IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vabuolas v. British Columbia (Information and Privacy Commissioner),* 2024 BCSC 27

Date: 20240108
Docket: S226203
Registry: Vancouver

Between:

John Vabuolas, Paul Sidhu, Grand Forks Congregation of Jehovah's Witnesses, Coldstream Congregation of Jehovah's Witnesses and Watch Tower Bible and Tract Society of Canada

Petitioners

And

Information and Privacy Commissioner for British Columbia, Gabriel-Liberty-Wall and Gregory Westgarde

Respondents

And

The British Columbia Humanist Association

Intervener

Before: The Honourable Justice Wilson

On judicial review from: An order of the Office of the Information and Privacy Commissioner, dated June 20, 2022 (Order P22-03).

Reasons for Judgment

Counsel for the Petitioners:	J. MacEwan D. Gnam A. Cantler (Articled Student)
Counsel for the Respondent, British Columbia (Information and Privacy Commissioner):	A. Hudson T. Urquhart
Counsel for British Columbia (Attorney General)	P. McLaughlin

Counsel for the Intervener, The British Columbia Humanist Association	W. McMillan
Counsel for the Intervener, The Association for Reformed Political Action (ARPA) Canada	J. Sikkema
Place and Date of Hearing:	Vancouver, B.C. September 27 – 29, 2023
Place and Date of Judgment:	Vancouver, B.C. January 8, 2024

Table of Contents

Introduction

[1] This is a judicial review of an order made by British Columbia's Office of the Information and Privacy Commissioner ("OIPC" and/or "Commissioner"). Two former members of the Jehovah's Witnesses each sought disclosure from their former congregations of all records that include their personal information. The elders of the

congregations refused, arguing that disclosure of confidential religious notes would be contrary to their religious beliefs.

[2] The former congregants separately applied to the OIPC pursuant to the *Personal Information Protection Act*, S.B.C. 2003, c. 63, [*PIPA*]. After failed mediation, the OIPC assigned an adjudicator to conduct an inquiry under s. 50 of *PIPA.* The Adjudicator ultimately ordered that the congregations turn over the disputed records for her review.

[3] The petitioners in this case are two elders, John Vabuolas and Paul Sidhu, Grand Forks Congregation of Johavah's Witnesses, Coldstream Congregation of Jehovah's Witnesses, and the Watchtower Bible and Tract Society of Canada. Together they argue that they should not be compelled to turn over their records to the adjudicator because *PIPA* infringes on their religious freedoms which are protected under s. 2(a) of the *Canadian Charter of Rights and Freedoms* [*Charter*]. They argue on this judicial review and constitutional challenge that *PIPA* is unconstitutional.

Background

[4] The OIPC is an independent agency that oversees and enforces access to information and privacy legislation in British Columbia, including *PIPA* and the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165.

[5] As part of the OIPC's oversight of *PIPA*, the OIPC is empowered to undertake a process (involving investigation, mediation and an inquiry, if necessary) to address disputes regarding personal information.

[6] Where an individual has made an access request to an organization for a copy of personal information about the individual held by the organization, and the individual is dissatisfied with the organization's response to the access request, they may ask the Commissioner to conduct a review. This is what happened in this case.

[7] Two individuals, Gabriel Liberty Wall and Gregory Lyle Westgarde, made independent access requests for their personal information to their former congregations of Jehovah's Witnesses. Mr. Wall and Mr. Westgarde (collectively, the "Applicants") were dissatisfied with the congregations' responses, and each filed a request for review to the OIPC. The OIPC conducted the review through its delegate, Ms. Barker (the "Adjudicator").

[8] After attempts at mediation were unsuccessful, the OIPC began an inquiry, issuing notices of inquiry in connection with these matters.

[9] The petitioners refused to produce the records or documents sought by the Applicants. They argued that the records include confidential ecclesiastical discussions regarding membership in the congregations, and that the records must remain confidential amongst congregation elders, and that *PIPA* infringes on their religious freedoms which are protected under s. 2(a) of the *Charter*, which provides as follows: "[e]veryone has . . . freedom of conscience and religion".

[10] The petitioner Watch Tower Bible and Tract Society of Canada (the "Watch Tower Society"), a Jehovah's Witness organization, sought *Charter* relief from this Court through a notice of civil claim, alleging that *PIPA* is unconstitutional. This Court stayed that civil action on September 20, 2021. The OIPC inquiry thereafter proceeded as a single proceeding, with the OIPC joining the two inquiries into one.

[11] On June 20, 2022, the Adjudicator issued Order P22-03—the interlocutory decision that gives rise to these petition proceedings (the "Production Order"). Relying on s. 38(1)(b) of *PIPA,* she required the two respondent congregations of Jehovah's Witnesses to produce to her for her review all of the records in their custody or control that contain Mr. Wall and Mr. Westgarde's personal information. The Production Order also applied to two elders of the congregations (the respondent John Vabuolas and the respondent Paul Sidhu) and to any other person in the congregations with custody or control of the records.

[12] The purpose of the Production Order was to permit the Adjudicator to review the records and determine whether:

a) the records contain "personal information" of either of the Applicants within the meaning of *PIPA*; and/or

b) whether one or more of the exceptions to disclosure in *PIPA* apply, and if so, whether the records are severable.

[13] The Production Order was automatically stayed by the filing of the within petition for judicial review.

The legislative scheme under *PIPA*

[14] *PIPA* creates a legislative scheme that imposes various obligations on organizations with respect to the collection, use or disclosure of individuals' personal information. It also imposes obligations to secure personal information, and to respond to access and correction requests made by individuals. *PIPA* applies to "organizations", which is broadly defined and includes individuals. "Personal information" is defined to include employee personal information, but not contact information or work product information.

[15] Section 3 delineates the scope of *PIPA. PIPA* applies to all organizations, but it excludes certain enumerated categories of records to which *PIPA* does not apply. Sections 3(1) and (2) of *PIPA* state, in part, as follows:

> 3(1) Subject to this section, this Act applies to every organization.
>
> (2) This Act does not apply to the following:
>
> (a) the collection, use or disclosure of personal information, if the collection, use or disclosure is for the personal or domestic purposes of the individual who is collecting, using or disclosing the personal information and for no other purpose;
>
> (b) the collection, use or disclosure of personal information, if the collection, use or disclosure is for journalistic, artistic or literary purposes and for no other purpose; [...]

[16] Section 23(1) of *PIPA* is key to this judicial review proceeding. It states as follows:

> 23(1) Subject to subsections (2) to (5), on request of an individual, an organization must provide the individual with the following:
>
> (a) the individual's personal information under the control of the organization;
>
> (b) information about the ways in which the personal information referred to in paragraph (a) has been and is being used by the organization;
>
> (c) the names of the individuals and organizations to whom the personal information referred to in paragraph (a) has been disclosed by the organization.

[17] Under s. 23 of *PIPA,* an individual has the presumptive right to obtain a copy of his or her own personal information held by an organization, unless an exception to access applies. *PIPA* includes several exceptions. Section 23(3) provides an organization with the discretion to not disclose in certain enumerated circumstances:

> 23(3) An organization is not required to disclose personal information and other information under subsection (1) or (2) in the following circumstances:
>
> (a) the information is protected by solicitor-client privilege;
>
> (b) the disclosure of the information would reveal confidential commercial information that if disclosed, could, in the opinion of a reasonable person, harm the competitive position of the organization;
>
> (c) the information was collected or disclosed without consent, as allowed under section 12 or 18, for the purposes of an investigation and the investigation and associated proceedings and appeals have not been completed;
>
> (d) [Repealed 2004-67-23.]
>
> (e) the information was collected or created by a mediator or arbitrator in the conduct of a mediation or arbitration for which he or she was appointed to act
>
> (i) under a collective agreement,
>
> (ii) under an enactment, or
>
> (iii) by a court;
>
> (f) the information is in a document that is subject to a solicitor's lien.

[18] Subsection 23(4) of *PIPA* provides that an organization must not disclose personal information and other information in respect to an access request in the following circumstances:

> 23(4) An organization must not disclose personal information and other information under subsection (1) or (2) in the following circumstances:
>
> (a) the disclosure could reasonably be expected to threaten the safety or physical or mental health of an individual other than the individual who made the request;
>
> (b) the disclosure can reasonably be expected to cause immediate or grave harm to the safety or to the physical or mental health of the individual who made the request;
>
> (c) the disclosure would reveal personal information about another individual;
>
> (d) the disclosure would reveal the identity of an individual who has provided personal information about another individual and the individual providing the personal information does not consent to disclosure of his or her identity.

[19] Under s. 23(5) of *PIPA*, if an organization is able to remove or redact the excepted information delineated in ss. 23(3) and (4), the organization is required to provide the individual with access to their personal information after the excepted information has been redacted.

[20] The powers of the Information and Privacy Commissioner are set out in Part 10 of *PIPA*. The Commissioner is appointed by the legislature to administer the enforcement of *PIPA*, and the Commissioner's powers include the power to conduct inquiry: s. 50.

[21] The Commissioner has the power to compel production of records, either to an applicant (pursuant to s. 52) or to the Commissioner for review. The Production Order made in this case was the latter, and was made pursuant to s. 38(1) of *PIPA*:

> 38(1) For the purposes of conducting an investigation or an audit under section 36 or an inquiry under section 50, the commissioner may make an order requiring a person to do either or both of the following:
>
> (a) attend, in person or by electronic means, before the commissioner to answer questions on oath or affirmation, or in any other manner;
>
> (b) produce for the commissioner a document in the custody or under the control of the person, including a document containing personal information.
>
> (2) The commissioner may

> (a) examine any information in a document, including personal information, and obtain copies or extracts of documents containing information
>
> (i) found in any premises entered under paragraph (c), or
>
> (ii) provided under this Act, and
>
> (b) [Repealed 2007-9-96.]
>
> (c) at any reasonable time, enter any premises, other than a personal residence, occupied by an organization, after satisfying any reasonable security requirements of the organization relating to the premises.

