File No. CI 20-01-29284

THE QUEEN'S BENCH
Winnipeg Centre

APPLICATION UNDER: *The Constitutional Questions Act*, C.C.S.M., c. 180

AND UNDER: The Court of Queen's Bench Rules, M.R. 553/88

IN THE MATTER OF: *The Public Health Act*, C.C.S.M. c. P210

B E T W E E N:

GATEWAY BIBLE BAPTIST CHURCH, PEMBINA VALLEY BAPTIST CHURCH, REDEEMING GRACE BIBLE CHURCH, THOMAS REMPEL, GRACE COVENANT CHURCH, SLAVIC BAPTIST CHURCH, CHRISTIAN CHURCH OF MORDEN, BIBLE BAPTIST CHURCH, TOBIAS TISSEN, ROSS MACKAY

Applicants,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA, DR. BRENT ROUSSIN in his capacity as CHIEF PUBLIC HEALTH OFFICER OF MANITOBA, and DR. JAZZ ATWAL in his capacity as ACTING DEPUTY CHIEF OFFICER OF HEALTH OF MANITOBA

Respondents.

APPLICATION BRIEF OF THE RESPONDENTS

Manitoba Justice, Legal Services Branch
Constitutional Law Section

Per: Michael Conner, Heather Leonoff Q.C., Denis Guénette and Sean Boyd

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APPLICATION BRIEF OF THE RESPONDENTS

I. OVERVIEW

1. Since March 2020, Manitoba along with the rest of the world has been in the grips of fighting COVID-19, the worst global pandemic in over a century. COVID-19 has infected over 120 million people and killed more than 2.5 million people worldwide. Most of the deaths have occurred in persons over age 60 or those with underlying health conditions. COVID-19 has also caused serious illness, requiring hospitalization and admission to intensive care units (ICU) across a wide spectrum of ages. For some, COVID-19 has had prolonged health implications, though this phenomenon is not yet well-understood. While new vaccines have been developed, much uncertainty remains due to variants of concern that are more infectious and virulent.

2. SARS-CoV-2, the new human virus that causes COVID-19, is highly communicable. Without public health interventions, the virus would grow exponentially. The rapid transmission of COVID-19 through the community would overwhelm the health care system leading to far more deaths and serious illness than we have experienced so far. We have witnessed this elsewhere. Therefore, to stop widespread exponential growth, public health officials all over the world have diligently and assiduously taken measures to "flatten the curve" of the pandemic. Since SARS-CoV-2 spreads through contact, one important and effective public health measure to contain the disease is to limit gatherings, especially prolonged contact indoors.

3. The Applicants challenge the constitutionality of specific sections of Manitoba's emergency public health orders made on November 21, 2020, December 22, 2020 and January 8, 2021 (the Impugned PHOs). They assert that restrictions on public gatherings, gatherings at private residences and the temporary closure of places of worship infringe sections 2(a), 2(b), 2(c), 7 and 15 of the *Canadian Charter of Rights and Freedoms*. They have also challenged the Impugned PHOs on administrative law grounds and under the division of powers (paramountcy).

4. The Respondents (Manitoba) concede that the restrictions on gathering had the effect of limiting the freedoms of religion, expression and peaceful assembly under s. 2 of the *Charter*. It is unnecessary to consider ss. 7 and 15 of the *Charter*. However, the limits on rights were

reasonable, proportionate and justified to address a serious public health emergency: a global pandemic with grave, sometime deadly, consequences.

5. Throughout the pandemic, Manitoba's Chief Public Health Officer (CPHO) in conjunction with experts and officials, has exercised his duty to protect public health, while proportionately balancing the impact on rights with the gravity of the virus. During the first wave, immediate action was taken to limit gatherings in the face of tremendous uncertainty. As the initial threat subsided, restrictions were substantially loosened, businesses re-opened and larger gatherings resumed subject to reasonable precautions such as physical distancing and hygiene. Over the summer months, groups of 50 people were allowed to gather indoors, up to 100 people could gather outdoors and up to 500 persons could attend places of worship for religious services.

6. The circumstances dramatically changed in the fall of 2020. The number of COVID-19 cases spiked along with community spread. The virus began spreading exponentially with cases doubling every 2 weeks. The government's ability to conduct contact tracing effectively was compromised. The numbers of hospitalizations, ICU admissions and deaths were skyrocketing. The province's health care system was in serious jeopardy of being overwhelmed. Modelling in mid-November projected that without decisive action we would exceed our ICU capacity by November 23 and our hospital capacity by mid-December. Herculean efforts were made by front line medical staff to provide care. The CPHO took heed of the scientific and epidemiological evidence. He put the Capital Region into Level Red (Critical) on the Pandemic Response System and, ten days later, the entire province followed suit on November 12. He introduced new public health measures to significantly limit gatherings including the Impugned PHOs. The public message was simple and clear: if at all possible, limit gathering and stay home.

7. For a 13 week period during the height of the second wave, these emergency measures were urgently required and justified to achieve an overarching objective of paramount public importance: to save lives and minimize serious illness. A lesser response could have had dire consequences. The CPHO could not afford to be wrong.

8. This case is not a public inquiry into the entire national and provincial responses to the pandemic. This is a challenge to specific portions of three public health orders.

II. FACTUAL BACKGROUND

A. SARS Co-V-2 and the COVID-19 Pandemic

9. On January 30, 2020, the World Health Organization declared the COVID-19 pandemic a Public Health Emergency of International Concern. COVID-19 is a disease caused by a novel coronavirus called SARS-CoV-2. The first case was identified in Wuhan, China in December 2019 but soon spread all over the world. As of early March there were 114 million cases and more than 2.5 million deaths. The numbers continue to climb. The first known case of the virus in Manitoba was on March 12, 2020.[1] As of early February, there have been over 30,000 cases in Manitoba and more than 2,500 serious cases including hospitalizations or deaths.[2]

10. COVID-19 is highly communicable and contagious. The virus spreads from person to person through respiratory droplets and aerosols (smaller droplets) that are expelled when a person breathes, talks, coughs, sneezes, sings or shouts. It is primarily transmitted when the virus comes into contact with another person's nose, mouth or eyes. It may also be spread when a person touches another person (e.g. handshake) or touches a surface containing the virus and then transfers it to their mucous membrane.[3]

11. Scientific studies have demonstrated that SARS-CoV-2 can be transmitted by persons who are asymptomatic (never develop symptoms) and especially those who are pre-symptomatic (do not yet display symptoms but will develop them). There is strong scientific evidence that transmission of SARS-CoV-2 primarily occurs from a few days before symptom onset until about five days after.[4] While healthy children tend to experience less severe disease, they can transmit the virus. There is evidence that older children and teenagers can spread the virus as efficiently as adults.[5]

12. Since the virus is typically spread through respiratory droplets, gatherings involving prolonged close contact are of particular concern. According to Health Canada guidelines, a high risk exposure (close contact) includes anyone who has shared an indoor space with a

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[1] Affidavit of Brent Roussin [Roussin], para. 21-22
[2] Affidavit of Carla Loeppky [Loeppky], Exhibit H
[3] Roussin, para. 24-26 and Exhibit 3; Affidavit of Jason Kindrachuk [Kindrachuk], Exhibit B, p. 6-7
[4] Roussin, para. 26; Kindrachuk, Exhibit B, pp. 7-10
[5] Roussin, para. 26; Kindrachuk, Exhibit B, p. 10

positive case for a prolonged period (15 minutes over a 24 hour period). Certain locations and activities pose a greater risk. Most transmission occurs in indoor settings, especially with poor ventilation. Singing, talking loudly or breathing heavily can also increase the risk of transmission. This explains why gathering in places such as fitness classes, theatres, restaurants, places of worship and choir practice are of particular concern. Multiple super-spreader events have been linked to close contacts including at places of worship.[6] In Manitoba, Epidemiology and Surveillance identified as many as ten clusters or outbreaks in relation to faith-based gatherings or funerals in many regions of the province, which is consistent with data from other jurisdictions and the scientific literature.[7] For the same reason, private residences have been identified as a significant source of transmission.[8]

13. COVID-19 entails a range of clinical symptoms. The most common symptoms include fever, cough, fatigue, shortness of breath, loss of appetite, loss of smell and taste. The disease can vary widely in seriousness. Some people remain asymptomatic. Others experience relatively mild symptoms or feel very ill but recover fully. But for some, COVID-19 is very serious leading to hospitalization, ICU admission or death. Older adults (over age 60) and people of any age with a variety of underlying medical conditions are at greater risk of experiencing severe disease and outcomes. Among others, these underlying comorbidities include heart disease, lung disease, hypertension, diabetes, kidney disease, liver disease, obesity, along with other immunocompromised individuals (e.g. persons with cancer or undergoing chemotherapy).[9]

14. In Manitoba, data current to February 8, 2021 shows that 8.1% of all COVID-19 cases are very severe, resulting in hospitalization or death. While a large majority of deaths have occurred in people over age 60, fatalities are not limited to that category. Moreover, approximately one third of hospitalizations in Manitoba and 44% of ICU admissions have been in persons under the age of 60.[10] Indigenous people in Manitoba are also more vulnerable to COVID-19. For example a disproportionate number of COVID-19 cases (31%) have been First Nations persons,

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[6] Roussin, paras. 26-27, 155-160, Exhibits 12 and 13; Kindrachuk, Exhibit B, p. 11-12
[7] Loeppky, para. 14; Roussin para. 160
[8] Affidavit of Jay Bhattacharya [Bhattacharya], Exhibit C, p. 19, 26
[9] Roussin, para. 30-33
[10] Roussin, para. 33-35, Exhibit 4 and 21; Loeppky, Exhibit H

more than half of which have been off reserve. Among First Nation individuals, the median age is 51 for hospitalizations and 57 for ICU admissions.

15. For a certain segment of the population, COVID-19 has resulted in persistent long-term symptoms, sometimes serious such as difficulty breathing. These "long hauler" cases are not limited to an older demographic. In one journal, it was estimated that 10% of people infected with COVID-19 experienced prolonged symptoms. An Italian study suggested 44% of recovered COVID-19 patients reported a worsened quality of life. However, further study is needed and it remains too early to draw any firm conclusions about the long-term effects.[11]

16. SARS-CoV-2, like all viruses, changes as it replicates. Many of these mutations are of little clinical significance. However, the more the virus is allowed to spread, the greater the opportunity for variants of concern to develop. These variants may exhibit increased transmissibility or disease severity. They may also impact the efficacy of vaccines or therapeutic treatments. To date, three variants of concern have been identified, which are present in Manitoba.[12]

17. SARS-CoV-2 is a new human virus. While far more is known about the virus today than at the beginning of the pandemic in early 2020, much uncertainty remains. The state of scientific knowledge continues to evolve rapidly and many studies continue around the world to shed light on difficult questions such as whether immunity is lasting after exposure or vaccination, the impact on children, variants of concern, potential long-term effects of COVID-19, the efficacy of non-pharmaceutical interventions, among many others. Studies are likely to continue long after the pandemic ends. Despite the uncertainty, public health decisions must be made quickly, in real-time under rapidly changing epidemiological situations as the pandemic unfolds. These decisions are based on the best available scientific evidence at the time.[13]

B. Manitoba's Pandemic Response

18. The office of the Chief Public Health Officer along with the Department of Health and Seniors Care play a leading role in Manitoba's response to the COVID-19 pandemic. They work

[11] Roussin, para. 36; Kindrachuk, p. 15
[12] Roussin, para. 28-29; Kindrachuk, Exhibit B, p. 16, 17, 18
[13] Roussin, paras. 37-45; Kindrachuk, Exhibit B, p. 14-17

closely with many specialists in a variety of health disciplines. In February 2020, Manitoba established an Incident Command Structure to manage the pandemic response. It is co-chaired by Dr. Brent Roussin, Chief Public Health Officer and Lanette Siragusa, Chief Nursing Officer from Shared Health Inc. In addition to the Incident Command, the government has established a Testing Task Force to oversee testing initiatives, the Centralized COVID Cases and Contact Team to operate contact tracing and the Vaccine Task Force to plan and conduct vaccinations.[14]

19. Notably, Dr. Roussin and his team continually review new scientific evidence as it emerges from around the world. Officials in Manitoba work collaboratively with their counterparts and experts from across Canada and internationally to share knowledge, experience and best practices. The fight against COVID-19 has been the subject of extensive interjurisdictional coordination and efforts. The CPHO's office regularly participates in meetings of Federal/Provincial/Territorial special advisory and technical advisory committees to coordinate the response and share the most up-to-date information about COVID-19. Weekly meetings are held among the chief medical officers of health from every Canadian jurisdiction. Dr. Tam, the Chief Public Health Officer of Canada is also in regular contact with her international counterparts to keep abreast of evolving scientific knowledge and best practices.[15]

20. When it comes to public health decision-making, a wide variety of experts regularly share information upon which the CPHO can rely. This includes public health experts, epidemiologists, basic scientists such as virologists and immunologists, laboratory experts, acute care specialists and other health care professionals, policy analysts, the Department of Health and Seniors care and elected officials.[16] Dr. Roussin also brings to bear his expertise in Public Health and Preventive Medicine, a medical specialty concerned with the health of populations.

