

AUG 02 2022

S-226203

No.
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA
In the Matter of the *Judicial Review Procedure Act*, RSBC 1996, c 241

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

PETITION TO THE COURT

ON NOTICE TO:

Information and Privacy Commissioner for British Columbia
4th Floor, 947 Fort Street
Victoria BC V8V 3K3

Gabriel-Liberty Wall
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This proceeding is brought for the relief set out in Part 1 below, by

[Check whichever one of the following boxes is correct and complete any required information.]

- the person(s) named as petitioner(s) in the style of proceedings above
 _____ (the petitioner(s))

[name]

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioners
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioners

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or,
- (d) if the time for response has been set by order of the court, within that time.

1.	The address of the registry is: Vancouver Registry 800 Smithe Street Vancouver BC V6Z 2C5
2.	The ADDRESS FOR SERVICE of the petitioners is: W. GLEN HOW & ASSOCIATES LLP 13893 Highway 7, PO Box 40 Georgetown ON L7G 4T1 Attention: Jayden MacEwan Fax number address for service (if any) of the petitioner(s): 905-873-4522 E-mail address for service (if any) of the petitioners: jmacewan@wghow.ca
3.	The name and office address of the petitioners' lawyer is: Jayden MacEwan W. GLEN HOW & ASSOCIATES LLP 13893 Highway 7, PO Box 40 Georgetown ON L7G 4T1

CLAIM OF THE PETITIONERS

Part 1: ORDERS SOUGHT

1. The Petitioners apply for:
 - (a) an Order quashing Order P22-03 of the Information and Privacy Commissioner for British Columbia (Commissioner) issued on 20 June 2022 by the Commissioner's delegate, Elizabeth Barker;
 - (b) a declaration that the *Personal Information Protection Act*, SBC 2003, c 63 (*PIPA*) unjustifiably infringes sections 2(a), 2(b), 2(d), and 8 of the *Canadian Charter of Rights and Freedoms* (*Charter*) insofar as it applies to the collection, use, or disclosure of personal information for religious purposes;
 - (c) further and in the alternative, a declaration that:
 - (i) sections 1, 3, and 23 of *PIPA* unjustifiably infringe sections 2(a), 2(b), and 2(d) of the *Charter*, and;
 - (ii) section 38 of *PIPA* unjustifiably infringes sections 2(a), 2(b), 2(d), and 8 of the *Charter*;
 - (d) a declaration that Order P22-03 is, consequently, *ultra vires* the Commissioner and his delegate;
 - (e) a declaration that *PIPA* is invalid and/or a declaration that the Petitioners and the records at issue are constitutionally exempt from the application of *PIPA*;
 - (f) costs; and
 - (g) such further and other relief as counsel may advise and as this Honourable Court may permit.

Part 2: FACTUAL BASIS

2. This Petition concerns an order made by a delegate of the Information and Privacy Commissioner for British Columbia that the Petitioners produce confidential religious records for the purpose of adjudicating an inquiry involving access requests made by former adherents. Order P22-03 is *ultra vires* the Commissioner and his delegate because it is grounded in unconstitutional provisions of *PIPA*. While the Commissioner's delegate held the application of *PIPA* infringed section 2(a) of the *Charter*, she wrongly decided *PIPA* is justified under section 1 of the *Charter*. The Petitioners seek an order quashing Order P22-03, and declaring *PIPA* unconstitutional and invalid as applied to the Petitioners and to the

confidential religious records at issue. The Petitioners provided the former adherents' personal information in sworn affidavits but declined to turn over the ministers' confidential religious records themselves.