[22] The purpose of a review by the Commissioner is to conduct a line-by-line review of a record in order to determine whether it contains an applicant's personal information and, if so, whether an exemption applies or if any redactions are appropriate and are possible. The Commissioner may thereafter order that the documents be disclosed to an applicant. The Commissioner may also confirm the organization's decision to refuse disclosure.

Procedural background

[23] The Applicants are both former members of the Jehovah's Witnesses. Each separately requested their personal information from their former congregations. The congregations refused, claiming that the information sought included confidential religious communications.

[24] Mr. Wall is a former Jehovah's Witness and former member of the Grand Forks Congregation of Jehovah's Witnesses in British Columbia.

[25] On March 10, 2020, Mr. Wall made a *PIPA* access request to the Grand Forks Congregation for disclosure of his personal information, including any form of document or electronic document that contains information about, or makes reference to him, including whether that documentation was forwarded to any other person or entity.

[26] The Grand Forks Congregation identified certain personal information in its possession as responsive to Mr. Wall's request, namely, Mr. Wall's "S-21 Publisher

Record Cards" (the "S-21 Cards") and internal records of Mr. Wall's disassociation from the Jehovah's Witnesses (the "S-77 Form"). On April 2, 2020, the Grand Forks Congregation informed Mr. Wall that he could make an appointment to review the former but not the latter on the basis that it was a privileged and confidential religious communication. Mr. Wall contacted the OIPC who attempted to resolve the dispute through mediation, but without success. The OIPC thereafter began its review, issuing a notice of inquiry accordingly.

[27] Mr. Westgarde is a former Jehovah's Witness and former member of the Coldstream Congregation of Jehovah's Witnesses in British Columbia.

[28] On October 31, 2020, Mr. Westgarde made a *PIPA* access request to the Coldstream Congregation, requesting access to and disclosure of his personal information, including any form of document or electronic document that contains information about, or makes reference to him, including whether that documentation was forwarded to any other person or entity.

[29] The Coldstream Congregation responded to Mr. Westgarde that it did not have any of his personal information in its possession, but it did have a sealed record indicating that Mr. Westgarde was no longer a Jehovah's Witness (the "Sealed Record"). The Coldstream Congregation informed Mr. Westgarde that it was withholding the Sealed Record on the basis that it was privileged and confidential religious communication.

[30] On February 1, 2021, Mr. Westgarde asked the OlPC to review the Coldstream Congregation's decision to deny access to the Sealed Record. The OIPC asked to be provided with a copy of the Sealed Record, but the Coldstream Congregation refused for the same reasons provided to Mr. Westgarde. On May 26, 2021, the OlPC issued a notice of inquiry to Mr. Westgarde and the Coldstream Congregation.

[31] On September 22, 2021, the Congregations requested that the inquiries related to the Applicants' requests be joined together and heard as a single inquiry

and that certain additional persons be added to the inquiry. These individuals include the petitioners, who are the Watch Tower Society and two congregation elders, John Vabuolas of the Grand Forks Congregation and Paul Sidhu of the Coldstream Congregation. Thereafter, the two matters have proceeded together.

[32] Other than as noted, the petitioners have refused to produce the records, including the Sealed Record, the S-21 Cards or the S-77 Form, either to the Applicants or to the Commissioner (the "Disputed Records"). The petitioners say the Disputed Records are ecclesiastical records of committees of three elders that pertain to spiritual decisions made by those elders as to the applicants' standing as members of the Jehovah's Witnesses. They say the documents contain prayerful religious discussions about membership decisions.

[33] The petitioners applied for an injunction to stay the OIPC proceeding. The Attorney General for British Columbia ("AGBC") filed a cross-application for a stay of the petitioners' civil claim. The reasons are indexed at 2021 BCSC 1829. Justice Winteringham concluded that the OIPC was well suited to determine constitutional questions, that it was reasonable to assume that the OIPC process would be a fair one, and pointed out at para. 121 of her decision that the OIPC was well-equipped to compile an adequate evidentiary record. She also agreed that if the OIPC decision was adverse to the petitioners, they would have the right of judicial review—a review conducted on the basis of correctness.

[34] The Production Order followed from the inquiry conducted by the Adjudicator. The petitioners sought an oral hearing, but the matter proceeded by way of affidavits and written submissions.

[35] The petitioners argued that *PIPA* was unconstitutional because it infringed on their religious freedoms as protected by s. 2(a) of the *Charter*. The Adjudicator found that both ss. 23(1)(a) and 38(1)(b) infringed upon the elders' *Charter* rights, but that the infringement was justified under s. 1 of the *Charter*.

[36] The petitioners now challenge the Production Order by way of this judicial review. They argue that *PIPA* in its entirety is unconstitutional and seek a declaration in that regard.

Parties' positions

[37] The petitioners seek a declaration that *PIPA* unjustifiably infringes ss. 2(a), (b) and (d) and also s. 8 of the *Charter* as it relates to the collection, use or disclosure of personal information for religious purposes.

[38] The relevant sections of the *Charter* read as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantee the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication…and (d) freedom of association.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.

[39] Alternatively, the petitioners seek the following declaratory orders:

a) sections 1, 3, and 23 of *PIPA* unjustifiably infringe ss. 2(a), 2(b), and 2(d) of the *Charter*; and

b) section 38 of *PIPA* unjustifiably infringes ss. 2(a), 2(b), 2(d), and 8 of the *Charter*.

[40] For brevity, I will not reproduce all relevant sections of *PIPA* here. In sum, s. 1 of *PIPA* defines an "organization" and of relevance to this petition, includes a person, an unincorporated association, a trade union, a trust or a not for profit organization. Section 3 sets out:

> 3(1) Subject to this section, this Act applies to every organization.
>
> (2) This Act does not apply to the following:
>
> (a) the collection, use or disclosure of personal information, if the collection, use or disclosure is for the personal or domestic purposes of

the individual who is collecting, using or disclosing the personal information and for no other purpose;

(b) the collection, use or disclosure of personal information, if the collection, use or disclosure is for journalistic, artistic or literary purposes and for no other purpose;

(c) the collection, use or disclosure of personal information, if the federal Act applies to the collection, use or disclosure of the personal information;

(d) personal information if the Freedom of Information and Protection of Privacy Act applies to the personal information;

(e) personal information in

(i) a court document,

(ii) a document of a judge of the Court of Appeal, Supreme Court or Provincial Court, or a document relating to support services provided to a judge of those courts,

(iii) a document of a master of the Supreme Court,

(iv) a document of a justice of the peace, or

(v) a judicial administration record as defined in Schedule 1 of the Freedom of Information and Protection of Privacy Act;

(f) personal information in a note, communication or draft decision of the decision maker in an administrative proceeding;

(g) the collection, use or disclosure by a member or officer of the Legislature or Legislative Assembly of personal information that relates to the exercise of the functions of that member or officer;

(h) a document related to a prosecution if all proceedings related to the prosecution have not been completed;

(i) the collection of personal information that has been collected on or before this Act comes into force.

(3) Nothing in this Act affects solicitor-client privilege.

(4) This Act does not limit the information available by law to a party to a proceeding.

(5) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless another Act expressly provides that the other enactment, or a provision of it, applies despite this Act.

[41] Section 23 provides, in essence, a right of access to individuals who want to access their personal information by requiring that, on request of an individual, organizations provide the individual's personal information under control of that organization, information about how their personal information has been used, and

the names to whom the personal information has been disclosed. Sections 23(3) and (4) also include a number of exceptions to the general right of access scheme. Section 23(3) provides that an organization is not required to disclose personal information where the information is protected by solicitor-client privilege or where it would harm an organization's competitive position. Under s. 23(4), an organization is prohibited from disclosing personal information under certain circumstances, such as where (c) the disclosure would reveal personal information about another individual.

[42] Section 38 delineates the Commissioner's powers in conducting investigations, audits or inquiries. As is relevant to this petition, s. 38(1)(b) empowers the Commissioner to order that a person to produce documents.

[43] The petitioners say the Adjudicator erred by focusing too narrowly by considering the various allegations of breach in isolation, as opposed to considering the constitutionality of the *PIPA* scheme as a whole.

[44] The AGBC argues that the petition is premature because the Production Order is an interlocutory order only, and until the Adjudicator has conducted her review of the Disputed Records, it is not known as to whether anything will be ordered disclosed to the Applicants.

[45] The AGBC also says the petitioners do not have the ability to challenge the constitutionality of *PIPA* as a whole, and that this judicial review is limited to the Production Order.

[46] I note that counsel for the OIPC made limited submissions on this petition. Given the interlocutory nature of the decision and the need to maintain the tribunal's impartiality, the OIPC did not make submissions as to the merits of the Production Order. The OIPC's position was limited to providing contextual information about the statutory framework of *PIPA,* providing procedural history of the matter, as well as submissions on the standard of review to be applied and remedy.

[47] If the petitioners are successful in establishing that *PIPA* is unconstitutional in its entirety, or if they succeed with either of the alternative submissions above, an order quashing the Production Order would necessarily follow.

Issues

[48] The issues to be determined on this petition are as follows:

a) whether the petition is premature;

b) whether the appropriate standard of review is reasonableness or correctness, or both;

c) the proper scope of this judicial review—i.e., is it limited to a review of one or a combination of ss. 1, 3, 23, and 38 or the entirety of *PIPA*;

d) whether the impugned provisions of *PIPA* infringe ss. 2 and 8 of the *Charter* and, if so, whether they are nonetheless saved under s. 1; and

e) whether the Adjudicator's decision was reasonable.