21. In addition to meeting the requirements of *The Public Health Act*, the CPHO follows the principles underlying sound and ethical public health decision-making, namely: effectiveness, proportionality, necessity, least infringement and public justification. These principles have also been summarized as (1) the harm principle; (2) least restrictive or coercive means; (3)

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[14] Roussin, paras. 15-19
[15] Roussin, paras. 42-45
[16] Roussin, para. 41

reciprocity (public assistance for citizens who comply with their duties) and transparency (e.g. engaging with affected stakeholders).[17]

C. Public Health Orders are Progressive and Responsive to the course of the Pandemic

22. As Dr. Roussin explains, since March 2020, Manitoba has implemented a variety of measures in response to the COVID-19 pandemic, which are generally consistent with measures seen across Canada and the rest of the world. The public health consensus is that limiting the number and duration of contacts is necessary to prevent the exponential spread of SARS-CoV-2 and keep it within manageable limits. If the number of serious COVID-19 cases overwhelms our health care system, this will result in greater morbidity and death including for non-COVID-19 patients. Hence the need to "flatten the curve". The precise scope and extent of measures are informed by the circumstances of the pandemic, epidemiological evidence and a variety of key indicators, such as the rate of growth, increases in serious outcomes (hospitalizations, ICU and deaths), the extent of community transmission, clusters, test positivity rates, capacity for testing and contact tracing and importantly, the strain on the health care system.[18]

23. The public health orders are not static. Public health officials have continually monitored the fluid and evolving pandemic and modified the public health measures progressively to ensure they are responsive to prevailing epidemiological evidence and proportionate.

24. The early response to the pandemic in the spring of 2020 was characterized by limited knowledge and tremendous uncertainty. Public health officials had witnessed what had happened in places like Italy and New York. Starting in March 2020, indoor and outdoor gatherings, including places of worship, were limited to 50 people. Retail establishments remained open with physical distancing but theatres and gyms were closed. Restaurants and hospitality premises were limited to the lesser of 50 people or 50% capacity. Gathering limits were reduced to 10 on March 30. Starting April 1, business not listed in a schedule were closed except for online, pick-up and delivery. Restaurants were restricted to delivery and take-out. At no time did the PHOs place any restrictions on the delivery of health care. Fortunately,

[17] Roussin, para. 54
[18] Roussin, paras. 58, 86-89

Manitoba was spared widespread community transmission and did not to experience a large number of cases during the first wave of the pandemic in the spring of 2020.[19]

25. Beginning May 22, 2020, the gathering restrictions were relaxed to allow 25 people indoors and 50 people outdoors, including places of worship. This reflected the growing understanding that the risk of transmission was greater in indoor settings. As the summer progressed, restrictions were gradually and progressively eased. By June 21, gathering sizes generally increased to 50 people indoors or 100 people outdoors. Many businesses opened to 75% capacity subject to physical distancing requirements. By July 24, businesses could generally fully re-open at full capacity with physical distancing, unless otherwise specified in the orders. Religious services were permitted up to 500 persons or 30% capacity. These restrictions continued essentially in this form until the fall. While life surely did not return completely to normal, as the spectre of COVID-19 continued to loom, the improving circumstances were accompanied by a significant relaxation of public health restrictions and more freedom to gather.[20]

D. Fall 2020 - The "Circuit Break"

26. Things changed dramatically when the second wave hit in the fall of 2020. Particularly after Thanksgiving, the virus began to spread rapidly throughout the community in an uncontrolled manner. The Capital Region was placed under Level Red (Critical) restrictions by the end of October and ten days later, on November 12, the entire province followed suit. The rising number of serious COVID-19 cases was threatening to overwhelm the capacity of our hospitals and ICUs to cope. Our health care system was on the precipice. Unless urgent action was taken to regain control of the virus and significantly reduce the number of hospitalizations and ICU admissions, Manitoba was on the verge of exceeding the ability to deliver urgent care for patients, whether for COVID-19 or otherwise. Swift and decisive action was essential. The

[19] Roussin, para. 94-95
[20] Roussin, para. 98-99. A more detailed chronology of the public health orders pertaining to gatherings and places of worship leading up to, during and after the circuit break can be found at Roussin, paras. 107-154

Impugned PHOs were intended as a "circuit break" to flatten the curve and avoid even greater loss of life or serious illness than was already being experienced.[21]

27. The CPHO's assessment was based on a variety of key indicators, current epidemiological evidence and modelling presented to him in on October 15 and again on November 10, 2020. This evidence included the following:

i) Manitoba was experiencing exponential growth of the virus. New cases were doubling every two weeks.[22] Cases escalated shortly after Thanksgiving (October 12). During the week of October 19-24, Manitoba had 1,038 new cases of COVID-19, close to the higher end of the projected range in the model. There was a significant spike of 480 new cases in one day on October 31. The case numbers were expected to continue rising, leading to greater hospitalizations and death.[23]

ii) Manitoba had the highest per capita rate of active COVID-19 cases in the country.[24]

iii) The test positivity rate had soared to over 10.5% provincially.[25]

iv) Community spread had started to occur rampantly in all regions of the province.[26]

v) The dramatic rise in COVID-19 cases put the effectiveness of the contact tracing program in jeopardy.[27] This is a key public health tool used to prevent the spread of a virus.

vi) Cases in young adults (aged 20-39) and seniors (aged 60 and older) were increasing very quickly. The latter group is at highest risk of severe outcomes. The impact on older and vulnerable populations was very concerning. First Nations had a test positivity rate of over 12% and a disproportionate number of COVID-19 cases.[28]

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[21] Roussin, para. 99-106, 147-151
[22] Loeppky, para. 16; Roussin, para. 102
[23] Affidavit of Lanette Siragusa [Siragusa], para. 15; Loeppky, paras. 16-17, Exhibits E, F, H
[24] Roussin, para. 102
[25] Roussin, para. 102
[26] Roussin, para. 100, 102; Loeppky, para. 16
[27] Loeppky, para. 17
[28] Roussin, para. 103 ; Loeppky, para. 17

vii) COVID-19 related deaths and hospitalizations were rapidly escalating. Epidemiological data shows that 7% of people diagnosed with COVID-19 require hospitalization and 1.3% will require ICU care.[29] When active cases of COVID-19 surge, the system can expect hospitalizations to rise about 10 days later.[30]

viii) The health care system was under tremendous strain. Elective surgeries were delayed because there was a need to redeploy medical staff to critical care, medicine and personal care homes to handle COVID-19 cases. This was exacerbated by the fact some hospital staff were also exposed to the virus.[31]

ix) Modelling presented on November 10th showed that Manitoba was tracking along the worst-case scenario in terms of number of cases. Case numbers were expected to rise to 400-1000 new cases each day by December 2020. Deaths were also expected to rise sharply, potentially doubling to 219 on December 10 with an estimated range of up to 597 deaths on that date. In fact, as of December 10, Manitoba experienced 478 deaths, at the higher end of the projected range.[32]

x) Modelling projected that without intervention, the rapid rise in infections could soon overwhelm our acute care system. COVID-19 patients were projected to require Manitoba's total capacity to provide ICU care by November 23rd and would require 100% of Manitoba's capacity to staff clinical hospital beds by mid-December 2020, leaving no room for other patients. The model was based on a maximum ability to provide ICU care for 124 patients. Manitoba's pre-COVID ICU capacity was 72 patients so the system was already under significant strain. On November 17, there were discussions about developing a triage policy to determine who would receive care in the event critical care resources were depleted. Surgical wards were transitioned into COVID-19 Medical Units and staff were redeployed to create additional ICU capacity.[33]

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[29] Roussin, para. 103; Loeppky, para. 9, 17
[30] Siragusa, para. 15
[31] Siragusa, paras. 10-11
[32] Loeppky, para. 16, 18, Exhibit E and F (pp. 32, 39, 44, 46)
[33] Roussin, para. 104 ; Siragusa, paras. 16-18; Loeppky, para. 15-18, Exhibits E and F (pp. 32, 39, 44, 46)

xi) There was concern that the rise in COVID-19 numbers would coincide with the Christmas holiday season when many hospital staff had planned vacation. Most staff were not able to pick up extra shifts to fill scheduling gaps due to stress and exhaustion.[34]

xii) Numerous protocols and precautions had been implemented to protect vulnerable populations in congregate living settings such as personal care homes and on First Nations communities. These measures worked well in the spring and summer but unfortunately, despite these efforts, outbreaks had occurred in these high risk settings.[35]

xiii) Nine clusters associated with faith-based gatherings, including choir practice and funerals, were identified to have occurred in the fall of 2020.[36]

28. As a result of added burden of COVID-19, on December 10-11, 2020, Manitoba reached a peak of 388 hospitalizations and 129 patients in ICU.[37] Therefore, at its peak, COVID-19 resulted in significantly more patients who required ICU care than the system would normally handle (79% more than the usual 72 patients).

29. Dr. Roussin and public health officials took into account unintended effects of the restrictions such as adverse economic or mental health impacts but in light of the gravity of the situation believed these were the minimum measures necessary to protect public health.[38]

30. After the restrictions were put in place, COVID-19 numbers began to decline, consistent with what the modelling predicted.[39] The Level Red public health measures implemented during the fall of 2020 along with the public's cooperation and compliance with those PHOs changed the trajectory of COVID-19 cases and eased the burden on acute care resources. Manitobans flattened the curve and avoided a disastrous situation.[40]

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[34] Siragusa, para. 20
[35] Siragusa, para. 22; Roussin, para. 165, Exhibits 14-16
[36] Loeppky, para. 14
[37] Siragusa, para. 19
[38] Roussin, para. 87
[39] Loeppky, para. 20, Exhibit F (p. 50-51) and Exhibit G (p. 15, 17)
[40] Siragusa, para. 21; Loeppky, para. 22

E. The Impugned Public Health Orders

31. November 12, 2020 was the first day of the province-wide "Circuit Break" PHO. At that time, places of worship had to close to in-person religious services. Gatherings were limited to 5 persons. Starting November 20, 2020, persons were also no longer allowed to gather in private residences subject to certain exceptions, including for health care, personal care and educational instruction or tutoring.[41]

32. The Applicants challenge specific orders from three PHOs that were in effect during three different time periods:

i) Orders 1(1), 2(1), 15(1) and 15(3) of the November 21, 2020 PHO, in effect from November 22 until December 11, 2020.

ii) Orders 1(1), 2(1), 16(1) and 16(3) of the December 22, 2020 PHO, in effect from December 23, 2020 to January 8, 2021.[42]

iii) Orders 1(1), 2(1), 16(1) and 16(3) of the January 8, 2020 PHO, in effect from January 8 to January 22, 2021.

33. Order 1 in each of these Impugned PHOs dealt with restrictions on gatherings at private residences. The November 21 PHO provided:

> **ORDER 1**
>
> 1(1) Subject to subsections (2) and (3), a person who resides in a private residence must not permit a person who does not normally reside in that residence to enter or remain in the residence.
>
> 1(2) Subsection (1) does not prevent a person from entering the private residence of another person for any of the following purposes:
>
> (a) to provide health care, personal care or housekeeping services;
>
> (b) for a visit between a child and a parent or guardian who does not normally reside with that child;

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[41] Roussin, para. 147-150

[42] The Applicants do not challenge the PHO in effect from December 11 to December 22, however, there was no material difference from the orders that followed on December 22, 2020 or January 8, 2021.