The Parties – Petitioners

3. **John Vabuolas** is an elder (spiritual shepherd) in the Grand Forks Congregation and lives in Grand Forks, British Columbia.
4. **Paul Sidhu** is an elder (spiritual shepherd) in the Coldstream Congregation and lives in Coldstream, British Columbia.
5. The **Grand Forks Congregation of Jehovah's Witnesses** (Grand Forks Congregation) and the **Coldstream Congregation of Jehovah's Witnesses** (Coldstream Congregation) are both unincorporated religious associations, made up of local Jehovah's Witnesses who congregate to worship Jehovah God and study the Bible.
6. **Watch Tower Bible and Tract Society of Canada** (Watch Tower Canada) is a registered charity, federally incorporated under the *Canada Not-for-profit Corporations Act*, representing Jehovah's Witnesses in Canada, with its registered office located at 13893 Highway 7, Georgetown, Ontario, L7G 4S4.
7. The Grand Forks Congregation and the Coldstream Congregation were named by the Commissioner's delegate as the organizations concerned by her inquiry (*PIPA*, s 50(3)). Mr. Vabuolas, Mr. Sidhu, and Watch Tower Canada were permitted to participate in her inquiry as "appropriate" persons under section 48 of *PIPA*. Mr. Vabuolas and Mr. Sidhu are directly impacted by Order P22-03.
8. The Petitioners filed joint submissions as Respondents in the inquiry. Mr. Vabuolas and Mr. Sidhu each filed affidavits explaining why disclosing the private religious records at issue violates their individual religious conscience and religious practice and jeopardizes their ability to fulfill their religious responsibilities with respect to determining who can be one of Jehovah's Witnesses. In their affidavits, the elders disclosed personal information of the former adherents contained in the records at issue.
9. Watch Tower Canada provided evidence through the affidavit of one of its members, Kevin Knaus, shedding additional light on the Scriptural responsibilities and duties of congregation elders, who are voluntary spiritual shepherds, in particular with regard to confidential religious communications and records and making religious adherence decisions.

The Parties – Respondents

10. The Respondent, the **Information and Privacy Commissioner for British Columbia**, appointed his delegate, Elizabeth Barker, to adjudicate the inquiry. The delegate issued Order P22-03 on 20 June 2022.
11. **Gabriel-Liberty Wall** (LW) was one of Jehovah's Witnesses and a congregant with the Grand Forks Congregation who formally disassociated himself in May 2017. In the inquiry, he was represented by his father, Randy Wall, who litigated his own disfellowshipping from another congregation of Jehovah's Witnesses.

[Highwood Congregation of Jehovah's Witnesses \(Judicial Committee\) v Wall](#), 2018 SCC 26 [*Highwood Congregation*].
12. **Gregory Westgarde** (GW) was one of Jehovah's Witnesses and a congregant with the Coldstream Congregation who formally disassociated himself in August 2009.
13. In 2020, LW and GW requested from their respective former congregation a copy of all records that contained their personal information. LW's and GW's letters were duplicates of each other.

The Parties – Intervenor

14. The Commissioner's delegate determined it was appropriate to notify the Attorney General of British Columbia (AGBC) and the Attorney General of Canada of this inquiry given the *Charter* issues it specified in the inquiry notice. The AGBC participated as an intervenor in the proceedings.

The Confidential Religious Records at Issue

15. Individual Jehovah's Witnesses can cease their religious adherence and stop associating with their former congregation at any time without any formality. However, when someone formally requests to disassociate from Jehovah's Witnesses, as did LW and GW, three congregation elders confirm that request and prepare a confidential religious record of their religious adherence decision. This is done pursuant to religious practice and procedure. In the cases at bar, the only record at issue is that confidential religious record.

OIPC, Order P22-03, *Grand Forks Congregation of Jehovah's Witnesses (Re)*, [2022 BCIPC 35](#) at paras 17-18, 40-41 [Order P22-03]. [Affidavit No. 1 of Valerie Bowles made 26 July 2022 (Bowles Affidavit), Exhibit A]. Affidavit No. 1 of Kevin Knaus, made 4 November 2021 at paras 27, 29-32 [Bowles Affidavit, Exhibit E].

Affidavit No. 1 of John Vabuolas, made 3 November 2021 at paras 16-18, 23 [Bowles Affidavit, Exhibit C].