Prematurity

[49] The AGBC submits that to the extent that the petitioners allege s. 23 of *PIPA* unjustifiably infringes their *Charter* rights, the issue is premature and this Court should therefore decline to exercise its discretion.

[50] The AGBC argues that judicial review is inherently discretionary and that courts will generally decline to exercise their discretion if a matter is premature: *Heminger v. Law Society of British Columbia*, 2023 BCCA 36, at paras. 10–12.

[51] The Production Order contemplates a process wherein the petitioners would provide the Disputed Records to the Adjudicator who would review them on a line-by-line basis. She would then decide whether the petitioners would be required to produce the Disputed Records or any portion of them to the Applicants. If the Commissioner decided that the petitioners were required to provide some portion of

the Disputed Records to the Applicants, she could make an order under s. 52(2) of *PIPA*:

> 52 (1) On completing an inquiry under section 50, the commissioner must dispose of the issues by making an order under this section.
>
> (2) If the inquiry is into a decision of an organization to give or to refuse to give access to all or part of an individual's personal information, the commissioner must, by order, do one of the following:
>
> (a) require the organization
>
> (i) to give the individual access to all or part of his or her personal information under the control of the organization,
>
> (ii) to disclose to the individual the ways in which the personal information has been used,
>
> (iii) to disclose to the individual names of the individuals and organizations to whom the personal information has been disclosed by the organization, or
>
> (iv) if the organization is a credit reporting agency, to disclose to the individual the names of the sources from which it received personal information about the individual,
>
> if the commissioner determines that the organization is not authorized or required to refuse access by the individual to the personal information;
>
> (b) either confirm the decision of the organization or require the organization to reconsider its decision, if the commissioner determines that the organization is authorized to refuse the individual access to his or her personal information;
>
> (c) require the organization to refuse the individual access to all or part of his or her personal information, if the commissioner determines that the organization is required to refuse that access.

[52] The Adjudicator has not yet determined whether s. 23(1)(a) of *PIPA* actually requires disclosure of the Disputed Records or whether the exceptions found in ss. 23(3) and (4) apply so as to require the congregation to refuse to disclose the Disputed Records to the Applicants. Therefore, the AGBC submits that the petition is premature.

[53] There are a couple of difficulties with the AGBC's submission, however.

[54] First, the petitioners argue that disclosure of the Disputed Records to anyone is a breach of their s. 2(a) *Charter* rights, not just the possibility of disclosure to the

Applicants. In other words, the petitioners say the Production Order is, in and of itself, a breach of their s. 2(a) *Charter* rights.

[55] Second, the petitioners advanced arguments before the Adjudicator that ss. 1, 3, 23(1)(a) and s. 38(1)(b) of *PIPA* are unconstitutional. The Adjudicator determined that ss. 23(1)(a) and 38(1)(b) breach the petitioners' *Charter* rights, but concluded that the provisions were saved under the s. 1 analysis as prescribed under the test set out in *R. v. Oakes,* [1986] 1 S.C.R. 103, 1986 CanLII 46. As such, the Adjudicator's conclusions with regard to the constitutional argument are a fundamental aspect of her reasoning that led to her making the Production Order. If it was not premature for the Adjudicator to come to those conclusions, it similarly cannot be premature for the court to review those conclusions for error.

[56] I find that the petition is not premature.

Standard of review

[57] The parties are in dispute regarding the standard of review to be applied. The petitioners say all of the issues in this petition involve the *Charter* and therefore are reviewable on a standard of correctness. The AGBC says that the Production Order should be reviewed on reasonableness, but the constitutional question regarding *PIPA* attracts correctness. The OIPC's submission on this point mirrors the AGBC.

[58] As discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*Vavilov*], the applicable standard of review on judicial review is presumptively reasonableness: para. 25. However, a review of an administrative decision maker's decision as to whether a statute complies with the *Charter* is a question where the rule of law requires that a standard of correctness is to be applied: paras. 17 and 57.

[59] In this case, the Adjudicator found that although ss. 23(1)(a) and 38(1)(b) of *PIPA* violate the petitioners' s. 2(a) *Charter* rights, the infringement was justified under s. 1 of the *Charter*. Because the petitioners are challenging the validity of *PIPA*, including ss. 23(1)(a) and 38(1)(b), the administrative decision maker's

interpretation is to be reviewed based on the standard of correctness: *Vavilov* at para. 57.

[60] However, to the extent that the petitioners seek judicial review of the Adjudicator's exercise of her discretion under s. 38(1)(b) of *PIPA* when she made the Production Order, this does not raise a constitutional question, but instead raises a question of whether the Adjudicator's exercise of discretion reflects a proportionate balancing of *Charter* values against *PIPA*'s statutory mandate. Such an exercise of discretion is reviewable based on a reasonableness standard: *Law Society of British Columbia* v. *Trinity Western University,* 2018 SCC 32 at para. 79, citing *Doré v. Barreau du Québec,* 2012 SCC 12 and *Vavilov* at para. 57.

Proper scope of Constitutional challenge

The Constitutional challenge is limited to ss. 23(1)(a) and 38(1)(b)

[61] The petitioners argue that the scope of this challenge is to the entirety of the *PIPA* legislative scheme. They argue that although the Adjudicator found that ss. 23(1)(a) and 38(1)(b) of *PIPA* infringe the congregation elders' right to freedom of religion, she erred in finding that the infringements were reasonable and proportionate in her s. 1 *Charter* analysis.

[62] However, they argue that her focus and therefore her findings were too narrow in scope. Rather, it is the entirety of the legislative scheme in *PIPA* that infringes the elders' s. 2(a) *Charter* rights to freedom of religion, and not just the two subsections.

[63] The petitioners rely on the Supreme Court of Canada's decision in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 [*Local 401*]. There, the Court was asked to determine whether Alberta's version of *PIPA* ("Alberta or Alberta's *PIPA*") unjustifiably limited a union's right to freedom of expression in the context of a lawful strike. In the result, the Court struck down the entirety of the Alberta legislation.

[64] In *Local 401,* a union represented the employees of a casino. During a strike, both the union and a security company hired by the employer took photographs and videotaped people crossing the picket line. Some of those who were recorded crossing the picket lines filed complaints with the Alberta Privacy Commissioner, complaining that the union was collecting, using and disclosing personal information about them without their consent, in contravention of the Alberta equivalent of *PIPA*. The adjudicator concluded that none of the exemptions—which are comparable to those in the BC legislation—applied in the circumstances, and therefore the union was ordered to cease its practice.

[65] The union applied for judicial review, arguing that the provisions of the Alberta *PIPA* that prevented it from collecting, using and disclosing the personal information infringed on its rights under s. 2(b) of the *Charter*, which protects freedom of expression. The Alberta Court of Appeal restated the question as whether it was justifiable to restrain freedom of expression in support of labour relations and concluded that the provisions of the Alberta *PIPA* were overly broad. The Court of Appeal agreed with the Chambers judge that there was a breach of the union's s. 2(b) rights that could not be saved under s. 1 and granted the union an exemption from the Alberta *PIPA*'s application. At the Supreme Court of Canada, the Alberta *PIPA* was subjected to a full analysis under the *Oakes* test. The Court confirmed that its review was with regard to the Alberta *PIPA* as a whole, as opposed to two specific provisions:

> [10] We turn first to the question of whether PIPA limits freedom of expression. This case arises in the specific factual context that was before the Adjudicator, but the challenge is to PIPA as a whole. While there was some debate about whether particular aspects of the conduct engaged in by the Union were protected by s. 2(b), there can be no doubt, in our view, that PIPA limits expressive activity that is so protected. The reviewing judge and the Court of Appeal both recognized that the collection, use and disclosure of personal information by the Union in the context of picketing during a lawful strike is inherently expressive. We agree.

[66] The Court had little difficulty in concluding that the Alberta *PIPA* restricted the union's freedom of expression rights under s. 2(b) of the *Charter* and found that it could not be justified under s. 1.

[67] However, in *Local 401*, both the Attorney General of Alberta and the Privacy Commissioner both asked that the legislation be struck down in its entirety if it were found to be unconstitutional, as opposed to the Court endeavouring to fashion a remedy that would be compliant:

> [40] Both the Information and Privacy Commissioner of Alberta and the Attorney General of Alberta stated in oral argument that if they were unsuccessful, they would prefer that *PIPA* be struck down in its entirety. We agree. Given the comprehensive and integrated structure of the statute, we do not think it is appropriate to pick and choose among the various amendments that would make *PIPA* constitutionally compliant: *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 80; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 707.
>
> [41] We would therefore declare *PIPA* to be invalid but suspend the declaration of invalidity for a period of 12 months to give the legislature time to decide how best to make the legislation constitutional. Rather than sustain the constitutional exemption ordered by the Court of Appeal, we would simply quash the Adjudicator's order.

[68] By contrast, neither the AGBC nor the OIPC seek that remedy in this case. The AGBC says that the petitioners are only presently subject to a single interlocutory production order made pursuant to s. 38(1)(b) of *PIPA*, and it remains to be seen what, if anything, will be ordered to be produced to the Applicants. The AGBC argues that this inquiry is limited to review of the record that was before the Adjudicator and the Production Order. The OIPC did not make submissions in this regard.