(c) to receive or provide child care;

(d) to provide tutoring or other educational instruction;

(e) to perform construction, renovations, repairs or maintenance;

(f) to deliver items;

(g) to provide real estate or moving services;

(h) to respond to an emergency.

1(3) A person who resides on their own may

(a) have one other person with whom they regularly interact attend at their private residence; and

(b) attend at the private residence of one person with whom they regularly interact.

34. Order 1 of the December 22, 2020 and January 8, 2021 Impugned PHOs were substantially the same. Exceptions were added in subsection 1(2) for a landlord to enter a rented premises and for the purpose of moving residences. Subsection 1(3) was renumbered as 1(4). A new subsection 1(3) added an exception allowing persons to attend at a home based business that was permitted to open under the PHO. A new subsection 1(5) allowed university and college students to live at the private residence of another person in the community where the university or college is located.

35. Order 2 in each of the Impugned PHOs limited public gatherings to five people, except as otherwise permitted. The November 21 PHO provided:

ORDER 2

2(1) Except as otherwise permitted by these Orders, all persons are prohibited from assembling in a gathering of more than five persons at any indoor or outdoor public place or in the common areas of a multi-unit residence

2(2) This Order does not apply to a facility where health care or social services are provided or any part of a facility that is used by a public or private school for instructional purposes.

2(3) For certainty, more than five persons may attend a business or facility that is allowed to open under these Orders if the operator of the business or facility has implemented the applicable public health protection measures set out in these Orders.

36. Order 2 remained substantially the same in the December 22, 2020 and January 8, 2021 PHOs. The one difference was that these two subsequent PHOs included the following exception for organized outdoor gatherings in cars, which had been put in place beginning on December 11, 2020:

> 2(2) This Order does not apply to an organized outdoor gathering or event which persons attend in a motor vehicle if
>
> (a) all persons stay in their motor vehicle at all times while at the site of the gathering or event;
>
> (b) persons in a motor vehicle do not interact with any person not in their motor vehicle while at the site of the gathering or event; and
>
> (c) all persons in a motor vehicle reside in the same residence or receive caregiving services from another person in the motor vehicle.

37. Order 15 in the November 21, 2020 PHO limited gatherings at places of worship. It provided:

> **ORDER 15**
>
> 15(1) Except as permitted by subsections (3) and (4), churches, mosques, synagogues, temples and other places of worship must be closed to the public while these Orders are in effect.
>
> 15(2) Despite subsection (1), religious leaders may conduct services at places of worship so that those services may be made available to the public over the Internet or through other remote means.
>
> 15(3) A funeral, wedding, baptism or similar religious ceremony may take place at a place of worship provided that no more than five persons, other than the officiant, attend the ceremony.
>
> 15(4) This Order does not prevent the premises of a place of worship from being used by a public or private school or for the delivery of health care, child care or social services.

38. Order 15 was renumbered as Order 16 in the December 22 and January 8 PHOs. The restrictions on places of worship remained substantially unchanged except that as of December

11, the following provision was added to allow places of worship to hold an outdoor religious service in vehicles, in accordance with subsection 2(2) discussed above:

> 16(4) This Order does not prevent a church, mosque, synagogue, temple or other place of worship from conducting an outdoor religious service that complies with the requirements of subsection 2(2).

39. Starting on January 22, 2021, restrictions in Impugned PHOs started to ease in light of improving indicators coming out of the Circuit Break, except in northern Manitoba and remote communities. First, outdoor gatherings were relaxed somewhat at private residences. The limit on funerals was expanded to 10 persons. On January 28th, up to two persons could visit a private residence. As of February 12th, the same PHO applied province-wide. Ten persons were now permitted at weddings and funerals. Places of worship could hold in-person services with up to 50 people or 10% of usual capacity.[43] At present, a private residence can allow either two visitors or create a bubble with persons from another residence. Outdoor gatherings have been expanded up to 10 persons on private property or 25 persons on public property. Regular in-person religious services can have up to 100 people or 25% of usual capacity.[44]

40. In total places of worship were temporarily closed to in-person religious services from November 12, 2020 to February 12, 2021, a period of 13 weeks.

[43] Roussin, para. 152-154. A more detailed history of the PHOs is set out at paras. 107-154
[44] COVID-19 Prevention Order (March 25, 2021) **[TAB 7]**.

III. ISSUES

41. This Application raises the following issues:

Administrative law issue

(1) Were the Impugned PHOs *ultra vires* because they failed to restrict rights or freedoms no greater than was reasonably necessary to respond to the COVID-19 public health emergency, as required by section 3 of *The Public Health Act*?

Division of powers issue

(2) Was the Impugned PHO relating to places of worship inoperative under the doctrine of paramountcy because it conflicted with s. 176 of the *Criminal Code*?

***Charter* issues**

(3) Did the restrictions on private gatherings, public gatherings or places of worship imposed in Orders 1(1), 2(1), 15(1) and 15(3) of the Public Health Order dated November 21, 2020, as subsequently amended on December 22, 2020 and January 8, 2021 limit rights under ss. 2(a), 2(b) or 2(c) of the *Charter*?

(4) Did the closure of places of worship in the Impugned PHOs discriminate on the basis of religion contrary to s. 15 of the *Charter*?

(5) Did the restriction on religious services at places of worship or the restriction on gatherings at private homes in the Impugned PHOs interfere with the right to liberty or security of the person contrary to the principles of fundamental justice, pursuant to s. 7 of the *Charter*?

(6) If so, were the restrictions in the Impugned PHOs justified as reasonable limits under s. 1 of the *Charter*?

IV. STANDARD OF REVIEW

Administrative law issue

42. The administrative law question as to whether the Impugned PHOs are *ultra vires* because they fail to comply with s. 3 of *The Public Health Act* is reviewable on a standard of reasonableness.[45]

Division of powers

43. The paramountcy issue is a constitutional question relating to the division of powers, which must be resolved on a standard of correctness.[46]

Charter issues

44. The standard of review in relation to the *Charter* questions is not as straight forward. Courts first determine whether a *Charter* right has been limited as a question of law, applying the correct test. If a *Charter* right has been restricted, the justification framework depends on the source of the breach: an administrative decision or a statutory instrument.

45. In *Doré*, Abella J.A. drew a distinction between the analytical approach when reviewing the constitutionality of a law compared to when reviewing an administrative decision that is said to violate the rights of particular individuals. In the former case, the *Oakes* test applies. In the latter context, a formal s. 1 analysis is not undertaken. Rather, when an administrative decision implicates the *Charter* rights of an individual, the question is whether that decision reflects a proportionate balancing between the *Charter* rights with the objective of the measure. The standard of review is reasonableness. On the other hand, if the administrative decision relates to whether an enabling statute violates the *Charter*, the standard of review is correctness.[47] The difficulty here is determining whether the CPHO's orders should be reviewed as delegated administrative decisions or are the orders more like statutory instruments.

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[45] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] **[TAB 13]**
[46] *Vavilov, supra* at para. 55 **[TAB 13]**
[47] *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*] **[TAB 18]**; *Vavilov, supra,* paras. 55-57 **[TAB 13]**

46. Recently, in *Beaudoin*, a case very similar to the one at bar, Hinkson C.J. applied the *Doré* framework to a judicial review of Dr. Henry's public health orders which *prima facie* violated s. 2 of the *Charter*. He determined that the public health orders were more akin to an administrative decision under delegated authority than a law of general application. The chief provincial health officer was entitled to deference (especially in the areas of science and medicine related to COVID-19), and the appropriate standard of review was reasonableness.[48]

47. On the other hand, in *Taylor v Newfoundland and Labrador*, the court applied the s. 1 *Oakes* test in the context of a *Charter* challenge to public health orders of general application, issued by that province's chief medical officer of health.[49] The orders at issue in that case restricted travel into the province to prevent the spread of COVID-19.

48. Pursuant to s. 67 of *The Public Health Act*, Manitoba's CPHO exercises delegated authority to issue PHOs, with approval of the Minister. Section 67 contemplates different types of orders. For example, some orders could apply to specific persons or places: the CPHO may give directions to a particular health care organization to manage the threat or order a particular place to close. Alternatively, PHOs can also be very broad: the CPHO may restrict all public gatherings.

49. Manitoba submits that the Impugned PHOs relating to gatherings and places of worship are, in essence, akin to legislative instruments of general application rather than an administrative decision that affects only particular individuals.[50] As such, restrictions on *Charter* rights should probably be justified under the s. 1 test rather than under the *Doré* framework.

50. It is acknowledged that the standard of review for these public health orders is not entirely certain. The Impugned PHOs could also be viewed as an administrative decision of delegated authority attracting a reasonableness review under *Doré*.

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[48] *Beaudoin v. British Columbia*, 2021 BCSC 512 [*Beaudoin*] at para. 120, 124, 212-221 **[TAB 10]**
[49] *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 **[TAB 47]**
[50] *Springs of Living Water Centre Inc. v. The Government of Manitoba*, 2020 MBQB 185 at para. 50-51 **[TAB 45]**

51. Regardless, Manitoba submits that in practical terms, little turns on the distinction between the *Doré* proportionality analysis and a formal application of the *Oakes* test under s. 1. The Supreme Court of Canada explained that the *Doré* proportionality analysis finds "analytical harmony" with and "works the same justificatory muscles" as the *Oakes* test.[51]. Moreover, under either framework, considerable deference is owed to government. Abella J. explained that "both contemplate giving a 'margin of appreciation', or deference, to administrative and legislative bodies" when balancing *Charter* rights and broader objectives.[52] Chief Justice Hinkson held that deference was particularly apt when dealing with complex areas of science and medicine in relation to COVID-19, which courts are not well-suited to resolve.

52. For the purpose of this Application, Manitoba is content to analyse the Impugned PHOs under s. 1 of the *Charter*. Regardless of which framework is adopted, Manitoba argues the public health orders were proportionate, reasonable and justified.

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[51] *Loyola High School v. Quebec (A.G.)*, 2015 SCC 12 at para. 40, cited in *Beaudoin, supra* at para. 217. **[TAB 27]**
[52] *Doré, supra*, 2012 SCC 12 at para. 57 **[TAB 18]**

V. ANALYSIS

A. Overview

53. The Applicants challenge the Impugned PHOs on three grounds. First, on administrative law grounds, they argue that the Impugned PHOs are *ultra vires* because they fail to impose restrictions that are no greater than reasonably necessary to respond to a public health emergency, as required by section 3 of *The Public Health Act*. Second, the Applicants argue that the restrictions on religious services are inoperative under the paramountcy doctrine due to a conflict with s. 176 of the *Criminal Code* (wilfully obstruct or disturb a religious service). Finally, they allege that the Impugned PHOs violate ss. 2(a), 2(b), 2(c), 7 and 15 of the *Charter*.

54. The Applicants' administrative law argument under s. 3 of the *PHA* largely mirrors the minimal impairment branch of the s. 1 analysis. Manitoba intends to address it in that context.

55. There is no merit to the paramountcy argument. There is no conflict between the Impugned PHOs pertaining to religious services and s. 176 of the *Criminal Code*.

56. Manitoba concedes that the Impugned PHOs *prima facie* limited freedoms protected by s. 2 of the *Charter*. In light of Manitoba's concession, it is unnecessary for the Court to decide the ss. 7 and 15 issues. It is trite law that courts should not make unnecessary constitutional pronouncements. In any event, the Impugned PHOs do not arbitrarily restrict s. 7 rights contrary to the principles of fundamental justice. Nor has there been any discrimination under s. 15 of the *Charter*.

57. The fundamental question is whether the limitation on *Charter* rights was justified under s. 1. The justification is identical for all asserted *Charter* violations. The *Charter* protects individual rights and freedoms but society also expects governments to protect the vulnerable and promote the common good. Rights are not absolute and must sometimes give way to reasonable and proportionate limits. A pandemic is a classic scenario where that is the case.

