

To: Dr. Bonnie Henry, British Columbia Provincial Health Officer and The Honourable Mr. Adrian Dix, British Columbia Minister for Health

From: The St. Thomas More Catholic Lawyers Guild of British Columbia

Date: December 23, 2020

RE: Restrictions on Religious Gatherings due to COVID-19

We are writing to you on behalf of the St. Thomas More Catholic Lawyers Guild of Vancouver to express our concerns regarding the legality of the orders made by the Provincial Health Officer for British Columbia on November 19, 2020, particularly the orders prohibiting religious gatherings in British Columbia.

We understand that you have been in dialogue with the Most Reverend J. Michael Miller, Roman Catholic Archbishop of Vancouver, as well as other religious and faith leaders in the Lower Mainland around their respective concerns with the health orders and their impact on faith and religious communities. However, we felt compelled to add our voices to the mix given the fact that the prohibitions on religious gatherings seem to be out of balance with restrictions imposed on other social gatherings in British Columbia.

The Supreme Court of Canada has reiterated in recent decisions that religion is often a key aspect of an individual's identity and when a government marginalizes or dismisses that person's religious beliefs or faith community, the government "is not simply rejecting the individual's views and values, it is denying his or her equal worth."¹

For the above reasons and for the facts and reasons we have set out below, we respectfully ask you to reconsider the complete prohibition on religious gatherings provided the religious communities comply with the standards which the Province has established for other sectors or areas where social gathering may occur.

Freedom of Religion

As is well known, both the Canadian courts and various levels of government in Canada have routinely found religious experience to be a fundamental human right. In Canada, this right is enshrined in section 2(a) of the *Charter of Rights and Freedoms*.² The right to religious freedom in Canada involves not only the right of an individual to believe in a particular religious system, but also the right "to manifest religious belief by worship and practice."³

¹ *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 44

² *Canadian Charter of Rights and Freedoms*, s 2(a), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

³ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 94

Religious freedom is not an absolute right and it is acknowledged that circumstances may arise when that freedom may be permissively impaired. However, section 1 of the *Charter of Rights and Freedoms* provides that the impairment must be “demonstrably justified in a free and democratic society.”⁴ The Courts have long held that justification of an infringed *Charter* right involves consideration of the impairment’s proportionality, minimal impairment and reasonable accommodation.⁵

There has been a recent trend whereby the ability to freely practice one's faith is portrayed as being in conflict with other, non-religious aspects of British Columbian and Canadian culture. When these ideals conflict, it is our experience that individuals are afraid to be open about their faith due to the potential recriminations and backlash, socially and legally, for doing so. The decisions taken by the Provincial Health Office and the B.C. Government with respect to prohibiting religious gatherings of any sort, while allowing other types of gatherings which have been factually and demonstrably shown to be the cause of greater COVID exposure events, reinforces this harmful attitude of minimizing the value of religious individuals.

Orders and Declarations of the Provincial Health Officer

From a factual perspective, we have set out below a list of key announcements and information provided by the Provincial Health Office in support of the increased restrictions due to the COVID-19 pandemic. The purpose of this section is to demonstrate that publicly, very few facts have been presented to indicate that faith-based gatherings have been a significant risk for spreading COVID-19.

On March 17, 2020, Dr. Bonnie Henry in her role as the Provincial Health Officer for British Columbia declared a public health emergency due to the current COVID-19 pandemic. The following day, the Honourable Mike Farnworth in his role as the Minister of Public Safety and Solicitor General declared a provincial state of emergency. Minister Farnworth has since extended this declaration several times, most recently on December 8, 2020 with the state of emergency extended until December 22, 2020.

On November 7, 2020, Dr. Henry announced restrictions on social gatherings in the province due to the rapid increase of COVID-19 cases. In her press conference, Dr. Henry explained that these new cases were “ the result of transmission in people’s homes and in many workplaces, including food processing facilities, retail locations, public venues, as well as with indoor group physical activities.”⁶ As a result, Dr. Henry explained that the new restrictions would be limited to “social gatherings, group physical activities and workplaces.”⁷ Dr. Henry further specified during