[69] Notably, *Local 401* also concerned whether Alberta's *PIPA* violated s. 2(b) of the *Charter* insofar as it restricted a union's ability to collect, use and disclose personal information without an individual's consent: paras. 9–10. At issue here is an individual's access to information that has already been collected by an organization. In other words, the fact that Alberta's *PIPA* prohibited the use, collection and disclosure of personal information at all, engaging the bulk of the statute, was at issue. Thus, a clear analogy cannot be drawn between the two contexts, with the scope of the challenge to Alberta's *PIPA* being informed by the factual matrix in front of the Adjudicator and then the Court. The activity in question in *Local 401* engaged a broader consideration of Alberta's *PIPA* more directly.

[70] Whether the Applicants should be entitled to access their personal information in the petitioners' control was the central issue in front of the Adjudicator and now this Court. Thus, the issue for consideration is far narrower than what was at issue in *Local 401* and similarly warrants a more limited scope.

[71] Further, while other *Charter* rights and the resultant jurisprudence can provide a helpful guide for analyzing s. 2(a), it is important to recall that *Local 401* was about freedom of expression under s. 2(b). As will be discussed further below, the petitioners conceded that they collect personal information that would not be subject to protection under s. 2(a).

[72] While I have concluded that the petition is not premature because the petitioners have argued that any production, even to the Adjudicator, constitutes a breach of their s. 2(a) *Charter* rights, it does not follow that the Court is in a position to entertain a challenge to the entirety of the *PIPA* legislative scheme. Given the record upon which the Adjudicator made her decision—pertaining only to the elders' ecclesiastical discussions at issue—and its interlocutory nature, I am not persuaded that consideration of the entirety of *PIPA* is appropriate.

[73] The petitioners' argument is that the congregation elders' confidential ecclesiastical discussions, which address fundamentally important questions such as membership, are subject to *Charter* protection under s. 2(a). They suggest that an appropriate remedy here is to read into s. 3(2)(b) an exemption for religious purposes, consistent with other exemptions. Section 3(2)(b) of *PIPA* reads as follows:

> 3 (1)Subject to this section, this Act applies to every organization.
>
> (2)This Act does not apply to the following:
>
> (b) the collection, use or disclosure of personal information, if the collection, use or disclosure is for journalistic, artistic or literary purposes and for no other purpose;

[74] The petitioners' proposed solution is to add the word "religious" between the words "journalistic" and "artistic" in the above subsection.

[75] What flows from this position, and indeed was acknowledged by the petitioners during submissions, is that not every record held by the petitioners that contains personal information would necessarily be subject to *Charter* protection. In other words, the congregations may hold documents containing personal information that would be properly disclosed under *PIPA*. Indeed, the congregations already disclosed certain documents to the Applicants earlier in the process. Therefore, even if I were to accept the petitioners' argument on this point, there would need to be some certainty as to what the Disputed Records contain.

[76] I return to the petitioners' overriding concern in this case, which is whether production of confidential ecclesiastical discussions amongst the elders in a congregation constitutes a breach of the elders' rights under s. 2(a) of the *Charter*. Their concern is focused on the confidential discussions amongst the elders regarding membership, as opposed to seeking a blanket exclusion or exemption for religious organizations generally.

[77] As noted, the Production Order contemplates that the Commissioner would review the Disputed Records and then determine whether the petitioners would be ordered to produce any of those Disputed Records to the Applicants.

[78] The Supreme Court of Canada and the British Columbia Court of Appeal have repeatedly emphasized the importance that constitutional issues should only be determined on a full factual record. In *Danson* v. Ontario *(Attorney General),* [1990] 2 SCR 1086 at 1100, 1990 CanLII 83, Justice Sopinka emphasized that *Charter* decisions must not be made in a factual vacuum. Doing so risks trivializing the *Charter* rights at issue and resulting in ill-considered opinions.

[79] At 1101 of *Danson*, Justice Sopinka explained that there is an even greater need for a full factual record where, such as the case at bar, it is not the purpose of the legislation that is challenged but rather its alleged deleterious effects*:*

> In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence,

> the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred.

[80] At this point, the Disputed Records have not been produced, either to the Adjudicator or to the Court. What was before the Adjudicator when she made the Production Order was affidavits from the elders and affidavits from others with regard to records kept by elders. The petitioners say that they sought an oral hearing before the Adjudicator such that the elders and the various other deponents could be subjected to cross-examination. They say that no one took them up on the offer, and that their affidavits must therefore stand as uncontradicted as it relates to the contents of the Disputed Records.

[81] It is not clear to me based on what I heard that an oral hearing was required. While the two elders were willing to be cross-examined, there is of course no obligation on anyone to cross-examine them. The Adjudicator ostensibly accepted their evidence with regard to their religious beliefs and it is improbable that there would have been anything in either of the elders' affidavits that would have given rise to a credibility issue.

[82] The Adjudicator was able to determine on this affidavit evidence that the petitioners' s. 2(a) *Charter* rights had been infringed. However, it does not follow that she was able to determine what the Disputed Records contain, writing the following:

> ***The Records in Dispute***
>
> [17] The respondents have not produced the disputed records for me to review in this inquiry. They contend that disclosing the records to anyone, including the commissioner, would violate the *Charter* rights and freedoms of all the elders in the two congregations and all other elders and Jehovah's Witnesses in British Columbia.
>
> [18] The respondents say that there is a single record in dispute in each case, "a confidential religious summary prepared by a committee of three congregation elders pertaining to spiritual status decisions involving LW and GW."[13] However, I cannot tell whether what the respondents say is an accurate description of the records. For instance, I question whether the terms "single" or "summary" accurately describe the records, at least for the records related to LW. Based on the congregation's response to LW's access request and his OIPC request for review, as well as what was said in the Civil Proceeding, the records are a "form" (*i.e.*, an *S-77 Notification of Disfellowshipping or Disassociation form*) and confidential "notes."

[83] The Adjudicator returned to the evidence before her when she addressed the evidence as it related to the Disputed Records:

> [39] A central question in this case is whether the records in dispute contain personal information. Section 1 of *PIPA* provides the following definitions:
>
> > "personal information" means information about an identifiable individual and includes employee personal information but does not include
> >
> > (a) contact information, or
> >
> > (b) work product information;
> >
> > "contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;
> >
> > "work product information" means information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business but does not include personal information about an individual who did not prepare or collect the personal information.
> >
> > "employment" includes working under an unpaid volunteer work relationship;
>
> [40] Although the congregations did not produce the records for my review, they did provide some information about their contents. For instance, JV, the elder with the Grand Forks Congregation, says the record in dispute is a confidential religious summary related to LW's decision to no longer be a Jehovah's Witness. He says the record contains LW's name, gender, date of birth, baptism date, the action by which LW disassociated himself and the date it was announced to the congregation that he was no longer a Jehovah's Witness. JV's evidence is also that the record contains details of the elders' spiritual deliberations and handling of the matter.
>
> [41] PS, the elder with the Coldstream Congregation, says the record related to GW is a confidential religious summary about GW's decision to no longer be a Jehovah's Witness. The record contains GW's name, gender, date of birth, the action by which GW disassociated himself and the date it was announced to the congregation that he was no longer a Jehovah's Witness. PS's evidence is also that the record contains information about how the elders handled the situation and their spiritual deliberations about it.
>
> [42] This evidence suggests that the records contain information about each of the applicants and, therefore, the records contain "personal information". It may also be the case that the records contain personal information of the elders, and possibly others.

[84] The Adjudicator then went on to summarize the challenge regarding the evidence before her in order to assess not only whether the Disputed Records contain confidential information but also whether they may be subject to exceptions:

> [43] The challenge I face, however, is that the respondents have refused to produce the disputed records for my review. I have concluded that, without seeing them, it is not possible to decide whether they contain personal information or whose personal information may be included. This also means I cannot make any finding about whether the disclosure prohibitions in ss. 24(c) or (d) apply or if severing under s. 23(5) is possible. In my view, it is not possible to decide any of these issues without having access to the disputed records.
>
> [44] On this point, I am not persuaded by the respondents' argument that their inquiry materials fulfill their obligations under *PIPA*. The respondents say:
>
> > In any event, and without prejudice to the religious parties' submissions with regards to the *Canadian Charter of Rights and Freedoms* and the constitutionality of *PIPA*, the Grand Forks Congregation and the Coldstream Congregation have *de facto* complied with *PIPA*'s requirement to provide access to GW's and LW's personal information to an acceptable and reasonable degree through the affidavits of [JV and PS].
>
> [45] As noted above, the respondents' inquiry materials suggest that the records contain personal information of LW and GW, but beyond that it is not clear whether they contain "personal information" of the elders or others. The respondents' materials do not provide an adequate evidentiary basis for answering this question or, it follows, for deciding whether ss. 24(c) or (d) apply, or if severing under s. 23(5) is operative.
>
> [46] Section 38(1)(b) authorizes me, as the commissioner's delegate, to order the respondents to produce the records:
>
> > Powers of commissioner in conducting investigations, audits or inquiries
> >
> > 38 (1) For the purposes of conducting an investigation or an audit under section 36 or an inquiry under section 50, the commissioner may make an order requiring a person to do either or both of the following:
> >
> > > …
> > >
> > > (b) produce for the commissioner a document in the custody or under the control of the person, including a document containing personal information.
> > >
> > > …
> >
> > (2) The commissioner may

> (a) examine any information in a document, including personal information, and obtain copies or extracts of documents containing information
>
> …
>
> (ii) provided under this Act, and
>
> [47] In my view, it is necessary to order the respondents to produce the records for my review pursuant to s. 38(1)(b). I must review them in order to fulfill my statutory duty to decide the questions of fact and law arising in this inquiry, including whether ss. 23(4)(c) and (d) apply and how s. 23(5) might operate.