Affidavit No. 1 of Paul Sidhu, made 4 November 2021 at paras 12-14, 18, 23 [Bowles Affidavit, Exhibit D].

16. John Vabuolas and Paul Sidhu represent the three elders who made the religious adherence decisions in their respective congregations. The elders declined to provide LW (or his father, Randy Wall), GW, or the Commissioner's delegate with a copy of the confidential religious record. They provided evidence that stated compulsion to disclose the records would violate their religious practice and individual religious conscience. The record contains the elders' private and prayerful religious deliberations and expressions. There is no evidence that any of these elders breached their Scriptural requirement of confidentiality.
17. Through their affidavits, Mr. Vabuolas and Mr. Sidhu provided LW's and GW's respective personal information contained in the records in dispute. Contrary to what the Commissioner's delegate appears to have misapprehended, the personal information of LW and GW is not at issue.
18. However, the elders asserted under oath that handing over the full confidential religious record to the Commissioner's delegate will disclose details of private and confidential religious deliberations, violating their religious practice and conscience. It would also require the Commissioner's delegate to enter into the forbidden domain of interpreting religious communications in an attempt to second-guess the elder's distinguishing personal information from spiritual deliberations on religious adherence.
19. LW and GW both requested that the Commissioner review the elders' decision regarding their access requests.

PIPA's Framework

20. Requests for access to personal information held by private organizations and persons are governed by *PIPA*.
21. *PIPA* purports to govern how all organizations in British Columbia, save for certain exceptions, must collect, use, and disclose personal information.
22. "Organization" is defined broadly to include "a person, an unincorporated association, a trade union, a trust or a not for profit organization" (*PIPA*, s 1, "organization").
23. *PIPA* grants individuals a broad and plenary right of access to personal information and as to how it is being used and disclosed (*PIPA*, s 23).

24. *PIPA* contains *exemptions* that protect a narrow spectrum of freedom of expression rights under the *Charter*, section 2(b); the collection, use, or disclosure of personal information "for journalistic, artistic or literary purposes" is exempted (*PIPA*, s 3(2)(b)). There is no exemption for *religious purposes*.
25. *PIPA* allows an exemption for "confidential commercial information," which enjoys no privilege at law (*PIPA*, s 23(3)(b)).
26. *PIPA* allows an organization to refuse disclosure of information "protected by solicitor-client privilege" (*PIPA*, s 23(3)(a)). It is not necessary for the adjudicator to inspect such documents to verify a claim of solicitor-client privilege.
27. *PIPA* grants to the Commissioner extraordinary, far-reaching, and sweeping statutory powers under *PIPA*, including:
 - investigating and resolving privacy complaints (*PIPA*, ss 36-53);
 - issuing binding orders (*PIPA*, s 52);
 - initiating commissioner-led investigations and audits of organizations (*PIPA*, ss 36, 38);
 - ordering the production of *any* document—not limited to documents containing personal information (*PIPA*, s 38(1)(b));
 - entering without a warrant any premises other than a personal residence, occupied by an organization, and:
 - examining without a warrant any information in a document—not limited to documents containing personal information (*PIPA*, ss 38(2)(a), (c)); and
 - obtaining copies of documents without a warrant (*PIPA*, ss 38(2)(a), (c)); and
 - conducting inquiries, and determining how an inquiry will be conducted, including the power to decide whether or not to hold a hearing (*PIPA*, ss 50(2)-50(4)).
28. Orders made by the Commissioner and his delegates are subject to judicial review (*PIPA*, s 53).

Inquiry Before the Commissioner's Delegate

29. On 1 April 2021 Mr. Vabuolas, Mr. Sidhu, and Watch Tower Canada filed a Notice of Civil Claim with the Supreme Court of British Columbia (civil proceeding) seeking declaratory and other relief with respect to the constitutionality of *PIPA*.