58. Pandemics are extremely difficult on a population. COVID-19 has caused serious illness and death, particularly in older adults but also in vulnerable populations of all ages. Pursuant to s. 67 of the *PHA*, the CPHO has been delegated the formidable task of taking measures (with

approval of the minister) to prevent or lessen the danger to public health posed by COVID-19. This includes taking measures to prevent exponential growth of SARS-CoV-2 from overwhelming our limited health care resources, while trying to minimize the hardship and disruption that these restrictions impose on our day-to-day lives. It is an extremely difficult balance that is not amenable to a quantitative metric. Decisions must be made quickly in real time, in rapidly evolving circumstances and often based on incomplete or uncertain scientific knowledge. The CPHO, in collaboration with other experts in Manitoba, across Canada and around the world, bring considerable expertise to this public health emergency.

59. In the fall of 2020, at the height of the second wave, COVID-19 cases were running rampant. Deaths and serious cases requiring hospitalization and intensive care were escalating rapidly and projected to continue rising. Our health care system was under tremendous strain. We were nearing the cliff edge. In light of these dire circumstances, decisive action was essential to regain control over the spread of the virus in order to save lives, minimize serious illness and relieve the intense burden on Manitoba's health care system. We could not afford to get it wrong. The circuit break measures including the Impugned PHOs were necessary, reasonable and justified.

B. Preliminary Observation – Scope of the Application

60. A court case is defined by the pleadings. It goes without saying that this is not a public inquiry into every aspect of the government's handling of the pandemic nor a challenge to every public health order or restriction. As Justice Binnie colourfully commented, a court case "should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight."[53]

61. The relevance of evidence must be tested by reference to what is in issue and the Amended Notice of Application defines what is in issue. In this regard, the Applicants have not challenged every PHO made during the pandemic or even all aspects of a single PHO. For example, there is no challenge to any quarantine or self-isolation order made under the Act (the *Self-isolation and contact tracing orders* and the *Self-isolation order for persons entering Manitoba*). The

[53] *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 40-41 **[TAB 25]**

Amended Notice of Application is confined to particular sections of the three Impugned PHOs made on November 21, 2020, December 22, 2020 and January 8, 2021 and Manitoba has responded accordingly. Specifically, they challenge the orders in effect from November 22, 2020 until January 22, 2021 in relation to:

- Gatherings at private residences: Order 1(1);
- Public gatherings: Order 2(1); and
- Places of worship: Orders 15(1) and (3) in the November 21, 2020 PHO, which became Orders 16(1) and (3) in the December 22, 2020 and January 8, 2021 PHOs.

62. The relevant time frame is important. The COVID-19 pandemic is fluid and evolving. The situation in the spring of 2020 was markedly different than the summer of 2020, or the fall of 2020 when the Impugned PHOs were made, or the circumstances existing today. Public health measures have necessarily and frequently varied to respond to the prevailing conditions of the COVID-19 pandemic. Manitoba's evidence and arguments are focused on justifying the Impugned PHOs in the relevant period from November 22, 2020 until January 22, 2021.

C. Administrative law ground

63. The Applicants contend that the Impugned PHOs are *ultra vires* in an administrative sense because they did not meet the requirements of s. 3 of *The Public Health Act.* This must be assessed on a standard of reasonableness, with due deference to medical and scientific expertise.

64. Section 3 of *The Public Health Act* states:

> **Limit on restricting rights and freedoms**
>
> 3 If the exercise of a power under this Act restricts rights or freedoms, the restriction must be no greater than is reasonably necessary, in the circumstances, to respond to a health hazard, a communicable disease, a public health emergency or any other threat to public health.

65. Manitoba submits that Dr. Roussin's assessment that the Impugned PHOs were no greater than reasonably necessary to respond to the public health emergency was eminently reasonable

given the critical circumstances of the pandemic facing the province in November 2020. Existing measures were insufficient to stem the tide of exponential growth of SARS-CoV-2 and the resulting wave of hospitalizations and critical cases. It was not simply the number of deaths, which is tragic, but the burden COVID-19 was placing on our health care system was enormous.

66. Manitoba was on the verge of exceeding our hospital and ICU capacity. This would have had devastating consequences because people would not receive necessary care, whether for COVID-19 or other health issues.

67. No doubt the Applicants will suggest that that lesser restrictions could have been imposed; that it was unnecessary to stop gathering in private homes; that larger public gatherings could have been allowed; that in-person religious services could have been allowed with physical distancing, hand cleaning and masks. However, the evidence shows these types of gatherings pose a high risk of transmission. Physical distancing and mask wearing are surely helpful but not fool proof. Much depends on individual conduct and adherence. It is impossible to monitor every private household and faith based institution in the province. At that critical juncture of the pandemic, in his judgment, Dr. Roussin determined that we could not take the risk. We could not afford more outbreaks and spread. It was certainly within the range of reasonable decisions, supported by the scientific and epidemiological evidence. It is a decision entitled to deference.

68. Notably, s. 3 of the Act essentially mirrors the minimal impairment analysis under s. 1 of the *Charter*, which Manitoba will address in more detail below. For all the same reasons Manitoba argues that the Impugned PHOs satisfy the minimal impairment test, it is submitted that the CPHO acted reasonably in determining that the PHOs met the requirements of s. 3 of the Act. Section 1 of the *Charter* does not demand that a limit on rights be perfectly calibrated, judged in hindsight, but only that it is reasonable.[54] No more can be expected of the CPHO.

D. Division of powers ground - paramountcy

69. The Applicants argue that the Impugned PHOs, as they pertain to religious services, are in direct contravention of s. 176 of the *Criminal Code*. Manitoba submits that the Impugned PHOs

[54] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*] at para. 37 **[TAB 8]**

are intended to protect the population from a serious communicable disease and do not violate or otherwise conflict with s. 176 of the *Criminal Code* in any manner.

70. Section 176 provides:

> **Obstructing or violence to or arrest of officiating clergyman**
> **176 (1)** Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who
>
> > **(a)** by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent an officiant from celebrating a religious or spiritual service or performing any other function in connection with their calling, or
> >
> > **(b)** knowing that an officiant is about to perform, is on their way to perform or is returning from the performance of any of the duties or functions mentioned in paragraph (a)
> >
> > > **(i)** assaults or offers any violence to them, or
> > >
> > > **(ii)** arrests them on a civil process, or under the pretence of executing a civil process.
>
> **Disturbing religious worship or certain meetings**
> **(2)** Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.
>
> **Idem**
> **(3)** Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on summary conviction.

71. Section 176 prohibits the criminal conduct of individuals who use threats or force or assault to wilfully interfere with religious worship. Under s. 176(1)(a), it is a crime for a person to unlawfully obstruct or prevent officiants from celebrating a religious service by threats or force. The Impugned PHOs are legislative instruments. A legislative instrument or order made under a statute does not use threats or force within the meaning of s. 176. Nor was the intent of the Impugned PHOs to obstruct or prevent officiants from performing religious services. While public gatherings in a place of worship were temporarily closed to limit the spread of COVID-19, officiants could continue to attend to perform services and offer them remotely. Finally, even if the Impugned PHOs had the effect of preventing officiants from performing in-person

religious services at a place of worship, they did not unlawfully do so. To the contrary, the PHOs were entirely lawful instruments made under *The Public Health Act*.

72. Section 176(1)(b) makes it a crime for a person to assault, be violent towards or arrest (by civil process) a religious officiant, knowing the officiant is about to perform or is returning from performing their religious duties. Again, this prescribes criminal conduct by individuals who knowingly interfere with an imminent religious function or one that has just been performed. The Impugned PHOs did not authorize anyone to assault or use violence against religious officiants. They did not authorize the arrest of a religious officiant on a civil process to prevent them from carrying out religious function or because they just completed religious functions or duties. As noted, an officiant is allowed to carry on a religious service and deliver it remotely. Any subsequent ticket issued would be in relation to a violation of the order against gathering in a place or worship, not an attempt to prevent a religious function by violence or assault.

73. Section 176(2) and (3) make it a crime for anyone to wilfully disturb or interrupt an assembly of persons for religious worship. It is not a crime to issue a statutory order of general application intended to prevent prolonged gatherings indoors for valid public health reasons. The Impugned PHOs do not "wilfully disturb or interrupt" religious assemblies within the meaning of s. 176. During the "circuit break", the Impugned PHOs temporarily closed places of worship to prevent in-person gatherings to reduce the spread of a communicable disease. However, religious assemblies could continue by remote means.

74. In *Skoke-Graham v. The Queen*[55], the Supreme Court of Canada considered s. 172(3) (the predecessor to s. 176(3)). Six persons were charged with wilfully doing an act that disturbed the order or solemnity of an assembly for religious worship. Dickson J. remarked that s. 172(2) and (3) protect people who have gathered from being purposefully disturbed or interrupted. To be criminal, it is necessary for the conduct to be disorderly in itself or productive of disorder. These *Criminal Code* provisions are not intended to capture peaceful or orderly conduct. The Court's conclusion was reinforced by the fact these sections are included within a series of criminal offences under the heading of "Disorderly Conduct". In short, issuing a PHO under *The Public Health Act* does meet the *actus reus* of s. 176 of the *Criminal Code*. Parliament had

[55] *Skoke-Graham v. The Queen*, [1985] 1 SCR 106 at 118-119 (per Dickson J.) and 130-131 (per Wilson J.) **[TAB 42]**

in mind disorderly conduct or agitation which interferes with religious worship,[56] not a lawful public health order.

75. The Impugned PHOs do not conflict with the operation or frustrate the purpose of s. 176 of the *Criminal Code*. If the Applicants' argument were accepted, it would also be impossible to restrict the number of people allowed in a place of worship or to close a place of worship due to serious violations of building and fire codes, which would be inoperative. This cannot be correct.

E. ***Charter* grounds**

76. Manitoba concedes that the Impugned PHOs *prima facie* limit aspects of the freedom of religion under s. 2(a), freedom of expression under s. 2(b) and freedom of peaceful assembly under s. 2(c) of the *Charter*. The principal question necessary to resolve this case is whether the restrictions on the freedoms under s. 2 of the *Charter* were justified under s. 1. It is therefore, unnecessary to consider ss. 7 and 15 of the *Charter*.

1. Section 2(a) of the *Charter*

77. Freedom of religion includes the right to entertain religious beliefs, to declare those beliefs openly without fear of hindrance or reprisal and to manifest religious belief by worship and practice or by teaching and dissemination. Section 2(a) is engaged when an impugned law or state conduct interferes with the ability to act in accordance with a sincerely held religious belief or practice, in a manner that is more than trivial or insubstantial. Freedom of religion includes the ability of religious adherents to come together and create cohesive communities of belief and practice.[57]

78. Manitoba concedes that the restriction on in-person religious gatherings is a *prima facie* limit on freedom of religion that must be justified under s. 1 of the *Charter*.

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[56] *R v. Lohnes*, [1992] 1 SCR 167 at 175, 177, 179, **[TAB 35]** citing *Skoke-Graham, supra* **[TAB 42]**
[57] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336 (para. 94) **[TAB 32]**; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*TWU*] at para. 62-64 **[TAB 26]**

2. Section 2(b) of the *Charter*

79. Freedom of expression protects all non-violent activities that convey or attempt to communicate meaning. A law or government action that has the purpose or effect of interfering with such activity is a *prima facie* interference with freedom of expression. Section 2(b) protects listeners as well as speakers.[58]

80. The restrictions on religious or other gatherings do not have the purpose of restricting expression. However, Manitoba concedes that they have that effect. Likewise, it is conceded that the restriction on the size of public gatherings could have the effect of limiting the Applicant MacKay's freedom of expression. Although he was entirely free to protest the COVID-19 measures and convey any message at a protest rally, the size of groupings was limited.[59]

3. Section 2(c) of the *Charter*

81. Section 2(c) of the *Charter* guarantees the freedom of peaceful assembly. There is relatively little jurisprudence interpreting this provision. It is inherently a group activity.[60]

82. The freedom of assembly and association are necessarily collective and so mostly public in nature.[61] The Ontario Divisional Court has held that s. 2(c) guarantees access to and the use of public spaces, including parks, squares, sidewalks and buildings subject to reasonable regulations governing the use of those places and having regard to public health and safety.[62] Freedom of assembly can be integral to freedom of expression. As a result, issues surrounding peaceful assembly are often subsumed under the freedom of expression and the infringement can usually be resolved under s. 2(b).[63]

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[58] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at 968-972 **[TAB 23]**; *Beaudoin, supra* at paras. 169-170 **[TAB 10]**
[59] *Beaudoin, supra* at para. 169 **[TAB 10]**
[60] *Beaudoin, supra* at para. 173 **[TAB 10]**
[61] *Moretto v. Canada (Citizenship and Immigration)*, 2019 FCA 261 at para. 72-73 **[TAB 28]**
[62] *Hussain v. Toronto*, 2016 ONSC 3504 at paras. 38, 44 **[TAB 21]**
[63] *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, 2009 BCCA 39 at para. 39 **[TAB 12]**

83. Manitoba concedes that to the extent the Impugned PHOs place limits on expression by prohibiting public gatherings to protest or comment on important matters of public interest, there is a *prima facie* limit on free assembly.