[85] The petitioners argue that because their evidence is uncontradicted, the Adjudicator and this Court must accept that the Disputed Records contain only confidential ecclesiastical discussions regarding membership in the congregations. They refer to *Alberta (Information Privacy* Commissioner*) v. University of Calgary*, 2016 SCC 53 [*University of Calgary*], as an example of a situation where the courts have concluded that it is not necessary to hand over the disputed documents in order to determine whether an exception to *PIPA* applies.

[86] In *University of Calgary*, the applicant was a former employee who sought disclosure of various records from their former employer—the University of Calgary. The University claimed solicitor-client privilege with regard to certain documents the applicant sought. The Privacy Commissioner ordered that the documents be produced for review and the University of Calgary objected. The Supreme Court of Canada concluded that the records should not have been ordered produced and found that the judicial review could be undertaken without the records in hand.

[87] However, *University of Calgary* may be distinguished on a number of grounds. First, solicitor-client privilege is generally considered to be within the expertise of the courts, rather than a specialized commission such as the OIPC. Second, *University of Calgary* largely turned on a matter of statutory interpretation; on whether the language in the statute, which required a body to produce documents to Alberta's Commissioner "despite . . . any privilege of the law of evidence" (para. 2) was precise enough to require that the documents be disclosed in spite of solicitor-client privilege. The Court found that solicitor-client privilege is not

a matter of evidentiary privilege but is rather a substantive right. The enabling statute was insufficiently clear and precise to override or permit an infringement of solicitor-client privilege. No such issues of statutory interpretation are present here.

[88] I conclude that the Adjudicator, and now the Court, have been asked to balance rights and interests in the absence of a full evidentiary record. The fact that the petitioners sought an oral hearing and were prepared to subject their deponents to cross-examination is a hollow remedy in the absence of the Disputed Records because the party conducting the cross-examination has a limited ability to challenge the witnesses' evidence.

[89] On a petition for judicial review, the evidence is confined to the record that was before the decision-maker when the impugned decision was made: *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 at para. 154:

> [154] As a general rule, in a petition for judicial review the evidence is confined to the record that was before the decision maker when the impugned decision was made: *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at paras.75–79 [*Beedie*]; *Air Canada* at paras. 34–44; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at para. 52 [*Sobeys*]; *Albu v. The University of British Columbia,* 2015 BCCA 41 at paras. 35–36 [*Albu*].

[90] The Adjudicator made the Production Order in this case because she did not have the Disputed Records before her and therefore was unable to determine whether or not the petitioners would be ordered to make further disclosure to the Applicants.

[91] I conclude that the scope of the constitutional challenge in this case must be limited to those sections of *PIPA* that gave rise to the Production Order, and that it would not be appropriate, following *Danson*, to determine the constitutionality of *PIPA* generally in a factual vacuum.

[92] The same reasoning applies to the petitioners' challenge to ss. 1 and 3 of *PIPA*. In any event, the petitioners resiled from their position on s. 1 in oral arguments, suggesting that some records collecting by the congregations do contain

personal information that should properly be disclosed. The petitioners focused instead on what is, in their view, a problematic absence of an exemption in s. 3 of *PIPA.* As noted, given the dearth of factual record in front of the Court on what the Disputed Records contain, it would be inappropriate to determine if the *Charter* requires a similar exception for records for a religious purpose. Therefore, in my view, the Adjudicator properly limited the scope of the constitutional challenge to ss. 23(1)(a) and 38(1)(b) of *PIPA*. My consideration of the constitutionality of these provisions follows.

Constitutionality

[93] The legal test to be applied in this case is not disputed. The party seeking to challenge the constitutionality of the legislation has the burden of proving that one or more of its *Charter* rights are violated. Once proven, the burden shifts to the government to prove that the infringing measure is justified under s. 1 of the *Charter*.

[94] If ss. 23(1)(a) and 38(1)(b) of *PIPA* infringe the petitioners' *Charter* rights, the AGBC would then have the burden to prove that the measures are a reasonable limit on religious freedom that are demonstrably justified in a free and democratic society.

[95] With this legal framework in mind, I will turn to the matters in issue on this application.

Sections 23(1)(a) and 38(1)(b) of *PIPA* infringe s. 2(a) of the *Charter*

[96] The Supreme Court of Canada in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*], summarized the test for an infringement of s. 2(a) of the *Charter* as follows:

> [32] An infringement of s. 2(*a*) of the *Charter* will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, and *Multani*. "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct. As explained in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, *per* Dickson C.J.:

> The purpose of s. 2(*a*) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(*a*) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314. [Emphasis in original.]

[97] The Adjudicator concluded that sections 23(1)(a) and 38(1)(b) of *PIPA*, which permit the Applicants to obtain access to their personal information and give the Adjudicator the power to order production of the Disputed Records to the Commissioner for review, infringe the petitioners' s. 2(a) *Charter* rights.

[98] The petitioners do not seek to disturb her conclusion in this regard. Rather, they argue that she should have gone further by finding that the *PIPA* scheme as a whole infringes on their s. 2(a) *Charter* rights and seeks a broader remedy.

[99] The AGBC does not dispute that the elders hold a sincere belief that their religion requires the Disputed Records be kept confidential. However, counsel submits that ss. 23(1)(a) and 38(1)(b) of *PIPA* do not interfere with the petitioners' sincerely held religious beliefs or, in the alternative, any interference is trivial or insubstantial. The AGBC makes a number of arguments in support of this position.

[100] First, the AGBC argues that even though the elders hold sincere religious beliefs regarding the confidentiality of the Disputed Records, *PIPA* only imposes a duty to disclose on the organization and not on the individual elders. However, the definition of "organization" in *PIPA* specifically includes individuals:

> "organization" includes a person, an unincorporated association, a trade union, a trust or a not for profit organization, but does not include
>
> (a) an individual acting in a personal or domestic capacity or acting as an employee,
>
> (b) a public body,
>
> (c) the Provincial Court, the Supreme Court or the Court of Appeal,

> (d) the Nisg̲a'a Government, as defined in the Nisg̲a'a Final Agreement, or
>
> (e) a private trust for the benefit of one or more designated individuals who are friends or members of the family of the settlor;

[101] Second, the AGBC says there may be alternative methods of facilitating the disclosure of the Disputed Records that would reduce or eliminate the impact on the elders. The AGBC says the petitioners' evidence indicates the documents created by elders when a member leaves a congregation may only be unsealed and accessed in very limited circumstances. However, the elders in both congregations reviewed the Disputed Records in anticipation of the underlying inquiry, indicating the elders consider legal proceedings to be a valid reason to unseal and review confidential religious communications. The AGBC argues that it is unclear why the same would not hold true for legal obligations to disclose pursuant to validly enacted privacy and access legislation such as *PIPA*.

[102] However, the Adjudicator held that any disclosure is contrary to their sincerely held religious beliefs, holding the following at para. 93:

> [93] The AGBC also argues that the impact on religious freedoms would be trivial because *PIPA* only requires disclosure of the Applicants' personal information and no one else's personal information. It also submits that the respondents' own evidence is that the records were unsealed and reviewed by elders for these legal proceedings. While both may be true, I do not see how that means *PIPA*'s requirement that the records be disclosed, in whole or in part, is a trivial or insubstantial infringement. As I understand their evidence, the sincerely held religious belief of PS, JV and the other elders in their congregations is that no part of the records should be accessed by anyone other than authorized elders. The impact of *PIPA* requires the elders to do the exact opposite with the parts of the records that contain the Applicants' personal information and, in the case of disclosure to the Commissioner, all parts of the records.

I agree with the Adjudicator's reasoning in this regard.

[103] Along the same vein, the AGBC argues that to the extent disclosure of the Disputed Records could constitute a breach of confidence and therefore a violation of religious practice, it must be viewed in context, including that the disclosure would be pursuant to a legal requirement as opposed to a personal decision by any

member of the congregation. The Adjudicator addressed these submissions in her decision, a conclusion with which I agree:

> [92] I am not persuaded by the AGBC's argument that the infringement is merely trivial because PS and JV do not have to personally carry out the congregations' *PIPA* duties, or because members of the congregation will understand that compliance with *PIPA* is a legal requirement and not an elder's personal choice. That misses the point as I see it, which is that PIPA requires behaviour that is contrary to the elders' sincerely held religious belief that only authorized elders may access the records. Within their own congregations, it is apparent that PS and JV are not alone in believing that only authorized elders may access the records. The body of elders that authorized PS and JV to unseal the records evidently share the same belief. There is nothing to suggest that there are elders in the two congregations who would not feel the same way as PS and JV if required by *PIPA* to disclose the information in the records.

[104] Finally, the AGBC suggests that the petitioners' confidential records would not be disclosed because they would be subject to an exemption. The AGBC says the following, quoting from its written submissions:

> 85. For example, s. 23 of PIPA only permits disclosure of the personal information belonging to the individual requesting it. In fact, PIPA *requires* the organization to *refuse* to disclose to a requesting party anyone else's personal information that might also be included in a responsive record (s. 23(4)(c)) or the identity of any person, without their consent, who has provided personal information about another individual (s. 23(4)(d)). Thus, there is no breach of confidence in relation to any third party who may have shared information with the Elders and the disclosure of the Elders' own personal information is limited to their work product information about the requesting party.
>
> 86. Similarly, where an applicant's personal information is intertwined with the personal information of an identifiable third party - e.g., what that third party said about the applicant - the personal information might not be severable and might require the organization to refuse to disclose that personal information pursuant to s. 23(4)(c) of PIPA . . .

[105] I cannot agree that it necessarily follows that the petitioners' confidential discussions regarding the status of the Applicants would be excluded. As the petitioners point out, the elders are the makers of the Disputed Records, rather than the subject of them. The AGBC's submissions with regard to the interpretation of the exceptions amounts to nothing more than a hypothetical interpretation of those sections as it relates to the Disputed Records that are not before the Court. Of note,

even the OIPC did not suggest in its submissions that such an interpretation would necessarily follow.