30. On 26 May 2021 the Commissioner issued formal notices of written inquiries with respect to both LW's and GW's access to information requests.
31. On 20 September 2021 the Supreme Court of British Columbia stayed the civil proceeding pending the outcome of the IPC proceedings.

[Watch Tower Bible and Tract Society of Canada v British Columbia \(AG\)](#),
2021 BCSC 1829.
32. The inquiries were joined into one inquiry. The Petitioners requested an oral adversarial hearing, including cross-examination. The AGBC objected. The Commissioner's Director of Adjudication, Elizabeth Barker (subsequently the appointed adjudicator), denied this request, holding an oral inquiry was not necessary.
33. The Petitioners filed joint submissions for the written inquiry, including the affidavits referred to at paragraphs 8 and 9 above, and an affidavit sworn by legal assistant Valerie Bowles to set out before the Commissioner's delegate all relevant correspondence.
34. The AGBC filed written submissions but no evidence.
35. On behalf of Respondent LW, Randy Wall submitted seven affidavits, and GW submitted one affidavit (besides his own), from various individuals, including an anonymous person, relating the affiants' personal opinions and experiences. The Petitioners requested the Commissioner's delegate strike the non-party affidavits from the record as they were irrelevant, immaterial, scandalous, and inflammatory. The Commissioner's delegate refused.
36. The Petitioners filed reply submissions, including second affidavits from Kevin Knaus and Valerie Bowles. In reply to the AGBC's assertion that Jehovah's Witnesses in the United Kingdom disclose confidential religious records in response to similar data requests, the Petitioners provided an affidavit from a solicitor in the United Kingdom who assists the community of Jehovah's Witnesses in that country on data request issues.
37. The Commissioner's delegate decided the eight non-party affidavits filed by LW and GW were neither relevant nor material to the issues to be decided and gave them no weight. The affidavits, however, remain part of the record.
38. Consequently, besides the Petitioners' affidavits, only GW's own affidavit was considered by the Commissioner's delegate when deciding to uphold the constitutionality of *PIPA* and issue Order P22-03.

Order P22-03

39. The Commissioner's delegate found that *PIPA* applies to congregations, its elders, and the records at issue. The Commissioner's delegate further concluded that sections 23 and 38 of *PIPA* infringe the fundamental religious freedom and conscience of congregation elders, including Mr. Vabuolas and Mr. Sidhu, who have, moreover, an objectively reasonable expectation of privacy over the records based on their religious conscience.
40. Despite these findings, and even though the AGBC tendered no *Charter* section 1 evidence, the Commissioner's delegate found that *PIPA*'s violation of section 2(a) of the *Charter* was justified.
41. The Commissioner's delegate purported to compel the elders under *PIPA*, section 38(1)(b), to produce the records to her for the purpose of review and potential disclosure of the confidential religious record to LW and GW. The Commissioner's delegate was not satisfied with the elders' sworn description of the records in dispute and with the personal information of GW and LW voluntarily provided to the extent permitted by their religious convictions and practices. The Commissioner's delegate insisted that a line-by-line review and analysis of the confidential religious record be conducted.

Part 3: LEGAL BASIS

42. Order P22-03 should be quashed and *PIPA* declared unconstitutional for the following reasons:
 - (a) The Commissioner's delegate erred in law by failing to find that in addition to sections 23(1)(a) and 38(1)(b) of *PIPA*, sections 1 and 3 also infringe the Petitioners' section 2(a) *Charter* right to freedom of religion. Sections 1 and 3 of *PIPA* unconstitutionally grant to the Commissioner jurisdiction over the Petitioners and the confidential religious records at issue. As explained below, section 1 of *PIPA* is overinclusive, and section 3 of *PIPA* is underinclusive;
 - (b) The Commissioner's delegate erred in law when she found that *PIPA* does not breach sections 2(b), 2(d), and 8 of the *Charter*. The Petitioners' unchallenged evidence in the inquiry established that (i) *PIPA* infringes the Petitioners' freedom of expression and freedom of religious association, and (ii) section 38 of *PIPA* further infringes the Petitioners' right to freedom from unreasonable search and seizure and the constitutional right to a reasonable expectation of privacy against coercive state intrusion; and