84. The Applicants also claim that restricting gatherings in places of worship violates freedom of assembly by preventing church services, bible studies and prayer meetings. This is arguable but is better addressed directly under the freedom of religion. Regardless, the *prima facie* limits on the freedoms of religion, expression and assembly will all be subject to the same justification under s. 1 of the *Charter.*

4. Sections 7 of the *Charter*

i. Court should not make unnecessary constitutional pronouncements

85. Manitoba denies that the Impugned PHOs violate s. 7 of the *Charter*. However, it is unnecessary to consider s. 7 and the Court should decline to do so because Manitoba has conceded a violation of s. 2 of the *Charter*. Furthermore, the justification under s. 1 will be identical regardless of the particular *Charter* breach alleged.

86. As Joyal C.J. recently held in *R. v. Assi*, "it is well established that courts should not decide issues of constitutional law that are not necessary to the resolution of the matter that is before the court in a given case".[64] The fact that a case was fully argued is insufficient to warrant deciding difficult *Charter* issues and laying down guidelines with respect to future cases simply because it might be "helpful" to do so.[65] There are many examples of cases in which the Supreme Court of Canada declined to determine whether a specific *Charter* provision was breached, having already found a violation of a different *Charter* provision. This includes cases where the Court declined to address s. 7 or s. 15 because s. 2 or another *Charter* provision had been violated.[66]

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[64] *R. v. Assi*, 2021 MBQB 44 at para. 13 **[TAB 31]**; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at paras. 6-13 **[TAB 30]**.
[65] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), supra* at para. 13 **[TAB 30]**
[66] *Carter v. Canada (A.G.)*, 2015 SCC 5 [*Carter*] at para. 93 **[TAB 16]**; *Devine v. Quebec (A.G.)*, [1988] 2 SCR 790 at para. 31 **[TAB 17]**; *R. v. Ladouceur*, [1990] 1 SCR 1257 at 1278 **[TAB 34]**; *R. v. Taylor*, 2014 SCC 50 at para. 36 **[TAB 38]**; *Canada (A.G.) v. Whaling*, 2014 SCC 20 at para. 75; *Dunmore v. Ontario (A.G.)*, 2001 SCC 94 at para. 2 **[TAB 19]**

87. In *Trinity Western University*, the Law Society of British Columbia refused to accredit a law school because of its religious covenant prohibiting same-sex intimacy. Aside from freedom of religion, the case also implicated s. 2(b), s. 2(d) and s. 15. The Court held that the factual matrix underpinning these other *Charter* claims was largely indistinguishable and the primary argument centred on religious freedom. Whether the claim was articulated in terms of freedom of religion, expression, association or protection from discrimination, the limit was subject to the same proportionality analysis.[67] Manitoba submits the same analysis applies here.

88. The Applicants assert that the Impugned PHOs interfere with liberty and security of the person by restricting the liberty of religious officials to hold religious services and by regulating access to private homes.[68] The Applicant Tissen asserts that restricting his ability to worship at church while permitting liquor and grocery stores to remain open, arbitrarily limits his security of the person.[69] These allegations essentially duplicate the claims under s. 2(a) and s. 2(c). Insofar as the Applicants claim that limiting home gatherings arbitrarily interferes with liberty and security of the person,[70] the government's justification under s. 1 is identical. Whether a law limits one or more *Charter* rights does not change the proportionality analysis under s. 1.

89. In *Beaudoin*, a case very similar to the present, the government also conceded a violation of s. 2 *Charter* rights. Chief Justice Hinkson declined to address s. 7:

> [186] Moreover, given the concessions of the respondents and my findings with respect to the religious petitioners' s. 2 *Charter* rights, I find that it is unnecessary to expand the jurisprudence relating to s. 7 of the *Charter*, and will make no finding with respect to s. 7. In *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*], Chief Justice McLachlin, for the majority, concluded that:
>
> > 105 The s. 15 claim was not considered at any length by the courts below and addressed only summarily by the parties in this Court. In my view, it is weaker than the s. 2(a) claim and can easily be dispensed with. To the extent that the s. 15(1) argument has any merit, many of my reasons for dismissing the s. 2(a) claim apply to it as well.

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[67] *TWU, supra* at paras. 76-78 **[TAB 26]**
[68] Amended Notice of Application at p. 5, para e.
[69] Amended Notice of Application at p. 13, para gg.
[70] Amended Notice of Application at p. 14, para ii.

> [187] Likewise, here the religious petitioners focussed their submissions on their s. 2 *Charter* rights, and addressed their claim pursuant to s. 7 of the *Charter* in only a summary way.

90. This case is best analysed under the rubric of s. 2 of the *Charter* and whether the limitation on those rights was reasonable and justified under s. 1. In the alternative, Manitoba will respond to the s. 7 claim below.

91. To establish a violation of s. 7 of the *Charter*, the onus is on the claimant to prove that: (1) the law interferes with or deprives them of their right to life, liberty or security of the person and (2) such deprivation is not in accordance with the principles of fundamental justice.[71]

ii. Do the Impugned PHOs limit liberty or security of the person?

92. In *Carter v. Canada (A.G.)*, the Supreme Court explained the rights to liberty and security of the person as follows:

> [64] Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" (*Rodriguez*, at pp. 587-88, per Sopinka J., referring to *R. v. Morgentaler*, 1998 CanLII 90 (SCC), [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 58; *Blencoe*, at paras. 55-57; *Chaoulli*, at para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.). While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together.[72]

93. Liberty protects the freedom from physical restraint and the autonomy to make fundamental personal choices. This does not mean that a limit on a fundamental freedom protected by s. 2 is sufficient to establish a violation of liberty under s. 7. These are distinct

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[71] *Carter, supra* at para. 55 **[TAB 16]**
[72] *Carter, supra* at para. 64 **[TAB 16]**

Charter rights. In *Blencoe,* the Supreme Court cautioned that courts must be careful not to conflate liberty or security of the person with dignity, self-worth and emotional well-being. Otherwise, s. 7 would be all-inclusive and "there would be serious reason to question the independent existence in the *Charter* of other rights and freedoms such as freedom of religion and conscience or freedom of expression".[73]

94. To establish a breach of security of the person, the claimant must provide evidence of serious state caused psychological harm that goes beyond ordinary stress and anxiety a person would suffer as a result of state action.[74]

95. The Applicants assert that the Impugned PHOs restrict their liberty and security of the person in two ways: they restrict the liberty of religious officials to hold religious services and they regulate "access to and from homes treating Manitobans as though they are criminals and on house arrest".

96. On the first point, Manitoba concedes that religious officials could not hold religious services in-person at a place of worship for a period of 13 weeks. However, as argued above, the restriction on a freedom to engage in religious practices is addressed by s. 2(a) rather than s. 7 of the *Charter*.

97. Regarding the second point, at no time were Manitobans treated as criminals on house arrest. There has never been an order requiring persons to remain in their homes or to refrain from seeing friends and family in small groups. The Impugned PHOs did limit gatherings inside homes while these orders were in effect. However, one could visit people outside of a residence as long as they complied with gathering size limits.

98. No one questions the emotional and psychological benefit of meeting in person compared to remote meetings. The restriction on in-person gatherings is hard for people. However, there is no evidence of the kind of serious psychological harm or suffering required by *Blencoe*,

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[73] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] at para. 80 **[TAB 11]**; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1170-1171 **[TAB 39]**; *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 346-348 (per Lamer C.J.) **[TAB 9]**.

[74] *Blencoe, supra* at paras. 81-86 **[TAB 11]**. The case at bar does not deal with security of the person in terms of harm to one's bodily integrity.

particularly when the impugned restrictions are time-limited (13 weeks). Moreover, the orders did not preclude a person from entering another's private residence for providing health care (which is not limited to physical care), personal care, tutoring or other educational instruction, or to respond to an emergency. As such, a minister from a religious institution could attend an adherent's home for any or those identified purposes, including one-on-one counselling for a mental health purpose or personal care purpose or to provide religious education. There was also an exception provided in Orders 15 and 16 which allowed a place of worship to continue to be used for the delivery of health care, child care or social services.

99. The orders do not preclude a person from entering another's private residence for providing health care (which is not limited to just physical care), for personal care, for tutoring or other educational instruction, or to respond to an emergency. As such, a minister from a religious institution has a basis to attend an adherent's home for any one or more of the identified purposes – which could include one-on-one counselling that assists for a mental health purpose or a personal care purpose, or provides religious education instruction

100. Assuming the PHOs engage liberty or security of the person, the Applicants must also demonstrate the interference is contrary to the principles of fundamental justice.

iii. Any *deprivation of s. 7 comports with the principles of fundamental justice*

101. A law will be contrary to the principles of fundamental justice if the interference with s. 7 rights is arbitrary, overbroad or grossly disproportionate.

102. The Amended Notice of Application asserts that limiting home gatherings or closing places of worship while allowing liquor and grocery stores to remain open, is arbitrary and disproportionate.[75] To the contrary, Manitoba submits the restrictions entirely accord with the principles of fundamental justice.

[75] Amended Notice of Application, p. 13 (para. gg) and p. 14 (para. ii)

The Impugned PHOs are not arbitrary or overbroad

103. As explained in *Carter*, a law is arbitrary when there is no rational connection between the limit on the right and the object of the law. An arbitrary law is one that limits rights but is not capable of fulfilling or in any way furthering its objectives.[76]

104. The object of limiting gatherings, whether in public places or in private residences or places of worship, is to prevent, reduce or eliminate the likelihood of spreading COVID-19 in order to minimize death and serious illness. It is indisputable that prolonged close contact, especially indoors, transmits SARS-CoV-2. The rational connection between restrictions on in-person gatherings and their object of decreasing the likely spread of COVID-19 is plain and obvious. Therefore, individuals' rights are not limited arbitrarily.

105. While the Applicants do not rely on the principle of overbreadth in their Notice of Application, Manitoba submits the Impugned PHOs are not overbroad. Overbreadth is closely related to arbitrariness. A law is overbroad when it targets *some* conduct that bears no relation to its purpose. In other words, while not arbitrary in all of its applications, it is arbitrary in part.[77]

106. The restrictions on gathering do not capture any conduct that poses no risk of transmission or that bears no relation to the objective of the order. It is impossible to rule out the possibility of transmission of SARS-CoV-2 at gatherings. This is particularly true because asymptomatic and pre-symptomatic individuals can transmit the virus to unsuspecting persons, without anyone suspecting they have COVID-19.[78]

107. With respect, the Applicants have misconstrued these principles when they compare the Impugned PHOs to other orders (e.g. dealing with retail businesses). Arbitrariness and overbreadth focus on the link between the impugned measures and the objective of those measures. For the purpose of s. 7, it is irrelevant to compare the Impugned PHOs to other restrictions. The fact that some places of business are allowed to remain open (subject to various restrictions) does not in any way alter the rational connection that exists between the Impugned PHOs and their object. Moreover, the PHOs restrict similar types of gatherings whether it is a

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[76] *Carter, supra* at para. 83 **[TAB 16]**; *Canada (A.G.) v. Bedford,* 2013 SCC 72 [*Bedford*] at para. 111 **[TAB 14]**
[77] *Carter, supra* at para. 85 **[TAB 16]**; *Bedford, supra* at para. 112 **[TAB 11]**
[78] Roussin, para. 26; Kindrachuk, Exhibit B at p. 7-10

religious or secular gathering (e.g. movie theatres, plays, concerts). These secular activities are also protected by s. 2(b) of the *Charter*. Retail locations are subject to different restrictions because people are not gathering for a prolonged period in the same way.