[106] As the Adjudicator did, I accept the elders' affidavit evidence regarding maintaining strict confidentiality of their records. Mr. Vabuolas, for example, provided affidavit evidence to the effect that it was his belief that confidential religious summaries and communications are not to be disclosed outside of the doctrinal rules that govern his conduct as an elder. He deposed that disclosing the Disputed Records would violate his religious practice and personal conscience as an elder. Mr. Sandhu provided evidence to the same effect. While I accept the elders' evidence of their sincerely held religious beliefs, it does not necessarily follow that I must accept that the Disputed Records contain only their confidential religious summaries. One is a substantially more subjective analysis than the other.

[107] The Adjudicator concluded that any disclosure, whether to the Applicants under s. 23(1)(a) or to the Commissioner under s. 38(1)(b) would be neither a trivial nor an insubstantial interference with the elders' religious beliefs and practices. I see no error in her conclusions in this regard.

[108] Thus, I find that the petitioners, Mr. Vabuolas and Mr. Sandhu, have a sincerely held religious belief that is interfered with in a manner that is not trivial or insubstantial by the right of access to personal information in ss. 23(1)(a) and the Production Order, which relies on s. 38(1)(b). This meets the test for an infringement of s. 2(a) of the *Charter* as set out in *Syndicat Northcrest v. Amselem*, 2004 SCC 47 [*Amselem*] and *Hutterian Brethren.*

Sections 2(b) and 2(d) of the *Charter*

[109] The petitioners did not make discrete arguments with regard to ss. 2(b) and (d) of the *Charter*—2(b) is freedom of expression and 2(d) is freedom of association—but rather assert that their expressive and associational rights are subsumed within an analysis of s. 2(a).

[110] Ordinarily, courts will assess *Charter* rights together where they are co-extensive and separately where a concern falls specifically under one of the rights: *R. v. J.J.,* 2022 SCC 28 at paras. 114-115. The petitioners argue, without justification from the AGBC's perspective, that their ss. 2(a), (b), and (d) *Charter* rights are necessarily co-extensive such that their religious freedom claim is sufficient to account for their expressive and associational rights.

[111] While I accept that freedom of religion may concurrently include considerations of both freedom of association and freedom of expression, this petition was argued based on infringements of the petitioners' freedom of religion rights. Expressive rights and freedom of association do not play a significant role in the arguments before me. The Adjudicator found the petitioners' submissions on s. 2(b) to be too brief and lacking in explanatory detail to make any findings on those grounds. I therefore intend to analyze the subsections of *PIPA* solely with regard to s. 2(a).

Sections 23(1)(a) and 38(1)(b) of *PIPA* are saved by s. 1 of the *Charter*

[112] As discussed earlier the s. 1 analysis is governed by the well-established *Oakes* test, which encompasses the following three questions:

a) Is the limit prescribed by law?

b) Is the purpose for which the limit is imposed pressing and substantial?

c) Is the limit proportionate, meaning:

   i. Is the limit rationally connected to the purpose?

   ii. Does the limit minimally impair the right?

   iii. Is the law proportionate in its effects?

[113] Certain aspects of the analysis under s. 1 are not disputed, and the focus is primarily on whether the infringements are proportionate.

Is the limit prescribed by law?

[114] There is no dispute that ss. 23(1)(a) and 38(1)(b) of *PIPA* are prescribed by law as they are duly enacted statutory provisions.

Is the purpose of the limit pressing and substantial?

[115] The parties agree that the purposes of *PIPA* are pressing and substantial.

[116] The purpose of *PIPA* is set out in s. 2:

> The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

[117] The Supreme Court of Canada in *Local 401* has already found that Alberta's virtually identical legislation has a pressing and substantial purpose:

> [19] There is no dispute that *PIPA* has a pressing and substantial objective. The purpose of *PIPA* is explicitly set out in s. 3, as previously noted, which states:
>
> > **3** The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.
>
> The focus is on providing an individual with some measure of control over his or her personal information: Gratton, at pp. 6 ff. The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as "quasi-constitutional" because of the fundamental role privacy plays in the preservation of a free and democratic society [citations omitted].

[118] This aspect of the test is satisfied.

Is the limit proportionate?

Is the limit rationally connected to the purpose?

[119] The parties also agree that ss. 23(1)(a) and 38(1)(b) of *PIPA* are rationally connected to the pressing and substantial purpose of *PIPA*.

[120] The duty imposed on organizations to disclose, on request, a person's personal information in their control furthers the right of individuals to protect their personal information. The requirement to disclose information is a tool available to individuals to hold organizations accountable for the collection, use, and disclosure of personal information. It also serves as a deterrent to misuse and allows individuals some measure of control over their personal information.

[121] Although the government has the burden of justifying the limitation, the purpose for which it must be justified is the purpose of the specific legislative provisions that are in issue, as opposed to the entire legislative scheme. In *Fraser v. Canada (Attorney General),* 2020 SCC 28 at para. 125, Justice Abella quoted with approval from *Quebec (Procureure générale) c. Alliance du personnel professionnel et technique de la santé et des services sociaux,* 2018 SCC 17 at para. 45, as follows:

> Where a court finds that a specific legislative provision infringes a *Charter* right, the state's burden is to justify *that limitation,* not the whole legislative scheme. Thus, the "objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified" *(RJR-Mac Donald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199, at para. 144; *R. v. K.R.J.,* 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 62).
>
> [Emphasis in original.]

[122] The Adjudicator found, "that the infringing measures are rationally connected to their purpose of providing the Applicants with a mechanism to protect their personal information under the control of JV, PS and the congregations" (Order P22 – 03 at para. 110). The petitioners do not dispute her conclusion in this regard.

Are the limits minimally impairing?

[123] The parties disagree on the question of whether ss. 23(1) and 38(1)(b) of *PIPA* minimally impede the petitioners' religious freedom. The petitioners say that the Adjudicator erred in concluding that the infringements only minimally impair the congregation elders' s. 2(a) *Charter* rights.

[124] The petitioners point to various measures throughout *PIPA* that are tailored to specific circumstances, including commercial and secular interests, while ignoring religious rights. These include the following:

a) deemed consent to collect, use, or disclose personal information for the purpose of enrolment or coverage under an insurance, pension, benefit, or similar plan, policy, or contract (*PIPA*, s. 8(2));

b) restriction on withdrawing consent when doing so would frustrate the performance of a legal obligation (*PIPA*, s. 9(5));

c) limitation on withdrawing consent when given to a credit reporting agency in certain circumstances (*PIPA*, s. 9(6)); and

d) permission to collect personal information without consent when:

    i. information is collected by observing a performance or sporting event (*PIPA*, s. 12(d)); preparing a credit report (*PIPA*, s. 12(g)); necessary to facilitate the collection or payment of a debt (*PIPA*, s. 12(j)); or providing legal services to a third party (*PIPA*, s. 12(k)); and

    ii. the collection is for the purposes of establishing, managing, or terminating an employment relationship (but not a religious relationship) between the organization and the individual (*PIPA*, s. 13).

[125] These examples speak to the use and collection provisions of *PIPA,* rather than when it comes to an individual attempting to gain access to their personal information.

[126] In *Hutterian Brethren,* Chief Justice McLachlin, writing for the majority, discussed the minimal impairment portion of the *Oakes* test. *Hutterian Brethren* was also a religious freedom case and involved an analysis of whether a provincial requirement that all driver's licenses have photographs was constitutional. The members of the Hutterian Brethren of Wilson Colony argued that having their photographs taken was contrary to their religious beliefs, and therefore argued that the requirement was unconstitutional. Chief Justice McLachlin described the minimal impairment test at paras. 53 and 54:

> [53] The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.
>
> [54] In *RJR-MacDonald*, the minimal impairment analysis was explained as follows, at para. 160:
>
> > As the second step in the proportionality analysis, *the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective.* The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . . . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.
> >
> > [Emphasis in original.]
>
> In this manner, the legislative goal, which has been found to be pressing and substantial, grounds the minimum impairment analysis. As Aharon Barak, former President of the Supreme Court of Israel, puts it, "the rational connection test and the least harmful measure [minimum impairment] test are essentially determined against the background of the proper objective, and are derived from the need to realize it": "Proportional Effect: The Israeli Experience" (2007), 57 *U.T.L.J.* 369, at p. 374. President Barak describes this as the "internal limitation" in the minimum impairment test, which "prevents it [standing alone] from granting proper protection to human rights" (p. 373). The internal limitation arises from the fact that the minimum impairment test requires only that the government choose the least drastic

> means *of achieving its objective*. Less drastic means which do not actually achieve the government's objective are not considered at this stage.

[127] Chief Justice McLachlin went on to discuss the consideration of alternative measures that still satisfy the government's legislative objectives, noting that the court need not be satisfied that the alternative would satisfy the objective to exactly the same extent as the impugned measure: para. 55.

[128] The proportionality analysis requires the court to consider whether the limit minimally impairs the *Charter* right. However, the phrase "minimally impair" does not require the court to consider whether the limit must be tailored to minimally impair the rights. With laws of general application, a claimant cannot expect that the law would be tailored to "every possible future contingency, or every sincerely held religious belief": *Hutterian Brethren,* para. 69. Rather, whether a law is constitutionally valid is determined by an analysis of whether the law is directed at an important objective and is proportionate in its overall impact, with the focus being at this stage on societal perspective: para. 69.

[129] The Supreme Court of Canada said in *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, that the test for minimal impairment does not require perfection. The limit need not even be the least intrusive solution, it must only fall within a range of reasonable alternatives: para. 50.