⁴ *Canadian Charter of Rights and Freedoms*, *supra* note 2, s 1

⁵ *R v Oakes*, [1986] 1 SCR 103 at para 70

RJR-MacDonald Inc. v Canada (Attorney General), [1995] 3 SCR 199 at para 160

Multani v Commission Scolaire Marguerite-Bourgeoys, 2006 SCC 6 at paras 49-55

⁶ <https://news.gov.bc.ca/releases/2020HLTH0059-001922>

⁷ *Supra* note 7

this press conference that religious services did not constitute “social gatherings” and thus would not be limited by her orders.⁸

Dr. Henry subsequently provided COVID-19 statements to the public on November 9th, November 10th, November 12th, November 13th, November 16th, November 17th and November 18th. In those press conferences, Dr. Henry made the following attributions regarding rising COVID-19 cases:

- November 9th: “There have been two new health-care facility outbreaks at Harrison Pointe and Normanna. The outbreaks at Fair Haven Homes Burnaby Lodge, at PICs and at The Gateway Assisted Living for Seniors have been declared over. In total, 32 long-term care or assisted-living facilities and five acute-care facilities have active outbreak...We have seen the virus spread in people’s homes, in a number of workplaces and with indoor group physical activities. This is increasing the risk across the entire province and we need to do all we can to stop this – now.”⁹
- November 10th: “We have two new health-care facility outbreaks at Holyrood Manor and Burnaby Hospital. In total, 33 long-term care or assisted-living facilities and six acute-care facilities have active outbreaks.”¹⁰
- November 12th: “We have six new health-care facility outbreaks at Chartwell Langley Gardens, Peace Portal Seniors Village, The Harrison at Elim Village, Finnish Manor, Dania Home and at Nanaimo Regional General Hospital. The outbreaks at CareLife Fleetwood, Hamilton Village and Mayfair Terrace Retirement Residence are over. In total, 35 long-term care or assisted-living facilities and seven acute-care facilities have active outbreaks.”¹¹
- November 13th: “We have three new health-care facility outbreaks at Sun Pointe Village, Capilano Care Centre and Fraserview Intermediate Care Lodge. The outbreaks at Queens Park Hospital, Lakeview Care Centre, Yaletown House and St. Michael’s Centre are now over. In total, 35 long-term care or assisted-living facilities and six acute-care facilities have active outbreaks...There have been no new community outbreaks and the outbreaks at Coast Spas and Pace Processing are now over.”¹²
- November 16th: “We have 11 new health-care facility outbreaks at Al Hogg Pavilion, Jackman Manor, George Derby Centre, Kiwanis Care Centre, Columbus Residence, Holy Family Hospital, Arbutus Care Centre, PICS Assisted Living, Village by the Station, Hamlets at Westsyde and Burnaby Hospital. The outbreaks at Haro Park Centre, Pinegrove Place, the Village at Mill Creek and Rosemary Heights Seniors Village are now over. In total, 41 long-term care or assisted-living facilities and seven acute-care facilities have active outbreaks...There have been two new community outbreaks at the Platinum Athletic Club and at Cambridge Elementary school...Through the COVID-19

⁸<https://bc.ctvnews.ca/in-person-gatherings-among-faith-groups-prohibited-for-2-weeks-b-c-premier-urges-caution-ahead-of-holidays-1.5196284>

⁹ <https://news.gov.bc.ca/releases/2020HLTH0060-001927>

¹⁰ <https://news.gov.bc.ca/releases/2020HLTH0060-001931>

¹¹ <https://news.gov.bc.ca/releases/2020HLTH0061-001935>

¹² <https://news.gov.bc.ca/releases/2020HLTH0061-001939>

pandemic, the individual efforts of people in B.C. have helped to keep our hospitals, schools and workplaces open, and to protect the ones we love...It is the small yet essential efforts, like staying home when ill, not having social gatherings, minimizing our travel, maintaining a safe distance from others and using masks, that have a big impact...Today, we have seen that much of the transmission is occurring in private homes at social gatherings, at workplaces where people are gathering, or in risky indoor settings, like group fitness activities. These are all locations where there are limited layers of protection and people are not wearing masks.”¹³

- **November 17th:** “We have one new health-care facility outbreak at Tsawaayuss-Rainbow Gardens in the Island Health region. There have been no new community outbreaks.”¹⁴
- **November 18th:** “We have three new health-care facility outbreaks at Agecare Harmony Court Estates, Menno Home and at Peace Villa. The outbreak at Normanna has been declared over...There have been no new community outbreaks and the outbreak at La Casa Resort has been declared over.”¹⁵