- (c) The Commissioner's delegate erred in law by finding that *PIPA's Charter*-infringing measures are justified under section 1 of the *Charter*. The Commissioner's delegate erred in failing to consider justification for permitting *PIPA* to expressly protect a limited number of expressive activities under the *Charter*, section 2(b) - and even non-*Charter* rights - while also ignoring the Petitioners' section 2(a) *Charter* rights. The AGBC provided no evidence pursuant to its burden under section 1 of the *Charter*.

Standard of Review

43. The issues on review concern whether the Commissioner's enabling statute, *PIPA*, violates the *Charter*. An administrative decision maker's interpretation of a statute's compliance with the *Charter* is a question of law reviewable on a standard of correctness. No deference is owed to the *Charter* analysis of the Commissioner's delegate.

[*Canada \(Minister of Citizenship and Immigration\) v Vavilov*](#), 2019 SCC 65 at para 57.

Sections 1 and 3 of PIPA Also Violate the Charter

44. While the Commissioner's delegate found that sections 23(1)(a) and 38(1)(b) of *PIPA* infringe the congregation elders' *Charter*, section 2(a), right to freedom of religion, she erred by not finding that sections 1 and 3 of *PIPA* also infringe their *Charter* rights.
45. Sections 1 and 3 of *PIPA* are the foundation of *PIPA's* infringement of the elders' *Charter* rights. These provisions purport to capture (while failing to exempt) the congregation elders as "organizations," and the confidential religious records as information subject to *PIPA*. Sections 1 and 3 of *PIPA* open the door to coercive intrusion into purely religious and spiritual deliberations and provide the Commissioner and his delegates, as stated in Order P22-03, with "**oversight powers** and ability to independently examine documents and **scrutinize** organizations' personal information practices."

Order P22-03, *supra* at para 105 [emphasis added] [Bowles Affidavit, Exhibit A].

46. ***PIPA*, sections 1 and 3(1), are overinclusive:** Section 3(1) of *PIPA* provides that *PIPA* "applies to every organization." Section 1 of *PIPA* defines "organization" as including, "a person, an unincorporated association, a trade union, a trust or a not for profit organization," but does not include, amongst other things, "an individual acting in a personal or domestic capacity" (*PIPA*, ss 1, 3(1) [emphasis added]).

47. Section 1 of *PIPA* also states that "personal information" means "information about an identifiable individual and includes employee personal information but does not include (a) contact information, or (b) work production information."
48. *PIPA*, sections 1 and 3(1), are therefore overinclusive as they capture congregation elders in their religious capacity and the non-commercial, purely religious, confidential records. The elders and the records are thus exposed to *PIPA*'s entire legislative scheme, including the provisions the Commissioner's delegate has found infringe their fundamental right to religious freedom. There are no statutory or administrative guidelines to direct this untrammelled exercise of discretion and scrutiny in matters of religious practice and individual religious conscience.
49. ***PIPA*, section 3(2), is underinclusive:** Section 3(2) of *PIPA* provides a list of exemptions from the application of *PIPA*. This includes a blanket exemption for "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" (*PIPA*, s 3(2)(b) [emphasis added]).
50. There is no exemption for the confidential religious records at issue in this inquiry since they were created for *religious* purposes. Failure to respect religious freedom as a fundamental *Charter* right while granting an exemption for journalistic, artistic, or literary purposes creates a hierarchy of *Charter* rights which, in itself, is unconstitutional. It is also patent discrimination.
51. By failing to provide an exemption for religious purposes, the elders and their purely religious activities are, through the interplay of sections 1 and 3, subjected to *PIPA*'s legislative scheme as a whole. *PIPA*'s rules on consent, access, use, and disclosure of personal information can be invoked to frustrate elders in their sacred religious obligation to conscientiously determine who can be one of Jehovah's Witnesses. Sections 1 and 3 should also be held unconstitutional.