[130] The petitioners argue that *PIPA*, including ss. 23(1)(a) and 38(1)(b) do not minimally impair the congregation elders' *Charter* rights. They argue that *PIPA* as a whole includes a wide array of exceptions, including exceptions designed to protect rights that are not *Charter* rights, yet it fails to make any effort to protect religious freedoms.

[131] The petitioners point to the blanket exemption under *PIPA* for organizations pursuing journalistic, artistic and literary purposes: *PIPA*, s. 3(2)(b). The petitioners argue that personal information collected and used for religious purposes should attract similar protection. They say this alternative measure would be more minimally

impairing of their religious freedoms. There are two issues with this alternative measure as proposed.

[132] First, I am not convinced that reading in an exemption into s. 3(2)(b) would address the infringement of the petitioners' religious freedoms. The infringement to the petitioners' religious freedoms—as they have framed it and as I have found above—is that they are required by the Production Order to disclose the contents of the ecclesiastical records to the Adjudicator, contrary to their sincerely held belief that these records must be kept confidential. Section 3(2)(b) says that *PIPA* does not apply to the collection, use or disclosure of personal information, if the collection, use or disclosure is for journalistic, artistic, or literary purposes and *for no other purpose* [emphasis added]. The language of "for no other purpose" necessarily requires that there be a means of determining the true purpose of the collection, use or disclosure of personal information at issue in a given case. In other words, *PIPA* would not apply where it can be ascertained that the use, collection or disclosure of personal information is actually for one of the enumerated purposes, but *PIPA* would apply if there were other purposes. Thus, the investigatory powers in s. 38 would still be available to the Commissioner, as would the orders to be made following an inquiry in s. 52 that would dispose of a matter. Accordingly, the alternative measure proposed by the petitioners would not adequately prevent the infringement at issue.

[133] Second, if I am incorrect that *PIPA* would still apply until the true purpose of a particular action or document relating to personal information could be proven, the alternative is that any statement by an individual or organization that their use, collection or disclosure of personal information is for an exempted purpose must be accepted at face value and without any further inquiry. While I am not convinced this is the case based on the language of s. 3(2)(b), if it were, reading in an exemption to s. 3(2)(b) for religious purposes would completely impede the AGBC's legislative goal in facilitating individual's access to and control of their personal information in the hands of religious organizations.

[134] The petitioners also say the Disputed Records are confidential ecclesiastical discussions surrounding membership in a congregation, which is not a justiciable issue in any event. As a result, there is no necessity for the records to ever be disclosed. In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, the Supreme Court of Canada confirmed that membership in religious orders is a private matter for determination by the religious order: para. 12. Disputes as to membership in a religious organization are not justiciable as courts are ill-suited for the role. In *Amselem*, the majority held that "[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion": para. 50.

[135] The *Highwood* Court noted that "[t]he courts have neither legitimacy nor institutional capacity to deal with such issues, and have repeatedly declined to consider them. . .": para. 36. The Court then went on to confirm at para. 39 that disputes with regard to membership of the Jehovah's Witnesses are to be determined after taking the steps outlined in the Book of Matthew, and the Court neither has the legitimacy nor capacity to determine whether the steps outlined in Matthew have been complied with. In the result, the freedom to associate necessarily includes decisions regarding membership, which is of no concern to the state.

[136] Of particular concern to the petitioners is that the groups of elders who meet to determine membership must be able to discuss matters in confidence and without fear of having their confidential discussions disclosed. The petitioners are concerned that if the elders' confidential communications are disclosed, they may be further disseminated for the purposes of mocking either the petitioners or elders, causing unnecessary embarrassment. Although the AGBC says there was no evidence of any meddlesome purpose that may result from disclosure, I acknowledge there may be a legitimate concern. However, in the absence of the Disputed Records, and there having been no order made to compel disclosure to the Applicants, the concerns are impossible to assess because the record is incomplete.

[137] In this respect, I also note that s. 41 of *PIPA* prohibits the Commissioner and the Commissioner's delegates from disclosing information obtained in performing their duties or exercising their powers except in very limited circumstances.

[138] Freedom of religion is not absolute, and courts have been reluctant to exclude religious organizations from laws of general application. In *Hutterian Brethren*, Chief Justice McLachlin stated the following at paragraph 36:

> [36] Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community.

[139] The petitioners' arguments are that they are focused on *PIPA* as a whole, and more specifically on whether an order to disclose confidential ecclesiastical records to an applicant would be a breach of the elders' s. 2(a) *Charter* rights. However, I have already determined that the scope of this constitutional challenge is limited to the right of access in s. 23(1)(a) and the Production Order which was made under s. 38(1)(b).

[140] If the Adjudicator were to order production of the Disputed Records or some portion of them to the Applicants, the order would be made under s. 52 of *PIPA*. At the present, no such order has been made, nor is it apparent that such an order will be made in the future. While I do not accept the AGBC's submissions that the confidential discussions of the elders will necessarily be excluded from production pursuant to ss. 23(4)(c) or (d), it remains nonetheless premature to determine the propriety of an order against the petitioners that could subsequently involve an order to disclose to the Applicants when no such order has been made.

[141] When the petitioners commenced their civil claim seeking interlocutory injunctive relief to stay the two proceedings before the OIPC, Justice Winteringham concluded that the OIPC was competent to determine the constitutional questions:

> [114] First, the OIPC is a court of competent jurisdiction for the purpose of deciding constitutional questions and granting constitutional relief under the *Charter*. The OIPC has the expertise and authority to decide questions of law and is in the best position to hear and decide constitutional questions related to *PIPA*.

[142] I am similarly persuaded that the OIPC is competent to decide what, if anything, from the Disputed Records should be produced to the Applicants, having regard to *Charter* values and the congregation elders' s. 2(a) *Charter* rights in particular. Moreover, if the petitioners are dissatisfied with the Adjudicator's decision after her review of the Disputed Records, the petitioners have the right to apply for judicial review, at which time the court would have the benefit of a complete record.

[143] As I said earlier, there is no doubt that *PIPA* applies to a wide range of organizations, including religious organizations. It is also apparent that not every record that includes personal information under the control of a religious organization was necessarily prepared for a religious purpose. Some mechanism is required in order to balance the rights of individuals to control their personal information on the one hand and the religious freedoms of those such as the congregational elders on the other.

[144] The alternative proposed by the petitioners is to read in an exemption into s. 3(2)(b) of *PIPA* so as *PIPA* would not apply to the collection, use or disclosure of personal information for religious purposes. Reading in such an exemption would significantly compromise the government's objective in giving individuals the ability to control their personal information. This personal information is intimately connected to their individual autonomy, dignity and privacy: *Local 401* at para. 19. As has been the thread throughout these reasons, I am not persuaded that I can make such a broad reaching determination on the factual record in front of this Court. Doing so, given the various interests at stake, risks reaching an ill-considered decision contrary to the guidance in *Danson* at 1100.

[145] This situation is analogous to that in *Hutterian Brethren.* Therein, the claimants proposed a solution that asked the government to significantly

compromise its legislative goal—the alternative was therefore not appropriate for consideration at the minimal impairment stage: para. 60. Chief Justice McLachlin, as noted above, was cognizant that freedom of religion cases often present such an "all or nothing dilemma", as adherents are often unwilling to compromise religious beliefs and governments may find it difficult to tailor laws to the myriad of ways they may trench on different religious beliefs: para. 61. Accordingly, she held that the ". . . justification of a limit on the right falls to be decided not at the point of minimal impairment, which proceeds on the assumption the state goal is valid, but at the stage of proportionality of effects, which is concerned about balancing the benefits of the measure against its negative effects": para. 61. She found that the universal photo requirement at issue minimally impaired the claimants' s. 2(a) *Charter* rights, as it fell within a range of reasonable options available to address the goal of preserving the integrity of the driver's licensing scheme: para. 62.

[146] In this case, the Disputed Records may or may not contain the Applicants' personal information, and even if they do, there may be an exemption to production. A determination of these questions may not lead itself to an absolute rule that can be determined in the absence of the records themselves.

[147] In the circumstances, I conclude that the Production Order will allow for a review of the Disputed Records to determine whether they contain any of the Applicants' personal information and if so, whether or not they are nevertheless exempt from disclosure.

Is the limit proportionate in its effect?

[148] The final stage of the s. 1 analysis involves a weighing of the limitation on the *Charter*-protected right and the means chosen to achieve the government objective. In *Hutterian Brethren*, the final stage was summarized as follows:

> [73] This leaves a final question: are the overall effects of the law on the claimants disproportionate to the government's objective? When one balances the harm done to the claimants' religious freedom against the benefits associated with the universal photo requirement for driver's licences, is the limit on the right proportionate in effect to the public benefit conferred by the limit?

[149] The role of the third stage of the proportionality analysis was described by Justice Bastarache in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425:

> 125. The third stage of the proportionality analysis performs a fundamentally distinct role. . . . The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible *given the validity of the legislative purpose.* The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.
>
> [Emphasis in original]

[150] The salutary purpose of ss. 23(1)(a) of *PIPA* is that it provides individuals a right of access to their personal information in furtherance of the fundamental values in society such as individual autonomy, dignity and privacy: *Local 401* at para. 19. When read together with s. 38(1)(b) of *PIPA*, these provisions allow for the Commissioner—in the course of an inquiry—to review disputed documents in order to determine whether they need to be disclosed to the Applicants before any disclosure order is made. The provisions represent a compromise between a blanket order of disclosure on the one hand and accepting the organization's word at face value that the documents either contain no personal information or would be subject to an exemption on the other.

[151] When considering the deleterious effects of the law in the context of religious freedom, the court must consider "whether the limit leaves the adherent with a meaningful choice to follow his or her beliefs and practices": *Hutterian Brethren* at para. 88.