108. In *Beaudoin*, the court rejected a very similar argument on arbitrariness and overbreadth.[79]

> [229] The fact that some religious activities are restricted and some secular activities are not is not necessarily evidence of arbitrariness. There needs to be a comparison of comparables and a demonstration that there is no rational basis for the distinction. That is not present here.
>
> [230] Overbreadth allows the courts to recognize that a law is rational in some cases, but that it overreaches in its effect in others. The impugned G&E Orders are as broad in scope as one might conceive of. However, they are intended to address a pandemic that affects all of us. In the result, they are, of necessity, and by design, broad enough to affect all British Columbians and those visiting our province. The G&E Orders do not overreach.

Gross disproportionality

109. The Applicants assert that their liberty and security of the person have been disproportionately limited. The principles of fundamental justice preclude a deprivation of s. 7 rights that is grossly disproportionate to the object of the measure. This is a high bar and only applies in extreme cases where the deprivation is totally out of sync with the objective. The Supreme Court gave the example of life imprisonment for spitting on the sidewalk. It must be entirely outside the norms accepted in our free and democratic society.[80]

110. In assessing this principle of fundamental justice, the Court must consider the significance of the limitation on s. 7 rights (gather in homes, public places and in-person religious services) to determine if the deprivation is so extreme that it is totally out of sync with the critical importance of the public health objective (to prevent death, serious illness and overwhelming the health care system). We submit the following factors are germane in assessing the limitation:

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[79] *Beaudoin, supra* at paras. 228-230, discussing arbitrariness and overbreadth in the context of s. 1. **[TAB 10]**

[80] *Carter, supra*, at para. 89 **[TAB 16]**; *Bedford, supra* at para. 120, 125 **[TAB 11]**

a) The importance of gathering is not questioned including for faith-based communities for whom communal worship is central to their religious beliefs. Physical contact and socializing is also an important part of human nature.

b) Religious services were not prohibited. They could continue to be offered remotely. Manitoba accepts that for some, a remote religious service is not an adequate substitute for in-person religious services, which is at the core of their beliefs.

c) Since December 11, 2020, religious services could also take place in-person, outside in motor vehicles, in accordance with Order 2(2).

d) Funerals, weddings, baptisms or similar religious ceremonies could take place subject to a limit of five persons other than the officiant (Order 15(3) or 16(3)).

e) The Impugned PHOs did not prevent a person, including a religious official, from entering a private residence for the purpose of providing mental health or spiritual care such as counselling (Order 1(2)(a)). Counselling and addiction support could also be delivered remotely to individuals or groups.

f) Tutoring or other individualized educational instruction could be provided. This was not restricted to secular education. (Schedule A to the PHO, item 75). In addition, the gathering limits did not prevent a person from entering a private residence to provide tutoring or other religious educational instruction (Order 1(2)(d)). Religious education could also be delivered to groups remotely.

g) The Impugned PHOs did not prevent places of worship from being used by a public or private school (including for religious education) or for the delivery of health care, child care or social services. (Order 15 and 16)

h) To the extent one of the Applicants raises concerns about summer bible camps[81], the Impugned PHOs did not take effect until November 22. Throughout the summer months until November 12, 2020, the public health orders allowed summer camps, as

[81] See the affidavit of Christopher Lowe, para. 24. Their summer program reached 30-35 children aged 4-12.

long as each group had up to a maximum of 50 children and there were no joint activities between different groups. Only overnight camps were prohibited.[82]

i) Places of worship were treated in the same way as similar indoor gatherings involving prolonged close contact, such as movie theatres, plays, concerts, sporting events. These activities are also protected under s. 2 of the *Charter*.

111. The impact on rights was surely difficult for people, religious and secular. But we submit it was not grossly disproportionate and totally out of sync with the overwhelming importance of the public health objective of the impugned orders. The following considerations are relevant:

a) The CPHO did not impose the stricter restrictions on gatherings and in-person services at places of worship until Manitoba started to experience exponential growth of SARS-CoV-2 that put lives at risk and our health care system in jeopardy.

b) In the fall of 2020, the situation in Manitoba was dire. By November 2020, community spread of the virus was rampant. As of November 10, Manitoba had the highest per capita rate of active COVID-19 cases in Canada. The test positivity rate had soared to over 10.5% provincially suggesting province-wide transmission. Newly reported cases were doubling every 2 weeks which also translated into a large increase of severe cases. It was becoming an increasing challenge to conduct contact tracing.[83]

c) COVID-19 related deaths and hospitalizations were rapidly escalating. Despite significant efforts to redeploy staff to maximize hospital and ICU capacity[84], acute care capacity was being overwhelmed. Epidemiological modelling projected that Manitoba was on the verge of exceeding our hospital and ICU capacity. On November 10, 2020, there were only 8 ICU beds left in Manitoba. It was projected that COVID-19 patients would require 100% of Manitoba's ICU beds by November

[82] See Order 9 of the public health orders in effect allowed day camps to continue until November 12, 2020.
[83] Roussin, paras. 100-106; Loeppky, paras. 17-19, Exhibits E, Exhibit F (slides 4, 7, 9, 11, 12, 16, 17, 19-21, 31-47), Exhibit H
[84] Siragusa

23rd and hospital capacity would be exceeded by mid-December unless action was taken. To put this in perspective, prior to COVID-19, Manitoba generally had capacity for 72 ICU patients. The model's projection that Manitoba would exceed ICU capacity was already based on stretching this capacity to 124 ICU beds. It was also projected that the number of deaths would rise rapidly, with an estimated maximum of 597 deaths by December 10th. Ultimately, Manitoba experienced 478 deaths as of that date, closer to the upper end of the projection.[85]

d) On December 10-11, Manitoba hit its peak to-date hospitalizations with 129 patients in ICU and 388 hospitalizations due to COVID-19. This exceeded our ICU capacity, however, Manitoba managed to address the situation with additional resources.[86]

e) Exceeding hospital and ICU capacity could lead to more preventable deaths and adverse health outcomes for both COVID-19 patents and other patients who may be unable to access timely care, as witnessed in other parts of the world fighting COVID-19.[87]

f) Faith-based gatherings at places of worship involve prolonged contact in an indoor setting, which heightens the risk of virus transmission. They often involve activities such as singing and ceremonial rituals that also heightens the risk of spread. There have been clusters and outbreaks of COVID-19 at faith-based gatherings in Manitoba, which is consistent with the experience in other jurisdictions in Canada and elsewhere.[88]

g) Gathering in homes is also an important source of transmission, again due to prolonged contact in close proximity.[89]

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[85] Loeppky, para. 18; Exhibit F (p. 44).
[86] Siragusa, para. 19
[87] Roussin, para. 89, 104
[88] Roussin, paras. 26-27, 155-160; Loeppky, para. 14; Kindrachuk, Exhibit B, p. 11; *Beaudoin, supra* at para. 151-152, 226, 233, 238-239 **[TAB 10]**
[89] Roussin, para. 27; Bhattacharya, Exhibit C at pp. 19, 26. He cites one study that states the most common source of infection was at home. Another study found that private gatherings at home accounted for 74% of the COVID-19 spread.

h) The measures were intended to protect vulnerable groups who are more prone to serious outcomes (death or hospitalization) due to COVID-19. This includes persons over the age of 60 and people with a variety of underlying conditions, who are not limited to older persons. Approximately one third of hospitalizations and 44% of COVID-19 patients admitted into ICU are under the age of 60.[90] As of February 22, 2021, more than 37% of all severe outcomes (hospitalizations, ICU cases and deaths combined) in Manitoba were among people under the age of 60. Almost 17% of severe cases were among people under the age of 40.[91]

i) First Nations populations were also seeing escalating positivity rates and a disproportionate number of COVID-19 cases. The median age of hospitalizations for First Nations is 51.[92]

j) The "circuit break" was temporary. In total, the Impugned PHOs were in place for 13 weeks but they were re-assessed at regular shorter intervals to ensure they remained necessary. The measures were implemented to regain control over the rapid community spread of the virus and consequent serious harm. Once the curve was flattened, the restrictions began to gradually ease again.

112. It is also important to note that before the "circuit break" was imposed, the gathering limits were much less stringent. For example, generally over the summer months until October 1, 2020, the indoor gathering limit was 50 and the outdoor limit was 100, with the possibility of having separate areas, each within these limits. Beginning on July 25, religious services could hold even larger gatherings up to a maximum of 500 people or multiple areas of 50 people, as long as it did not exceed 30% capacity. On October 1, gathering limits started to be constrained due to worsening conditions. For the first time, a restriction on gathering in private residences (10 people) was introduced in the Capital Region. Even as of November 12, religious gatherings of up to 250 people or 20% capacity were permitted, except in the Capital Region where it was reduced to 100 people or 15% capacity (because the transmission was worse in and around

[90] Loeppky, Exhibit C (Tables 1 and 2)
[91] Loeppky, Exhibit H (Chart on age distribution of hospitalizations, ICU and deaths).
[92] Roussin, para. 33-35, 103, 167-168

Winnipeg at that time).[93] Thus, the public health measures have always ebbed and flowed proportionately with the gravity of the pandemic and the potential for harm. None of the Applicants have challenged measures taken prior to the PHO in effect on November 22, 2020.

113. The reality facing the province at the height of the second wave of the pandemic demanded decisive action to reduce the spread of SARS-CoV-2 and flatten the curve. It is not an exaggeration to say that lives were at stake. The restrictions on gatherings and in-person faith services were temporary and necessary. The impact on rights cannot be minimized but it was certainly not grossly disproportionate or totally out of sync with the critical objectives to preserve our health care system and ultimately to protect public health and save lives of vulnerable persons.

114. In *Beaudoin*, Hinkson C.J. also rejected the notion that closing places of worship was so extreme such that the seriousness of the deprivation was totally out of sync with the objective of the measure. The court held the restrictions were based on a "reasonable assessment of the risk of transmission of the Virus during religious and other types of gatherings".[94] The same analysis is true here.

115. Any limit on s. 7 rights was entirely consistent with the principles of fundamental justice.

5. Section 15 of the *Charter*

i. *Court should not make unnecessary constitutional pronouncements*

116. For the same reasons argued in relation to s. 7, it is also unnecessary for the Court to consider s. 15 and it should decline to do so. The Applicants assert that their equality rights have been infringed because places of worship were ordered to close, while liquor and grocery stores could remain open. They argue this distinction is discriminatory because it is arbitrary and "an abuse of fundamental rights as set out in section 2(a), (b) and (c) of the *Charter*."[95] It is evident their s. 15 claim substantially overlaps with the s. 2 argument.[96] In *Beaudoin*, Hinkson C.J. held

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[93] Roussin, paras. 119-133
[94] *Beaudoin, supra* at paras. 230-233 **[TAB 10]**
[95] Amended Notice of Application at p. 5 (para. f), p. 12 (para. z) and p. 13 (para. gg)
[96] *TWU, supra* at paras. 76-77 **[TAB 26]**

that given the government's concessions and the court's findings with respect to s. 2 of the *Charter*, it was unnecessary to address s. 15.[97] Whether it was arbitrary to close places of worship but not retail stores can be addressed under s. 1.

117. In the alternative, Manitoba submits that the Impugned PHOs do not discriminate on the basis of religion, as addressed below.

ii. *The Impugned PHOs do not discriminate contrary to s. 15 of the* Charter

118. The s. 15 *Charter* test has two stages. First, does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds? If so, does the law impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage.[98]

119. The Applicants assert that the Impugned PHOs discriminate on the basis of religion because they classify liquor, cannabis and big box retailers as "essential" and allow them to remain open, while they classify churches and religious gatherings as "non-essential" and require them to close. In short, they say it is it discriminatory to allow people to assemble in liquor and grocery stores but not worship at church. Manitoba submits that neither part of the s. 15 test is satisfied.

120. First, the Applicants have not accurately described the PHOs. The Impugned PHOs do not characterize certain retailers as "essential". Nor do they characterize churches or religious gatherings as "non-essential". In no way do the Impugned PHOs imply that places of worship or religious practices are not essential or are of lesser importance than retail establishments.