PIPA Violates sections 2(b) and 2(d) of the Charter

52. The Commissioner's delegate concluded the Petitioners did not demonstrate how *PIPA* interferes with the elders' freedom of expression and freedom of association. This is an error in fact and law, as the Petitioners' affidavit evidence and inquiry submissions provide substantial evidence and explanation to demonstrate how these fundamental freedoms are also infringed by sections 1, 3, 23, and 38 of *PIPA*.

53. Sections 2(b) and 2(d) of the *Charter* can either be assessed separately, or together with section 2(a), given the congregation elders' *Charter* rights are intertwined and co-extensive. Nonetheless, there is a sufficient evidentiary basis to find *Charter* violations under each of these sections.

[R v JJ](#), 2022 SCC 28 at paras 114-115.

54. **Freedom of expression:** The uncontradicted evidence is that any form of compelled disclosure of, or access to the records would interfere with the congregation elders' ability to express their religious views when making religious adherence decisions. As Paul Sidhu explained in his affidavit:

This is not simply a matter of religious procedure. A confidential religious summary is an expression of the elders' individual and collective deeply-held religious convictions and conscience based on our understanding and application of Holy Scripture to our role as elders and spiritual shepherds. We write this anticipating it will remain strictly confidential.

Affidavit No. 1 of Paul Sidhu made 4 November 2021 at para 25 [Bowles Affidavit, Exhibit D].

Order P22-03, *supra* at para 63 [emphasis added] [Bowles Affidavit, Exhibit A].

55. Mr. Vabuolas, for his part, stated:

The summary is an expression of my private deliberations and expressions as an elder. I prepared this summary with the expectation that this internal religious record should and would remain confidential and read by no one else except, potentially, for a fellow elder who may eventually be appointed to view the information for a necessary religious purpose, most notably a future request for reinstatement. ...

I never imagined that one day someone could read my confidential religious notes. From the start, I expected privacy from having my spiritual thoughts and considerations read by third parties, in particular LW.

Affidavit No. 1 of John Vabuolas made 3 November 2021 at paras 23 and 32 [emphasis added] [Bowles Affidavit, Exhibit C].

56. Kevin Knaus explained the detrimental effect that state-compelled disclosure of congregation elders' confidential records would have on the ability of the elders to freely express themselves. He explained:

Requiring congregation elders to hand over a confidential religious record as requested by LW and GW would be contrary to the elders' religious obligation under canon law and would seriously impede them from carrying out their religious and Scriptural responsibilities before God. It would jeopardize the integrity of the process by exposing the private spiritual deliberations and expressions to any not sharing in this process and decision-making. The three elders would not be free to write down their spiritual views and doctrinal application of Scripture without fear of others or disgruntled individuals from copying or exposing the elders' private spiritual thoughts for personal, malicious, or troublesome purposes. ...

Such potential risk of violation of the elders' sacred duty would only have an adverse effect on their ability to freely, after prayer and scriptural deliberation, write down their Scriptural assessment, decision and reasons.

Affidavit No. 1 of Kevin Knaus made 4 November 2021 at paras 40-41 [emphasis added] [Bowles Affidavit, Exhibit E].

