which are not banned. The disadvantage of the ban therefore does not correspond to the "actual circumstances and characteristics" of the religious persons and groups who seek to gather for in-person worship and the sacraments.

46. This intervener respectfully disagrees with the statement that in the impugned orders "gatherings are defined neutrally".[57] Whereas the section 15(1) claim in *Hutterian Brethren*[58] was based on a neutral policy choice concerning security measures, the impugned orders specifically ban all in-person worship gatherings on the basis of the religious purpose of the assembly, while permitting other non-religious gatherings to continue. This differential effect is imposed by the definition of "event" and the activities exempted from the impugned orders.

47. Again, the focus of this stage of the section 15(1) test is discriminatory **effect**. The

---

[53] *Withler v. Canada (A.G.)*, 2011 1 SCC 12, at para 65.
[54] *Ibid*., at para 35, [emphasis added].
[55] *Quebec (Attorney General) v. A*, 2013 SCC 5, at para 357 [emphasis in original]. It is also necessary to heed the warning of Justice Wilson in *Andrews* where she wrote that "the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances." *Andrews*, *supra* note 9, at p 152.
[56] *Withler*, *supra* note 53, at para 36.
[57] Response to Petition Part 5, para 42.
[58] *Hutterian Brethren of Wilson Colony*, *supra* note 18, at paras 105-108.

discriminatory effect in the present case is that citizens can assemble for a business meeting, a support group meeting, or a food bank inside their house of worship, but if they were to change the purpose of the assembly to a religious purpose – the same people, in the same space, with the same numbers, following the same safety protocols – they would face legal sanction.

48. In *Andrews*, the Supreme Court of Canada defined discrimination as:

> […] a distinction […] based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group […] or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[59]

49. As set out above, the Public Health Orders squarely fit this definition:

(1) The group/personal characteristic: British Columbians who hold sincere religious beliefs that in-person assembly for religious worship is a requirement of their faith;

(2) Distinction based on grounds related to the group characteristic: The Public Health Orders specifically disadvantage those who choose to peacefully assemble with others of their religious community for a legitimate and constitutionally-protected religious practice, despite religious assemblies posing no greater Covid-19 transmission risk than other assemblies whose risks are regulated and tolerated;

(3) The disadvantage: an absolute prohibition on assembling for a *religious* purpose; and

(4) Available to others: citizens of British Columbia are permitted to assemble for all sorts of purposes including political, economic, social, athletic, and aesthetic reasons. But Public Health Orders single out for exclusion only those who wish to assemble for a *religious* purpose, despite the willingness of such persons to comply with the public health restrictions applicable in other contexts of equivalent Covid-19 transmission risk.

50. Heterogeneity within religious communities does not defeat a claim of discrimination. In *Quebec v. A.*, Justice Abella explained that the Supreme Court has "squarely rejected the idea that for a claim of discrimination to succeed, all members of a group had to receive uniform treatment from the impugned law."[60] This is the analytical equivalent within section 15(1) to the law under section 2(a) from *Amselem* – that, provided the claimant sincerely believes as

---

[59] *Andrews*, *supra* note 9, at 174.
[60] *Quebec (Attorney General) v. A.*, *supra* note 55, at paras 354-55.

they do, it does not defeat their claim if their belief is not mandatory within their denomination or shared by all others within their religious group.[61]

51. Importantly, the Supreme Court of Canada guides us to not only ask whether there is different treatment based on protected personal characteristics, "but also whether those characteristics are relevant considerations under the circumstances."[62] The Public Health Order respects the choice of some citizens to: gather in-person for a business meeting rather than meet over Zoom, to eat pizza inside a restaurant rather than ordering takeout or delivery, to exercise indoors at a gym rather than at home or outdoors, or to find support for their struggles with addiction with a support group meeting in person rather than electronically. This freedom for citizens to make responsible economic, social, athletic, and aesthetic choices is laudable. But the same Public Health Order does not extend the same respect and trust to the very same citizens when they seek to peacefully assemble for a religious purpose, despite express constitutional protection for that choice. A peaceful assembly's religious nature should grant it *additional* constitutional protection. Instead, the impugned orders single out such assemblies for prohibition.

52. This statement from the Supreme Court of Canada regarding section 2(a) is apposite here:

> religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. […] If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth.[63]

VI. Minimal Impairment and Proportionality in a Free and Democratic Society

53. Whether the court applies the *Oakes* or *Doré* test to scrutinize the constitutionality of the impugned orders, the orders can only be upheld if they are minimally impairing and proportionate.[64] This intervener makes submissions only on specific and discrete aspects of the minimal impairment and proportionality analysis.