In the above-mentioned public statements, Dr. Henry advised that the public outbreaks being monitored by the Province occurred in health-care facilities, long-term care facilities, assisted living facilities, spas, food processing facilities, athletic clubs, schools and resorts. In addressing concerning behaviour which the Province had noticed was linked to increases in COVID-19 transmissions, Dr. Henry specifically singled out people’s homes, workplaces and indoor group physical activities. Notably, Dr. Henry did not report any outbreaks at religious institutions or houses of worship nor did she raise concern of community transmission at religious services.

On November 19, 2020, Dr. Henry announced new provincial orders which prohibited any religious gatherings. Specifically, the Health Order made the following restrictions to public activity in British Columbia:

Social gatherings

All indoor or outdoor events as defined in our Gathering and Events order are prohibited. This includes religious, cultural or community events, with the exception of baptisms, funerals and weddings. These may proceed with up to 10 people including an officiant if a COVID-19 safety plan is in place. There are to be no associated receptions of any kind in any venue.

There are to be no social gatherings at residences with anyone other than those who reside there. People who live alone must host no gatherings, but can continue to see one or two of the same members of their core pandemic bubble at home.

Group physical activities

¹³ <https://news.gov.bc.ca/releases/2020HLTH0061-001941>

¹⁴ <https://news.gov.bc.ca/releases/2020HLTH0061-001943>

¹⁵ <https://news.gov.bc.ca/releases/2020HLTH0061-001947>

Businesses, recreation centres or other venues that organize or operate indoor group spin classes, hot yoga and high-intensity interval training will stop for the fall and winter.

Guidance on other physical activities done with a group indoors will need to follow updated guidance that is being developed.

Sports activities can continue, but there is to be no travel outside of communities for games or competitions, and no spectators are allowed. League organizers should continue planning for 2021 with today's modifications in mind.

Workplace safety

All businesses and worksites must conduct active daily screening of all on-site workers using their COVID-19 safety plans.

Workers and customers must wear masks in indoor public and retail spaces (except when eating or drinking), and in workplace common areas, including elevators, hallways, group or break rooms, kitchens and customer counters.

Office-based employers should temporarily suspend their efforts to safely get employees back to their workplace and support work-from-home options wherever possible.

Travel

All non-essential travel outside of one's community is strongly discouraged. People travelling to stay with immediate family members should ensure they do not host or participate in any social gatherings.¹⁶

On December 7, 2020, Dr. Henry extended the above-mentioned restrictions until January 8, 2021.

Data Regarding COVID Outbreaks and Exposures in British Columbia

We have reviewed the data made publically available by the British Columbia Centre for Disease Control (BCCDC). Based on that data, it appears that there have been only two exposures or outbreaks of COVID-19 relating to gatherings at religious institutions in British Columbia to date, namely:

- An outbreak at Calvary Chapel (Kelowna) in September 2020¹⁷
- A possible exposure at Gurdwara Baba Banda Singh Bahadar Sikh Society (Abbotsford) in November 2020¹⁸

¹⁶ <https://news.gov.bc.ca/releases/2020HLTH0061-001949>

¹⁷ <https://www.cbc.ca/news/canada/british-columbia/5-cases-of-covid-19-linked-to-outbreak-at-kelowna-church-1.5742585>

¹⁸ <https://www.abbynews.com/news/covid-19-exposure-reported-at-abbotsford-sikh-temple/>

However, during this same time period, the BCCDC has reported significantly more exposures and outbreaks of COVID-19 at bars, nightclubs, restaurants, retail establishments and athletic facilities.¹⁹ Specifically:

1) Bars and Nightclubs have resulted in at least 34 possible exposures or outbreaks:

- Sticky Wicket Bar & Restaurant (Victoria) in March 2020
- Brandi's Exotic Show Lounge (Vancouver) in June 2020
- Hotel Belmont Bar & Nightclub (Vancouver) in June 2020
- No5 Orange (Vancouver) in July 2020
- Hookah Lounge (Surrey) in August 2020
- The Taphouse (Coquitlam) in August 2020
- Charlie Hamiltons Pub (Coquitlam) in August 2020
- Mary's Bleu Moon Cafe (Sidney) in August 2020
- 10 Acres Cafe & Market (Sidney) in August 2020
- Il Falcone Restaurant (Courtenay) in August 2020
- PumpJack Pub (Vancouver) in August 2020
- Pierre's Champagne Lounge (Vancouver) in August 2020
- Levels Nightclub (Vancouver) in August 2020
- IVY Lounge (Vancouver) in August 2020
- Hawksworth Restaurant (Vancouver) in August 2020
- Bartholomew Bar (Vancouver) in August 2020
- Banter Room (Vancouver) in August 2020
- Cabana Lounge (Vancouver) in August 2020
- Studio Lounge and Nightclub (Vancouver) in August 2020
- The Compound/Heaven (Vancouver) in August 2020
- Flying Beaver Bar and Grill (Richmond) in September 2020
- The West Pub (Vancouver) in September 2020
- Athens Cultural Club (Vancouver) in September 2020
- The King's Head Public House (Vancouver) in September 2020
- Abruzzo Cappuccino Bar (Vancouver) in September 2020
- Jolly Coachman Pub (Pitt Meadows) in October 2020
- Baselines Pub (Surrey) in October 2020
- Tofino Brewing (Tofino) in October 2020
- Buffalo Bill's Bar & Grill (Whistler) in October 2020
- Irish Times Pub (Victoria) in November 2020
- Browns Socialhouse (Courtenay) in November 2020
- The Longhorn Saloon (Whistler) in November 2020
- The Morrissey (Vancouver) in November 2020
- Pioneers Pub (Richmond) in December 2020

2) Restaurants have resulted in at least 7 possible exposures or outbreaks:

- West Oak Restaurant (Vancouver) in August 2020
- Prive Kitchen and Bar (Vancouver) in August 2020

¹⁹ <http://www.bccdc.ca/health-info/diseases-conditions/covid-19/public-exposures>

- El Furniture Warehouse (Vancouver) in August 2020
 - Hanaya Japanese Restaurant (Surrey) in October 2020
 - Atrak Restaurant (Port Moody) in October 2020
 - Bow & Stern (Abbotsford) in October 2020, twice
 - Earls Kitchen & Bar (Whistler) in November 2020
- 3) Retail Establishments have resulted in at least 4 possible exposures or outbreaks:
- Hope River General Store (Hope) in August 2020
 - Foot Locker (Vancouver) in August 2020
 - Willowbrook Motors (Langley) in October 2020
 - Dicks Lumber (Surrey) in October 2020
- 4) Athletic Facilities have resulted in at least 5 possible exposures or outbreaks:
- Saanich Commonwealth Place Swimming Pool (Saanich) in March 2020
 - Saanich Commonwealth Place Kick Boxing Class (Saanich) in March 2020
 - Lions MMA (Vancouver) in August 2020
 - Platinum Athletic Club (Surrey) in October and November 2020
 - Gritt Athletics (Langley) in November 2020

The above analysis of the COVID-19 exposure and outbreak data for British Columbia seems to indicate that attendees at religious gatherings are less likely to be exposed to the virus than similar attendees at bars, nightclubs, restaurants, retail establishments and athletic facilities. If provincial health orders are to be made to curb the spread of the COVID-19 virus, such measures ought to be focused on those non-essential establishments such as bars and nightclubs where potential COVID-19 exposures have been most prevalent. At a minimum, the data suggests that the paucity of potential exposures at religious gatherings supports a conclusion that provincial health orders ought to be no more restrictive for religious institutions than for those establishments where there have been the most potential COVID-19 cases.

Lack of Minimal Impairment and Reasonable Accommodation By Provincial Government

With all due respect, we believe that the current health order issued by the Provincial Health Office does not comply with the principles of minimal impairment and reasonable accommodation as required by the *Charter* and the Supreme Court of Canada for three primary reasons.

First, the health order provides a framework for how non-religious institutions may be able to continue to operate safely and in compliance with provincial requirements (i.e., operate while minimally impaired), but fails to apply these same standards to religious institutions. For example, the health order sets out the standards by which workplaces may continue to operate, namely through daily screening of office workers and the mandatory usage of masks. Most religious and faith-based communities, including the Roman Catholic Archdiocese of Vancouver have been working hard to operate in full compliance with these provincial orders and are prepared to continue to accommodate such requirements to ensure that their congregants remain safe and at minimal risk when gathering to celebrate their faith. The Provincial Government has not publically provided a rationale or explanation for why these same precautions cannot be adopted by religious institutions to allow for their continued operation .