[152] In *Hutterian Brethren*, McLachlin C.J. held that there was no "magic barometer" to measure the seriousness of the particular restriction or limit on a

religious practice, and that each particular limit must be judged on a case-by-case basis: para. 89. The deleterious effects must take into consideration the petitioners' perspective, but within the context of a multicultural, multi-religious society where legislation for the general good will inevitably produce conflicts with individual beliefs: para. 90.

[153] The petitioners also rely on *Local 401* to say that *PIPA*'s deleterious effects outweigh the salutary. Similar to the petitioners in this case, the union in *Local 401* acknowledged that the Alberta *PIPA* had a legitimate purpose, but said the restrictions were not justifiable. The Court agreed:

> [20] *PIPA*'s objective is increasingly significant in the modern context, where new technologies give organizations an almost unlimited capacity to collect personal information, analyze it, use it and communicate it to others for their own purposes. There is also no serious question that *PIPA* is rationally connected to this important objective. As the Union acknowledges, *PIPA* directly addresses the objective by imposing broad restrictions on the collection, use and disclosure of personal information. However, in our view, these broad restrictions are not justified because they are disproportionate to the benefits the legislation seeks to promote. In other words, "the *Charter* infringement is too high a price to pay for the benefit of the law": Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at p. 38-43.

[154] The Court went on to conclude the following on the question of proportionality:

> [25] The price *PIPA* exacts, however, is disproportionate to the benefits it promotes. *PIPA* limits the collection, use and disclosure of personal information other than with consent without regard for the nature of the personal information, the purpose for which it is collected, used or disclosed, and the situational context for that information. As the Adjudicator recognized in her decision, *PIPA* does not provide any way to accommodate the expressive purposes of unions engaged in lawful strikes. Indeed, the Act does not include any mechanisms by which a union's constitutional right to freedom of expression may be balanced with the interests protected by the legislation. As counsel for the Commissioner conceded during oral submissions, *PIPA* contains a general prohibition of the Union's use of personal information (absent consent or deemed consent) to further its collective bargaining objectives. As a result, *PIPA* deems virtually all personal information to be protected regardless of context.

[155] An important feature to the proportionality analysis in *Local 401* was the extent to which the significant values at stake—privacy—were actually impaired:

para. 25. Therein, the personal information was collected from the complainants to the OIPC at an open political demonstration. Those crossing the picket line would reasonably expect that their image would have been collected and the type of information collected, used and disclosed by the union was not of an intimate nature. In other words, the privacy interests of those subject to the union's collecting of personal information was low. The same cannot be said here, partly because the Court does not know the nature of the personal information held by the petitioners.

[156] I am not satisfied that disclosure of the Disputed Records by the congregational elders to the Commissioner for review for the purpose of determining whether disclosure to the Applicants will be required would preclude the elders from continuing to follow their religious practices when weighing the rights of individuals to control over their personal information on the one hand and the religious freedom of the elders on the other. The Production Order represents a balancing of the competing interests, and I conclude that the infringement on the congregational elders' religious freedoms that results from the Production Order is proportionate.

[157] While production of the Disputed Records to the Commissioner is not an insubstantial breach of the congregation elders' right to religious freedom under s. 2(a) of the *Charter*, it nonetheless furthers the interests of society as a whole by ensuring access to their personal information. Since the Disputed Records would be reviewed only by the Adjudicator or the Commissioner's delegate, the impairment of the elders' rights is minimized. The Adjudicator or Commissioner's delegate is prohibited from disclosing those documents to anyone, except in the limited circumstances enumerated in ss. 419(2)–(6), in the course of their review. Moreover, the Adjudicator's decision clarifies that once the review is complete, the parties will have the opportunity to make further submissions and if a disclosure order is made pursuant to s. 52 of *PIPA*, the petitioners would be entitled to apply for a judicial review of that decision.

Conclusion on justification

[158] I conclude that the limit on the petitioners' freedom of religion imposed by the Production Order has been shown to be justified under s. 1 of the *Charter.*

Sections 23(1)(a) and 38(1)(b) of *PIPA* do not infringe s. 8 of the *Charter*

[159] Section 8 of the *Charter* protects individuals from unreasonable search and seizure. The purpose of s. 8 is to protect individuals against unreasonable state incursions into their private life: *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para. 95. Section 8 protects three aspects of privacy: personal, informational and territorial: *R. v. Tessling*, 2004 SCC 67 at paras. 20–24.

[160] According to the Supreme Court of Canada in *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 80:

> These privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information "about one's lifestyle, intimate relations or political or religious opinions": *Thomson Newspapers*, *supra*, at p. 517, *per* La Forest J., cited with approval in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 62.

[161] For a search and/or seizure to be reasonable it must be authorized by law, the law itself must be reasonable, and the search and/or seizure must be carried out in a reasonable manner: *R. v. Caslake,* [1998] 1 S.C.R. 51 at para. 10.

[162] The Adjudicator acknowledged that an order made under s. 38(1)(b) of *PIPA* was arguably a seizure for *Charter* purposes. However, she was satisfied that any infringement was reasonable in the circumstances, finding that the Production Order under s. 38(1)(b) represented a balancing of the interests of the congregation elders on the one hand and the Applicants on the other. As the Adjudicator held at paras. 155–156 of her decision, a review following a production order is the only way to determine the petitioners' compliance and whether exceptions may apply.

[163] There is no doubt that the seizure in this case is authorized by law, as it is prescribed by *PIPA* in s. 38(1)(b). As indicated, I have found ss. 23(1)(a) and 38(1)(b) to be constitutionally valid and therefore the law is reasonable.

[164] It is difficult to distinguish between the impact of the Production Order on the religious freedoms of the congregational elders under s. 2(a) of the *Charter* with the right to be free from unreasonable search and seizure under s. 8 of the *Charter* in the absence of the Disputed Records.

[165] The Commissioner has extensive powers under s. 38(2), including the right to enter an organization's premises. However, there is no suggestion that this power has been exercised or is likely to be exercised in the circumstances of this case. Section 38(1.1) expressly contemplates court oversight:

> 38 (1.1)The commissioner may apply to the Supreme Court for an order
>
> (a) directing a person to comply with an order made under subsection (1), or
>
> (b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).

[166] At this point, it is not apparent as to precisely what is contained in the Disputed Records. The petitioners argue that a search of their records is unreasonable because it includes confidential ecclesiastical records. The petitioners' argument with regard to unreasonable search and seizure presupposes that the contents of the Disputed Records will be found to be protected by their s. 2(a) *Charter* rights and therefore will not be ordered to be disclosed to the Applicants. However, whether the petitioners' descriptions and characterization of the Disputed records is accurate or complete is the very point of the Production Order.

[167] I do not understand the petitioners to argue that the Production Order is not an order that was available for the Adjudicator to make as a matter of discretion. I also do not understand the petitioners to advance a separate argument beyond the petitioners' submissions that any order for production of the Disputed Records breaches their s. 2(a) *Charter* rights. Rather, the petitioners' arguments with regard to unreasonable search and seizure are themselves premised on the argument that

s. 38(1)(b) of *PIPA* constitutes an unreasonable infringement on their freedom of religion rights under s. 2(a) of the *Charter*. Therefore, I find the seizure, on the interlocutory Production Order, to be reasonable in the circumstances.

[168] I conclude the petitioners have not established a breach of s. 8 of the *Charter*.

Constitutionality conclusion

[169] I conclude that while ss. 23(1)(a) and 38(1)(b) of *PIPA* infringe the petitioners' rights under s. 2(a) of the *Charter,* those rights are limited in a manner that is reasonably justified in a free and democratic society. I further find that the petitioners have not established a breach of s. 8 of the *Charter.*

Reasonableness of Commissioner's decision

[170] The legal test for the review of discretionary administrative decisions that engage a *Charter* analysis is as set out in *Doré v. Barreau du Quebec*, 2012 SCC 12 and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12. The British Columbia Court of Appeal confirmed in *Pacific Centre for Reproductive Medicine v. Medical Services Commission,* 2019 BCCA 315 at para. 80, review of discretionary administrative decisions pursuant to the *Doré*/*Loyola* framework involves two questions:

1. Does the administrative decision engage the *Charter* by limiting *Charter* protections?

2. If so, does the decision reflect a proportionate balancing of the relevant *Charter* protections?

[171] On judicial review, the question of whether an administrative decision reflects a proportionate balancing of *Charter* values is subject to review for reasonableness. Courts owe administrative decision makers deference when considering whether the decision under review reflects a proportionate balance between *Charter* protections and statutory objectives: *Doré* at para. 56.

[172] The focus of the petitioners' submissions on this judicial review was whether *PIPA* was constitutional, as opposed to how the Adjudicator exercised her discretion. Nor did the AGBC or OIPC present submissions on the reasonableness of the Adjudicator's decision.

[173] I am satisfied that the Adjudicator's decision was reasonable within the meaning of *Doré* at para. 7:

> [7] . . . If the decision is disproportionality impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[174] The Adjudicator conducted an extensive proportionality analysis in her reasons for the Production Order with regard to the same considerations I have addressed in the foregoing. At paras. 154–156, she acknowledged that her decision engaged an analysis of *Charter* and the petitioners' rights under section 2(a), but concluded that the Production Order was required to ensure the petitioners' compliance with *PIPA*. Her decision reflected a balancing of the petitioners' s. 2(a) *Charter* rights with the legislative purpose of *PIPA*. Not only was the decision reasonable in terms of the options available, I am satisfied that it was the one that infringes the petitioners' rights to the least extent possible.

Disposition

[175] The petition is dismissed.

"Wilson J."