A. Minimal Impairment Requires Prioritizing Constitutionally Protected Activity

54. In the second step of the *Oakes* proportionality analysis, the emphasis is on the right being

---

[61] *Amselem*, *supra* note 12, at para 46.
[62] *Withler*, note 53, at para 39.
[63] *Loyola*, *supra* note 29, at para 44; to similar effect see *Saguenay*, *supra* note 10, at para 73.
[64] *Loyola*, *supra* note 29, at paras 37-38.

breached.[65] That is, "the government must show that the measures at issue impair the [*Charter*] right…as little as reasonably possible in order to achieve the legislative objective."[66]

55. It should be fatal to the government's demonstrable justification burden at the minimal impairment stage if the court concludes that the Covid-19 transmission risk of banned religious assemblies (if practiced with equivalent public health safeguards) are no greater than the Covid-19 transmission risk in equivalent non-religious gatherings which the impugned orders permit to continue. It appears that the government's pressing and substantial objective for the impugned orders was to reduce total Covid-19 transmission to a certain (unstated) target level. The goal was clearly not to reduce Covid-19 transmission to an absolute minimum, because if that were the objective, then the orders would ban *all* in-person gatherings, which they do not. The orders have in fact reduced total contacts by a certain percentage. Where that reduction could be achieved through restrictions of non-constitutionally protected activity, it cannot, as a matter of basic logic, be minimally impairing for government to permit the non-constitutionally protected activity to continue and to instead ban the constitutionally protected activity. The *Charter* does not permit government to prioritize elevated respiration at gymnasiums over elevated respiration in worship singing, extended in-person conversation in support groups over in-person conversation at a Bible study, or commercial meals in restaurants over in-person participation in the sacrament of the Lord's supper.

56. That is, where government bans constitutionally protected activity, without first regulating or prohibiting equivalently risky activities which do not receive constitutional protection, the infringement of *Charter* rights is not minimally impairing and is therefore not demonstrably justified in a free and democratic society. Demonstrable justification requires government to pursue its pressing and substantial objectives by restricting non-constitutionally protected activity *before* restricting constitutionally protected activity. The Supreme Court of the United States recently affirmed this same principle under US constitutional law, granting an injunction against the State of California's absolute prohibition on indoor worship.[67]

---

[65] *Oakes*, *supra* note 8 at p 139.
[66] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160.
[67] *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al*., 592 U.S. ____ (2021) per Gorsuch, J.: "California errs to the extent it suggests its four [risk] factors are always present in worship, or always absent from the other secular activities its regulations allow. […] Nor, again, does California explain why the narrower options it thinks adequate in many secular settings […] cannot suffice here. Especially when those measures are in routine use in religious services across the country today. […] California singles out religion for

57. Religious assemblies and practices have constitutional protection.[68] The provincial government has (for the purposes of the Covid-19 pandemic) even declared these religious assemblies as "benefiting the community," sufficient to qualify them for immunity from civil liability.[69] Other activities may be worthy of promotion or protection, but not at the expense of those activities afforded express *Charter* protection.

58. In the case at bar, the government has chosen to completely prohibit religious assemblies. In evaluating whether this restriction is minimally impairing, the question is whether government could achieve substantially the same end (i.e. equivalent reduction in the spread of Covid-19) in a manner that does not impair this right. The court should ask not only: (1) Do restrictions on religious assemblies reduce viral spread? But also: (2) Are there other non-*Charter*-protected activities contributing to viral spread that could be further restricted before outright banning *Charter*-protected activities?

59. There may be legitimate economic or other reasons for government to decide not to ban certain academic, athletic, recreational, economic, or commercial activities. But the fact that these activities are permitted, but worship services are not, demonstrates that the relevant freedoms are not minimally impaired. The *Charter* precludes restricting enumerated rights as the government's 'first choice.'

B. Complete Denial of Assembly for Some Mitigation of Risk is not Proportionate

60. The deleterious impact of the impugned orders includes the complete denial of the freedom of the Petitioners, Reformed Christians, and others whose religious beliefs compel assembling in-person for worship and/or sacraments.[70] For these individuals, the impact of the orders in issue is not merely to change the *mode* in which they conduct their religious practices (i.e., online instead of in person), but in fact makes it impossible for them to perform their mandatory religious practices.

---

worse treatment than many secular activities. At the same time, the State fails to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests." See also *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, 592 U.S. __ (2020).

[68] *Big M Drug Mart*, *supra* note 8, at para 94.

[69] *Covid-19 (Limits On Actions And Proceedings) Regulation*, BC Reg. 204/2020 s. 3(3)(b)(ii): "For the purposes of section 5 (1) of the [Covid-19 Related Measures] Act, the following acts are prescribed: … an activity that has the purpose of benefiting the community or any aspect of the community, including in relation to … the advancement of education or religion."