Second, the health order specifically permits certain athletic facilities to continue to operate, despite the high-risk nature of their operation when compared to religious gatherings. As a result, individuals are permitted to continue to attend indoor gyms or similar facilities in groups within enclosed spaces simultaneously. Such activities are inherently hazardous given both the information provided by the Provincial Health Office regarding the manner by which the COVID-19 virus can be spread²⁰ and the multiple instances where such activities have led to exposures and outbreaks.

On December 15, 2020, provincial health officials announced that the Province would be expanding the permissions for fitness and training facilities to operate due to “the overarching intent...to support people to participate in important health-promoting activities while reducing COVID-19 transmission risk.”²¹ The authors of this letter agree that physical exercise positively affects the physical and mental well-being of individuals. However, scientific studies including those conducted by the Mayo Clinic have concluded that religious participation likewise provides individuals “with better health outcomes, including greater longevity, coping skills, and health-related quality of life (even during terminal illness) and less anxiety, depression, and suicide.”²² The Province has not provided any rationale or explanation as to why physical exercise facilities may be permitted to operate as opposed to religious institutions, particularly when attendants at religious gatherings are more likely and better able to wear masks and maintain appropriate social distancing, particularly given the much larger capacity limits that churches, mosques, temples and other religious gathering places are able to accommodate. Finally, the health order provides a framework for how religious institutions may be minimally impaired but fails to implement those parameters to religious gatherings. The health order specifically permits baptisms, weddings and funerals so long as there is a COVID-19 safety plan in place and there are no more than 10 people in attendance. The majority of faith based communities are prepared to comply with the orders issued by the Provincial Health Office and will work to meet the mandated requirements, but a complete prohibition on gatherings goes much further than the minimal impairment standards established under the Charter and at law.

Conclusion

The issue of whether far-reaching restrictions made by government to religious institutions in response to the COVID-19 pandemic may be justified was recently considered by the Supreme Court of the United States of America. In his concurring Reasons for Judgment, Mr. Justice Gorsuch made the following comments:

²⁰ https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-public-health-guidelines-low-intensity-exercise.pdf?bcgovtm=20201118_GCPE_AM_COVID_3_NOTIFICATION_BCGOVNEWS_BCGOV_EN_BC_NOTIFICATION

²¹ <https://www.cbc.ca/news/canada/british-columbia/bc-health-officials-lift-restrictions-for-low-impact-group-exercise-1.5842454>

²² [https://www.mayoclinicproceedings.org/article/S0025-6196\(11\)62799-7/pdf](https://www.mayoclinicproceedings.org/article/S0025-6196(11)62799-7/pdf)

As almost everyone on the Court today recognizes, squaring the Governor’s edicts with our traditional First Amendment rules is no easy task. People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of “essential” businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens there just isn’t as “essential” as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all “essential” while traditional religious exercises are not. That is exactly the kind of discrimination the First Amendment forbids. [emphasis added]²³

In a similar light, we respectfully remind the Provincial Health Office and the Province of British Columbia that there is no *Charter* right or protection to attend yoga classes, frequent local pubs or buy luxury goods on Robson Street. However, British Columbians do have a *Charter* right to religious freedom. We are rapidly approaching the Christmas season, one of the holiest and most revered seasons in the Christian calendar. The effect of the Provincial Health Office orders to prohibit religious gatherings during this time has the perverse consequence where the secularized aspects of the Christmas tradition such as shopping or other commercial activities are being only modestly curtailed, while the religious celebrations of Christmas itself are being banned outright when the risk to participants is no greater, if not materially less, than the those commercial activities.

In light of the above considerations, we ask that the Provincial Health Office and the Province of British Columbia please reconsider the current restrictions placed on gatherings for religious purposes pursuant to the health order.

Respectfully,

The St. Thomas More Catholic Lawyers Guild of British Columbia

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²³ *Roman Catholic Diocese of Brooklyn, New York v Andrew M Cuomo*, 592 US No20A87 (2020)