57. Order P22-03 requires the elders' private deliberations and expressions be entirely disclosed to the Commissioner and his delegate.
58. The undisputed evidence is that compelled access and disclosure hinder the elders' ability to freely express their religious views which, in turn, jeopardizes their ability to spiritually support the congregation.
59. **Freedom of association:** Although religious associational rights receive protection under section 2(a) of the *Charter*, full meaning must also be given to section 2(d) rights. Freedom of religious association must protect against compelled disclosure of confidential determinations of religious adherence. Creating, preserving, and maintaining strict confidentiality over confidential religious adherence decisions is critical to the elders' ability to protect the religious associational rights of their congregations in accordance with religious standards.
Lavigne v Ontario Public Service Employees Union, [1991] 2 SCR 211, 1991 CarswellOnt 1038 at para 239.
60. The Petitioners' concern here is *not* that the Commissioner's delegate will judge the merits of religious adherence decisions, contrary to what is stated at paragraph 148 of Order P22-03. The issue is that by exercising jurisdiction and oversight over the congregation elders' confidential religious records, by scrutinizing their personal information practices, and by compelling access and disclosure to the records, the Commissioner and his delegate is interfering with the elders' spiritual role and jeopardizing the integrity of the process surrounding religious adherence decisions. This is clearly evident in the elders' affidavits.

61. The constitutional freedom to "organize their churches and communities," prohibits the Commissioner and his delegates from examining confidential internal religious records that concern only issues of spiritual status and association. Such spiritual status decisions and the religious procedure governing them, including congregation recordkeeping, are non-justiciable.

[Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine \(Village\)](#), 2004 SCC 48 at para 68.
[Highwood Congregation](#), *supra* at paras 38-39.

PIPA Violates section 8 of the Charter

62. There was no order to produce any records in this inquiry until Order P22-03 was made. The Petitioners nonetheless anticipated this issue arising; their affidavits and inquiry submissions explained that requiring the records be disclosed, even to the Commissioner's delegate via a potential section 38 *PIPA* order, would constitute a serious infringement of the elders' rights and freedoms under section 2(a) of the *Charter*. In their reply submissions, the Petitioners reiterated this concern and added that a production order would trigger a direct constitutional challenge to section 38 of *PIPA*, on the basis of section 2(a) and section 8 of the *Charter*.

63. The AGBC addressed in its inquiry submissions the authority of the Commissioner's delegate under section 38 of *PIPA* to order production of the records at issue. Later, however, the AGBC declined to make additional submissions on section 8 of the *Charter*.

Letter from E. Barker to J. Penner dated 2 June 2022 & emails between R. Rohrick & J. Penner dated 6-7 June 2022 [Bowles Affidavit, Exhibit Q].

64. In her *Charter* analysis, the Commissioner's delegate found that a production order under section 38 would constitute a "seizure" for *Charter* section 8 purposes. She erred in law when opining it would not be an "unreasonable" seizure. The Commissioner's delegate appears to have provided three reasons why she did not view section 38 as an unreasonable seizure: 1) In her view, compliance with *PIPA* can be ascertained only by examining the records; 2) The purpose of examining the records is only to decide what part of the records must be disclosed to LW and GW; and 3) There exists a mechanism for review of the production order – judicial review.
65. The conclusion of the Commissioner's delegate is wrong. A crucial reason why an Order made under section 38 of *PIPA* is an unreasonable seizure and therefore in violation of section 8 of the *Charter* is because section 38(5) provides that an

organization must comply with the production order, "[d]espite any other enactment or any privilege afforded by the law of evidence."

66. When production orders under the *Criminal Code* are issued for confidential religious records or communications or when elders are summoned to testify in criminal proceedings with regard to confidential religious information and communications, the *Criminal Code* allows them to challenge the production order or the subpoena and argue the information should be privileged on a case-by-case basis. *PIPA*, however, explicitly forbids raising any such privilege to challenge a production order. Subsequent judicial review does not cure this deficiency.
67. Moreover, although Order P22-03 compels the congregation elders to provide the records only to the Commissioner's delegate at this stage, there are various circumstances in which section 41 of *PIPA* permits the Commissioner to disclose information it receives.
68. If this Honourable Court concludes that *PIPA*, sections 1, 3, and 23, unjustifiably violate the congregation elders' *Charter* rights, it is not strictly necessary, for the purpose of this case, to find that section 38 also violates section 8 of the *Charter*. Order P22-03 can simply be quashed, and the order found to be *ultra vires* the Commissioner and his delegate. Nevertheless, there are sufficient grounds to also declare that section 38 violates the Petitioners' section 8 *Charter* right to be secure against unreasonable search or seizure.