121. Rather, Order 4 provides that businesses listed in Schedule A may open to provide goods and services to the public, subject to capacity limits and other public health measures like physical distancing. Order 5 states that a retail business permitted to remain open may only sell "essential items" listed in Schedule B in person. Any "non-essential items" must be removed

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[97] *Beaudoin, supra* at para. 197 **[TAB 10]**. At para. 193, the Court also cited *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 108 where McLachlin C.J. reasoned that the substance of the s. 15 claim – a right to an unfettered practice of their religion – was already dealt with under s. 2(a) of the *Charter*. **[TAB 8]**

[98] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras. 18-19 **[TAB 24]**

from public access inside the store. However, both "essential items" and "non-essential items" could be sold remotely online or by phone and made available for delivery or pick-up. Under Order 6, facilities or businesses not listed in Schedule A must close for in-store shopping but could continue to sell goods remotely. Thus, the distinction was between essential and non-essential items for the purpose of determining which items may be bought in-store rather than purchased only remotely. The Applicants have not challenged Orders 4, 5 or 6.

122. The Applicants are correct that certain retailers (listed in Schedule A) were allowed to remain open for in-store purchases of "essential items". Orders 15 and 16 required places of worship to remain closed for in-person services but this was not because religious services are viewed as inessential or less important, but rather because the nature of such gatherings pose a heightened risk of transmission.[99]

123. The Impugned PHOs do not create any distinction based on religious beliefs or the religious or non-religious nature of the location. Rather, any distinction between facilities that could remain open and those that had to close was based entirely on the level of risk of viral transmission posed by the type of gathering or activity. Retail stores typically involve transient contact between individuals who are only in close proximity for relatively short duration. It is transactional in nature. In contrast, places of worship often have gatherings of individuals who are in close contact for prolonged periods of time. In addition, religious services often involve behaviours that carry a higher risk of transmission such as singing, choirs, sharing communal items and rejoicing among congregants.[100] As the evidence of the Applicants attests, religious services in church are important because they bring members of the community physically together to gather, worship, sing, pray, socialize, express affection and adoration and share communion and bread and wine together.[101] This is also precisely why the risk of transmission is higher at a religious service in a place of worship than in a retail environment.

124. In fact, places of worship were treated very much like movie theatres, sports facilities, plays, restaurants or other venues that entail prolonged periods of close contact, posing a higher risk of virus transmission. At the height of the second wave of the pandemic, all of these venues

[99] Roussin paras. 155-160; Kindrachuk, Exhibit B, pp. 11-12
[100] Roussin at paras. 155-160, 162, Exhibit 3, Exhibit 12 (p. 609)
[101] Affidavit of Tobias Tissen (para. 9, 11), Affidavit of Riley Toews (paras. 9, 10, 16, 19-21), Affidavit of Christopher Lowe (para. 9, 18) and Affidavit of Thomas Rempel (para. 15)

were also closed for in-person gathering (even though this also implicated freedom of expression and assembly). That is not to suggest that virus transmission does not occur in retail environments. However, the distinction is about balancing risk. It is not about religion.

125. In *South Bay United Pentecostal Church v. Newsom*[102], the United States Supreme Court refused an injunction against a California law which limited capacity of religious services to 25%. Chief Justice Roberts, writing for the majority, said the following about restrictions on places of worship in the context of the COVID-19 pandemic:

> Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. **Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time**. **And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.** [Emphasis added].

126. In a subsequent decision, a majority of the U.S. Supreme Court granted an injunction against a California law that closed places of worship in response to the pandemic, except insofar as the regulation prohibited singing. In part, the majority reasoned that the regulation could not be viewed as neutral because singing was permitted in Hollywood studios but not in churches.[103] In dissent, Kagan J. (Breyer and Sotomayor JJ. concurring) adopted the same line of reasoning that Chief Justice Roberts had expressed in the earlier decision:

> California's response to the COVID pandemic satisfies the neutrality rule by regulating worship services the same as other activities "where large groups of people [come together] in close proximity for extended periods of time". *South Bay United Pentecostal Church* v. *Newsom* [citation omitted] (ROBERTS, C. J., concurring in denial of application for injunctive relief) (slip op., at 2). The restricted activities include attending a worship service or political meeting; going to a lecture, movie, play, or concert; and frequenting a restaurant, winery, or bar. So the activities are both religious and secular—and many of the secular gatherings, too, are constitutionally protected. In all those communal activities,

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[102] *South Bay United Pentecostal Church et al. v. Gavin Newsom, Governor of California et al,* No. 19A1044 (May 29, 2020, USSC) at p. 2 **[TAB 43]**

[103] *South Bay United Pentecostal Church et al. v. Gavin Newsom, Governor of California et al,* No. 20A136 (20-746) (February 5, 2021, USSC) per Barrett J. concurring. **[TAB 44]**

> California requires mask wearing and social distancing, and bars indoor singing and chanting, to reduce the risk of COVID transmission [104]

127. Manitoba submits that the reasoning of Roberts C.J. in the first *South Bay* case and that of Kagan J. in the second case is in line with Canadian jurisprudence on substantive equality and supports the conclusion that there is no breach of equality rights.

128. Even if it could be argued that the Impugned PHOs created a distinction based on religious grounds, the distinction did not impose a burden or deny a benefit in a manner that reinforces, perpetuates or exacerbates disadvantage or a demeaning stereotype. As in *Beaudoin*, there is no evidence that the restrictions disadvantage a group of people based on their religious beliefs or practices. Gatherings are allowed and restricted for secular and religious people alike, in both secular and religious settings.[105] Religious schools are as open as secular ones. Funerals and weddings can be conducted by any religious or secular community, subject to the same limits. Non-religious people have no more ability to gather than religious people.

129. Even during the temporary 13 week closure, worship and spiritual practices of all faiths and religions continued to be encouraged and accommodated to the extent possible by remote means, in vehicles and outdoors. Religious ceremonies (e.g. weddings, funerals, baptisms) could also happen in places of worship subject to gathering limits. Religious education could continue either remotely or in schools or individually in the home. Religious or spiritual counselling for health or addictions could also continue individually in one's home.

130. In *Hutterian Brethren*, the Supreme Court of Canada held:

> Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious

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[104] *South Bay United Pentecostal Church et al. v. Gavin Newsom, Governor of California et al,* No. 20A136 (20-746) (February 5, 2021, USSC) per Kagan J. dissenting, at p. 2 **[TAB 44]**
[105] *Beaudoin, supra*, para. 191 **[TAB 10]**

> discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(*a*). There is no breach of s. 15(1).[106]

131. The same result should apply here. Section 15 does not afford the Applicants a right to the unfettered practice of their religion. They have a right to be free from religious discrimination. Since the Impugned PHOs apply similar limits to all indoor gatherings involving prolonged contact, with a heightened risk of transmission, there is no discrimination based on religious beliefs.

6. Section 1 of the *Charter*

132. Manitoba submits that the restrictions on s. 2 rights are justified as a reasonable limit under s. 1 of the *Charter*. The *Oakes* test is well-known. First, the objective of the measure must be pressing and substantial. Second, the means employed must be proportionate to the objective. The proportionality requirement will be satisfied where (i) there is a rational connection between the means chosen and the objective; (ii) the measure minimally impairs the rights at issue and (iii) there is proportionality between the salutary and deleterious effects of the measure.[107]

133. The proportionality inquiry is a normative and contextual one. The court must look at the broader picture in order to balance the interests of society with those of individuals and groups.[108] In a case such as this, where individual rights compete with the public good and societal interests that are themselves protected by the *Charter* because the health and lives of others are at stake, a restriction on rights is more apt to be found proportionate to its objective.[109]

134. The jurisprudence has often stated that proportionality does not require perfection. Section 1 only requires that limits be reasonable.[110]

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[106] *Hutterian Brethren, supra* at para. 108 **[TAB 8]**
[107] *Hutterian Brethren, supra* **[TAB 8]**
[108] *R. v. K.R.J.*, 2016 SCC 1 at para. 58 **[TAB 33]**
[109] *Carter, supra* at paras. 94-95 **[TAB 16]**
[110] *R. v. K.R.J., supra* at para. 67 **[TAB 33]**

i. *The importance of context and deference*

135. Deference or a "margin of appreciation" must be accorded to governments in determining whether a law is justified under s. 1 of the *Charter*. This is especially true for complex issues that involve a multitude of overlapping and conflicting interests. McLachlin C.J. wrote in *Hutterian Brethren* that the primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. The *Charter* does "not demand that the limit on the right be perfectly calibrated, judged in hindsight" but only that it be reasonable and justified:

> [37] If the choice the legislature has made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives. **Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified"**. **Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused**. Courts recognize that the issue of identity theft is a social problem that has grown exponentially in terms of cost to the community since photo licences were introduced in Alberta in 1974, as reflected in the government's attempt to tighten the scheme when it discontinued the religious exemption in 2003. The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate: *Edwards Books*, at pp. 781-82, *per* Dickson C.J., and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 43, *per* McLachlin C.J. [Emphasis added] [111]

136. In this case, public health officials must respond to a novel and complex pandemic. They are required to make decisions quickly, in real time, in rapidly changing circumstances and in a climate of scientific uncertainty and evolving knowledge. The factual underpinnings for managing a pandemic are essentially scientific and medical matters that fall outside the institutional expertise of courts. They should not be second guessed, especially when there may

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[111] *Hutterian Brethren, supra* at para. 35, 37 **[TAB 8]**; *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 57 applied this principle in relation to s. 7 **[TAB 37]**; *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 57 **[TAB 18]**

be divergent opinions or schools of scientific thought.[112] Moreover, official must balance the ameliorative effects of the public health measures against potential negative effects, the severity of which is often extremely difficult to predict or quantify. In *RJR-MacDonald*, McLachlin J. (as she then was) held that the civil standard of proof under s. 1 does not require "scientific demonstration" or the "standard required by science".[113]

137. In *Taylor*, Burrage J. properly remarked that constitutional rights do not magically disappear in a pandemic. Nonetheless, the court stressed the important role of deference in justifying COVID-19 public health measures under s. 1 of the *Charter*:

> [456] It is at this point that I digress briefly to consider the role of deference to the CMOH and the institutional capacity of the Court.
>
> [457] I am mindful of the fact that while travel restriction has legal force, **it is in essence a medical decision directed towards protecting the health of those in this province. The qualifications of the CMOH to make this decision are not challenged. Furthermore, in the exercise of her authority the CMOH draws upon specialized resources at her disposal. This team approach is conducive to informed decision making based on the best medical evidence available**.
>
> [458] **To this I would add that the courts do not have the specialized expertise to second guess the decisions of public health officials**.
>
> [459] In the context of the COVID-19 pandemic Chief Justice Roberts of the Supreme Court of the United States, for the majority, had the following to say regarding deference and the role of the judiciary (*South Bay United Pentecostal Church et al v. Gavin Newsom, Governor of California, et al.,* No. 19A1044 (USSC) at p. 2):
>
> > The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those official "undertake [ ] to act in area fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary,"

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[112] *Beaudoin, supra* at paras. 120-121, citing *Lapointe v. Hôpital Le Gardeur*, [1992] 1 SCR 351 at para. 31 **[TAB 10]**; *Taylor v. Newfoundland and Labrador, supra* at paras. 457-458 **[TAB 47]**. *Trest v. British Columbia (Minister of Health),* 2020 BCSC 1524 at para. 91 **[TAB 49]**

[113] *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 SCR 199 at para. 137 **[TAB 40]**

> which lacks the background, competence, and expertise to assess public health and is not accountable to the people See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).
>
> …
>
> [463] I accept the Applicant's argument that the pandemic is not a magic wand which can be waved to make constitutional rights disappear and that the decision of the CMOH is not immunized from review.
>
> [464] **However, it is not an abdication of the court's responsibility to afford the CMOH an appropriate measure of deference in recognition of (1) the expertise of her office and (2) the sudden emergence of COVID-19 as a novel and deadly disease. It is also not an abdication of responsibility to give due recognition to the fact that the CMOH, and those in support of that office, face a formidable challenge under difficult circumstances.** [Emphasis added]

138. The court took much the same approach in *Beaudoin*, affording considerable deference to the chief public health officer in British Columbia, who also temporarily ordered places of worship to close, at a time when that province was facing exponential growth of the virus: [114]

> [244] The dangers that Dr. Henry's G&E Orders were attempting to address were the risk of accelerated transmission of the Virus, protecting the vulnerable, and maintaining the integrity of the healthcare system. Her decision was made in the face of significant uncertainty and required highly specialized medical and scientific expertise. The respondents submit, and I agree, that this is the type of situation that calls for a considerable level of deference in applying the *Doré* test.

ii. Pressing and substantial objective

139. Containing the spread of the SARS-CoV-2 pandemic in order to protect public health is a pressing and substantial objective of the highest order. In short, the objective is to save lives, prevent serious illness and stop exponential growth of the virus from overwhelming Manitoba's hospitals and acute health care system.