[70] Petitioner evidence on the merits: Koopman Affidavit paras. 8-12; Van Muyen Affidavit para. 30 and Exhibit A p. 1; Champ Affidavit paras. 5-9, 27; Smith Affidavit paras. 14-22 and Exhibit B; Dyck Affidavit para. 7). Intervener evidence on intervention application: Penninga Affidavit on intervention application, paras. 2, 24, and Exhibit A.

For them, it is an absolute prohibition which places them between two conflicting moral obligations: the moral and religious obligation to assemble in-person for worship and participate in the sacraments in accordance with their sincere religious beliefs on one hand, and their moral and legal duty as citizens of Canada and British Columbia to obey the civil government on the other. The beliefs of many Christians, including Reformed Christians, are that corporate, assembled worship is a requirement for the church of Christ. Corporate worship requires in-person presence that cannot be achieved through virtual means. A virtual livestream can be observed or watched by a congregant, but Reformed theology holds that a congregant is not to be merely an observer of corporate worship, but an active participant, most obviously through joining together in singing, prayer, receiving the sacrament of the Lord's Supper (also called "communion"). All of these are to be done corporately – that is, together as an assembled body. This strikes at the heart of *Charter* protections in sections 2(a) and 2(c) and is of the greatest severity.

61. In addition to the sum of fundamental freedom infringements on individual worshippers and churches, the impugned orders do serious macro harm to institutional pluralism. An entire category of constitutionally-protected societal actors are banned from assembly, thus deeply injuring their vitality and leading to significant downstream harms. On the micro level, this deprives British Columbians of their religious institutions during a period of greater, not lesser, need for comfort and guidance. On a macro level, it sidelines mediating societal institutions crucial in providing counterpoint to the otherwise unchallenged state. The risk of a slide towards statism is greatest during times of emergency; it is precisely during those times that it is most crucial to uphold constitutional guarantees of institutional pluralism.[71] British Columbia is rendered deeply less free and democratic by the challenged portion of the impugned orders, and unnecessarily so.

62. The mere fact that there has been *some* Covid-19 transmission in "religious settings" may not suffice to justify a blanket ban, if the ban is disproportionate to the degree of transmission as compared to baseline community transmission occurring generally in the population and tolerated by government. Where the line should be drawn is something for the parties to argue over. This intervener's point is that government should not receive a "pass" on the

[71] Per Gorsuch J. in *South Bay*, supra at footnote 67:"Even in times of crisis—perhaps especially in times of crisis—we have a duty to hold governments to the Constitution. As this crisis enters its second year – and hovers over a second Lent, a second Passover, and a second Ramadan – it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could."

proportionality requirements of the *Oakes* or *Doré* tests as applied to a ban on all constitutionally-protected religious gatherings simply because it may prevent some (small) amount of Covid-19 transmission. While such evidence might be sufficient to satisfy the government's burden to establish a rational connection, it is not sufficient to satisfy the government's proportionality burden under section 1, which is a matter of weighing the deleterious and beneficial impacts of the impugned orders.[72] The court here is not simply asking whether there is *any* evidence in support of the orders as it might under typical administrative law review for reasonableness; the court is conducting a constitutional review which, at a minimum under *Doré*, "'works the same justificatory muscles' as the *Oakes* test."[73]

63. Although government has legitimate and important responsibilities with respect to protecting citizens' health from various threats, government does not exercise sole responsibility for protecting or promoting health. In a free and democratic society, private institutions and individuals also have a legitimate and important role to play in enhancing various aspects of health. The church, for example, is much better equipped than the state to address the spiritual, and in many cases mental and social, health of Canadians. The ban on assemblies for corporate worship and sacraments contributes to Canadians mental, emotional, relational, and spiritual health problems. Ironically, churches are permitted to alleviate these downstream effects of the deprivation of worship services through counselling, poverty alleviation, and substance abuse groups, but is not permitted to prevent them in the first place through maintaining their core communal, and constitutionally protected, religious practices.[74]

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated February 26, 2021

Geoffrey Trotter and André Schutten
Co-Counsel for the Intervener, ARPA Canada

[72] Per Chief Justice Roberts in *South Bay*, *supra* at note 67: "the State's present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake. […] Deference, though broad, has its limits."
[73] *Loyola*, *supra* note 29, at para 40, citing *Doré v. Barreau du Québec*, 2012 SCC 12 at para 5.
[74] Van Muyen Affidavit at para 12. Smith Affidavit at para 11. Koopman Affidavit at paras 26-31, Exhibit B, and Exhibit C.