**Court of Appeal for Saskatchewan**
**Docket: CACV4088**

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

Between:

**Jasmin Grandel and Darrell Mills**

*Appellants*
*(Applicants)*

And

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

*Respondents*
*(Respondents)*

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

**Kalmakoff J.A.**

## I. INTRODUCTION

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

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

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

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

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

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

## II. BACKGROUND

### A. The statutory framework and the impugned PHOs

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

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

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

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

(2) An order pursuant to this section may:

(a) direct the closing of a public place;

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

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

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

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

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

(e) establish temporary hospitals.

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

**25.2**(1) In this section:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### B. The *Chambers Decision*

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

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

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

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

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

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

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

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

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

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

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

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

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

## III. ISSUES

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

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

## IV. ANALYSIS

### A. The jurisprudential landscape

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

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

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

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

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

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

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

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

## B. Analysis the appellants' arguments

### 1. Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

### 2. The Rathwell affidavit

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

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

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

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

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

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

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

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

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

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

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

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

### 3. Dr. Warren's evidence

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

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

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

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

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

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

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

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

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

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

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

[61] I would dismiss this ground of appeal.

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

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

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

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

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

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

[66] In *Beaudoin*, the British Columbia Court of Appeal held that the Chambers judge in that case, having found infringements of other *Charter* freedoms, was not required to consider whether the orders in question violated s. 15. On this point, the Court cited *Trinity Western* as authority for the fact that further analysis of other infringements was not necessary where "the factual matrix underpinning the *Charter* claim was, as it is here, largely indistinguishable, and the religious freedom claim was sufficient to account for the expressive, associational and equality rights of TWU's community members in the context of a *Doré* analysis" (*Beaudoin* at para 233). In support of this point, the Court cited other Supreme Court decisions where an individual analysis of each

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 5. Section 1 of the *Charter*

#### a. Standard of review

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

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

### b. The s. 1 framework

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

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

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

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

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

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

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

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

### c. The Chambers judge's s. 1 analysis

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

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

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

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

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

> without the retroactive lens through which we view the PHOs. I am guided by Pomerance J. in *Ontario Churches* at para 128:
>
> > [128] … This mix of conflicting interests and perspectives, centered on a tangible threat to public health, is a textbook recipe for deferential review. As it was put by Joyal C.J. in *Gateway*, at para. 292, the court must "be guided not only by the rigours of the existing legal tests, but as well, by a requisite judicial humility that comes from acknowledging that courts do not have the specialized expertise to casually second guess the decisions of public health officials, which decisions are otherwise supported in the evidence."

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

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

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

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

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

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

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

### d. The alleged errors

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

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

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

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

### e. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [268] I emphasize that hindsight has no place in this analysis…Regard must be had to what was known about the potential for the virus to cause widespread death and disable the delivery of essential services, including health care services to British Columbians. The analysis must recognize that, when the orders were made, vaccines were not widely available. The prospect of the exponential growth of COVID-19 cases was very real. Failing to act in a timely and reasonable way to prevent transmission in settings identified as high-risk could lead to the imposition of more extreme measures at a future date to curb the spread of the virus.
>
> (Citations omitted)

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

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

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

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

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

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

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

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

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

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

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

## V. CONCLUSION

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

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

"Kalmakoff J.A."

Kalmakoff J.A.

I concur.

"Caldwell J.A."

Caldwell J.A.

I concur.

"Tholl J.A."

Tholl J.A.