PIPA Not Saved by section 1 of the Charter

69. The Commissioner's delegate erred in law by finding that *PIPA*'s infringement of the congregation elders' *Charter* rights is justified under section 1 of the *Charter*. The *Oakes* test has not been met. The AGBC did not adduce any section 1 evidence and failed to meet its burden of proof.
70. First, there was (and is) no evidence to support the finding that the purpose for limiting the congregation elders' rights is pressing and substantial. This stage of analysis requires not simply considering *PIPA*'s overall purpose, as did the Commissioner's delegate, but rather the purpose of the infringing measures. The appropriate question is: Did the Attorney General demonstrate that a pressing and substantial purpose is furthered by *PIPA* capturing religious ministers and confidential religious information? The answer is no. There is no evidence of such.

[Fraser v Canada \(AG\)](#), 2020 SCC 28 at para 125.

71. Second, the Commissioner's delegate erred when finding that *PIPA* interferes with the Petitioners' *Charter* rights no more than necessary, the minimal impairment part of the test.
72. The Commissioner's delegate held that providing an exemption for religious organizations would not be an acceptable alternative because such an exemption "would completely undermine and defeat that purpose." The Commissioner's delegate failed to explain, however, how *PIPA* is able to achieve that purpose while providing a blanket exemption for the collection, use, and disclosure "for journalistic, artistic or literary purposes." And the Commissioner's delegate failed to explain how *PIPA* is able to achieve that purpose while providing an exemption for "confidential *commercial* information," but not confidential *religious* information.

Order P22-03, *supra* at para 120 [Bowles Affidavit, Exhibit A].

73. The reality is that less drastic means *are* available, already exist in the statute, and are contained in similar legislation in Alberta and Quebec.
74. Section 38 of *PIPA* further interferes with the congregation elders' rights more than necessary by empowering the Commissioner to order the production of confidential religious records when less drastic means to adjudicate the inquiry exist. Petitioners tendered affidavit evidence under oath providing LW's and GW's respective personal information contained in the records in dispute. If the Commissioner's delegate had questions about the elders' affidavit evidence, she could have held an oral hearing to seek clarification. The Commissioner has decided inquiries dealing with solicitor/client privileged records on the basis of affidavit evidence.

[University of Victoria \(Re\)](#), 2020 BCIPC 7 at paras 10, 13-16.

75. Lastly, the Commissioner's delegate further erred when she determined the infringing measures are proportionate in their effect. This stage of analysis requires weighing the deleterious effects of the infringing measures with the public good achieved by infringing the *Charter* rights. Again, the AGBC did not adduce any legislative or adjudicative evidence to prove that the public good is achieved by subjecting religious ministers and, in particular, confidential religious records pertaining to religious adherence decisions, to *PIPA*. The effects are entirely disproportionate.

Part 4: MATERIAL TO BE RELIED ON

- 76. The entire record before the Information and Privacy Commissioner;
- 77. Affidavit No. 1 of Valerie Bowles made 26 July 2022; and
- 78. Such further and other materials as counsel may advise and this Honourable Court may permit.

The petitioners estimate that the hearing of the petition will take 2 days
[time estimate]

Date: 2 August 2022



Signature of counsel for the petitioners
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W. Glen How & Associates LLP

Co-counsel for the petitioners
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To be completed by the court only:

Order made

- in the terms requested in paragraphs _____ of Part 1 of this petition
- with the following variations and additional terms:

Date: _____

Signature of Judge Master

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

B E T W E E N :

WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA,
JOHN VABUOLAS and PAUL SIDHU

PETITIONERS

AND:

OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER FOR BRITISH COLUMBIA,
GABRIEL-LIBERTY WALL, and GREGORY WESTGARDE

RESPONDENTS

PETITION TO THE COURT

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