140. Community transmission of SARS-CoV-2 was raging in the fall of 2020. Cases were doubling every 2 weeks. Deaths were rising fast. Manitoba's ICU and hospital capacity was being stretched to the maximum by COVID-19 patients. The situation was critical. In

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[114] *Beaudoin, supra* at paras. 120-121, 216, 244 **[TAB 8]**

particular, there was an urgent need to stem the tide of SARS-CoV-2 and flatten the curve because our hospitals and ICUs were in serious jeopardy of being overrun.[115]

141. Protecting public health has long been recognized as a pressing and substantial objective.[116] Courts across the country, including this Court, have recognized the pressing need to fight the COVID-19 pandemic.[117]

iii. Rational connection

142. To establish a rational connection, the government must show a causal connection between the infringement and the benefit sought on the basis of reason or logic. It is not a high threshold. The government only has to show it is reasonable to suppose that the measure may further the goal, not that it will do so. The must be a rational link between the infringing measure and its goal.[118]

143. Based on evidence,[119] logic, reason and common sense, the measures taken to limit gatherings, including in places of worship, are rationally connected to the goal of reducing the spread of SARS-CoV-2. The virus spreads through respiratory droplets. The risk of transmission is particularly high in gatherings involving close contact for prolonged periods. Outbreaks of SARS-CoV-2 have occurred in places of worship and other gatherings.

144. In *Beaudoin*, the court found no basis to conclude that the closure of places of worship was arbitrary or "bears no connection" to the law's purpose. To the contrary, Dr. Henry's public health orders were based on evidence of the risk of transmission during religious and other types

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[115] See affidavits of Roussin, Loeppky and Siragusa
[116] *R. v. Oakes,* [1986] 1 SCR 103 at 141 **[TAB 36]**; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at para. 65 (per La Forest J. dissenting, but not on this point). **[TAB 40]**
[117] *Springs of Living Water Centre Inc. v. The Government of Manitoba,* 2020 MBQB 185 **[TAB 45]**; *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 at paras. 426-437 **[TAB 47]**; *Beaudoin, supra* at para. 224, 228 **[TAB 10]**; *Toronto International Celebration Church v. Ontario (Attorney General),* 2020 ONSC 8027 [*Toronto International Celebration Church*] **[TAB 48]**; *Ingram v. Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806 **[TAB 22]**
[118] *Hutterian Brethren, supra* at para. 48, 51 **[TAB 8]**
[119] See affidavits of Roussin; Kindrachuk; Loeppky; Bhattacharya

of gatherings.[120] The rational connection between the Impugned PHOs and their pressing objective is equally obvious in Manitoba.

iv. Minimal impairment

145. Minimal impairment considers whether the Impugned PHOs limit rights in a manner that is reasonably tailored to the objective. It is only when there are alternative, less harmful means of achieving the government's objective "in a real and substantial manner" that a law should fail the minimal impairment test.[121] The government's decision must fall within a reasonable range of outcomes. The inquiry is highly contextual.[122]

146. In assessing this part of the s. 1 test, the courts will accord a measure of deference particularly on complex social or scientific issues where the government may be better positioned than the courts to choose among a range of alternatives.[123] In *RJR-MacDonald*, the Supreme Court explained the concept of minimal impairment analysis as follows:

> 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. [Citations omitted.][124]

147. Recent academic literature on COVID-19 confirms that in a fast-moving pandemic, "governments are forced to make urgent policy maneuvers that impact civil liberties in a vortex of uncertainty, without the luxury of prolonged deliberation". The situation is "scientifically and socially dynamic" with "emerging evidence continually altering the level of uncertainty". Public health measures designed to flatten the curve involve "quintessentially complex and polycentric" trade-offs between multiple individuals and the need to balance claims of competing groups. The primary beneficiaries are paradigmatically vulnerable populations. In addition to protecting

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[120] *Beaudoin, para*. 228-229, 233 **[TAB 10]**
[121] *R. v. K.R.J. supra* at para. 70 **[TAB 33]**
[122] *TWU, supra* at para. 81 **[TAB 26]**
[123] *Hutterian Brethren* at para. 53-54 **[TAB 8]**
[124] *RJR-Macdonald Inc. v. Canada,* [1995] 3 SCR 199 at para. 160 **[TAB 40]**

the population from the pandemic itself, the CPHO must balance a plethora of competing interests including economic, social, mental health, limited acute care resources, the degree of public acceptance and compliance, among others, which are not amenable to any easy calculus. These are precisely the type of considerations that suggest the need to be deferential to actions taken in response to COVID-19.[125]

148. In *Irwin Toy*, the Supreme Court of Canada held:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources.[126]

149. The situation facing the province starting in October to November 2020 was dire. In the weeks following Thanksgiving, Manitoba saw a rapid escalation in cases including a significant spike of 480 new cases on October 30th alone. The Capital Region was put into level red indicating uncontained community spread and significant strain on our health care system. Ten days later, on November 12th, the entire province was in level red. We had the highest per capita rate of active cases in the country. SARS-CoV-2 infections were growing exponentially, with cases doubling every 2 weeks. The test positivity rate had soared to 10.5% provincially. Indigenous people, who are more vulnerable, were also seeing a disproportionate number of cases. We were on the verge of losing our ability to contact trace effectively. COVID-19 related deaths and hospitalizations were accelerating. Hospital and ICU resources were under extreme duress. Modelling information provided by Epidemiology and Surveillance projected that without significant action, in a very short time our hospitals and ICUs would no longer be able to cope with the influx of new COVID-19 case. This would mean more preventable deaths and serious illness from COVID-19 and other patients.[127]

150. The model projected that we would exceed 124 ICU patients by November 23rd. This was already significantly higher than Manitoba's typical ICU capacity of 72 patients prior to

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[125] C. Flood, B. Thomas and Dr. K. Wilson, Civil Liberties vs Public Health, Chapter C-1 at pp. 252, 254, 258-259 in Vulnerable: The Law, Policy and Ethics of COVID-19 (University of Ottawa Press, 2020) **[TAB 51]**

[126] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at pp. 993-994 **[TAB 23]**

[127] Roussin, paras. 100-106 ; Loeppky, paras. 16-19, Exhibits E, F; Siragusa, paras. 15-20

COVID-19. As Lanette Siragusa outlines in her affidavit, significant efforts were already made to expand ICU capacity well beyond the usual number of patients, including by deferring or suspending surgeries, transitioning surgical wards into COVID-19 medical units and redeploying medical staff. During the COVID-19 crisis, we could no longer maintain the usual one-to-one ICU patient care because there were not enough specialized ICU nurses to maintain that ratio. A team based model of care was employed. Ultimately, after the level red restrictions were imposed, Manitoba peaked at 129 patients in ICU on December 10th.

151. Based on all the data presented to him, Dr. Roussin concluded that a temporary "circuit break" was essential to significantly reduce the number of contacts and regain control of the pandemic. In his professional judgment, a lesser restriction would not suffice. It cannot be forgotten that in the midst of a public health emergency, public health officials do not have the luxury of "trial and error" or undertaking extensive research projects to determine if "significantly less intrusive measures" would be "equally effective". When a pandemic is raging, there is little room for error.

152. Manitoba submits that the Impugned PHOs are minimally impairing for a variety of reasons:

a) Throughout the pandemic, public health officials have continually monitored and reassessed the situation in order to tailor orders to the prevailing circumstances. Orders have been regularly changed, either tightening or relaxing restrictions as warranted approximately every 2 - 4 weeks. For example, after the first wave, the public health restrictions were relaxed. Since July 24, 2020, businesses could generally re-open and gathering sizes were only limited to 50 persons indoors and 100 people outdoors. Places of worship could have up to 500 people or 30% of usual capacity. When the pandemic began to worsen in October 2020, the CPHO did not immediately close things down or eliminate gatherings. He took a focused and measured approach based on the epidemiological data and other indicators available to him. For example, from November 12 to 20, 2020, the limit on religious services was reduced from 500 to 250 people or 20% except in the Capital Regions where it

was 100 people or 15%.[128] The history of orders demonstrates they were responsive and progressive. Tighter gathering restrictions were not put into place in the Impugned PHOs until the pandemic became critical and more urgent intervention was necessary.

b) The public health orders applied regionally when possible, so that restrictions could vary with the severity of community transmission. For example, on October 1, 2020 a more restrictive limit on gatherings including in private residences was imposed only in the Capital Region. The limit on religious gatherings also depended on the situation in particular locations.

c) Unlike some other jurisdictions, there was no curfew imposed or a "shelter in place" order that would prevent people from leaving their home other than for limited reasons. It was still possible to gather with family and friends at indoor and outdoor public places, up to the gathering limit of 5 people. Children could also visit parents in a private residence. An exception was also made for people who live on their own to allow one person to visit.

d) The PHOs did not close schools, maximizing learning and also permitting socializing among children.

e) There was an attempt to accommodate religious services. Religious services could still be delivered remotely indoors, or outdoors in vehicles. As well, individual prayer and reflection was permitted. Places of worship could be used for the delivery of health care and social services (Order 15(4)). Religious officials could attend at one's private residence for counselling or educational instruction or tutoring (Order 1(2)). Bible studies could happen online.

f) Funerals, weddings, baptisms or similar religious ceremonies were permitted, subject to a gathering limit of 5 persons (in addition to the officiant).

[128] Roussin, para. 98

g) The Impugned PHOs were tailored to the nature of the risk. Places involving greater risk due to prolonged contact were subject to greater restrictions. Places of worship and gatherings in the home were treated much like restaurants, movie theatres, plays and concert halls, which had to remain closed during the circuit break. Some retail transactions were allowed in-store because this usually involved shorter, transitory contact between people. Even so, there was an attempt to minimize such transactions. People were only allowed to purchase "essential items" in-store. Otherwise, shopping had to be done remotely for pick-up or delivery.

h) Despite the size limit on outdoor gatherings, this did not preclude many other means of expression to protest the PHOs or other important issues. This included petitions, emails, social media and letters to the media or politicians. In fact, the Impugned PHOs did not preclude a protest involving many small groups as long as each group of five persons was discrete, sufficiently spread out and did not interact with other groups.

i) By the fall of 2020, it became clear that the previous measures in place up until then proved insufficient to stop the exponential spread of the virus. Despite earlier capacity limits and precautions, there was evidence of clusters associated with faith-based gatherings including one where several individuals carried on services despite being symptomatic.[129] Private home gatherings were another important source of transmission. Modelling suggested that more stringent limits on gatherings coupled with good public compliance were necessary to flatten the curve.

j) The Circuit Break was temporary. It was limited to a 13 week period when the pandemic was at its most dangerous point to date, cases were surging and our health care system was under enormous strain. Once the measures achieved the desired goal of flattening the curve, restrictions were gradually eased.[130] Currently, gatherings are limited to 5 people at indoor public places, 10 persons at an outdoor gathering on private property and 25 persons at outdoor public places. Religious services can hold up to 100 people or 25% of capacity. Weddings and funerals have increased to 25

[129] Loeppky, para. 14
[130] Roussin, paras. 152-154

persons. Private residences may allow up to 2 visitors or can create a "bubble" with another residence.

153. The record shows that, as predicted by the modelling, the circuit break had its intended effect and averted a disaster.[131]

154. The Applicants will suggest that Manitoba could have imposed lesser restrictions on gatherings and places of worship. For example, they may argue that the orders could have allowed religious services of limited size to continue as long as reasonable safety precautions were followed such as physical distancing, masks, proper hand hygiene. The problem is that smaller gatherings had been allowed up until then. It was not possible to monitor hundreds of private places of worship or residences. There could be no assurance that these precautions would always be followed properly or at all. Singing and communion are often integral parts of such services and pose higher risk.

155. Whether less intrusive measures are effective depends on the prevalence of the virus in the community and behavioural factors. Just like Dr. Henry in B.C., Dr. Roussin responded to evidence of accelerating transmission and assessed the scientific evidence to determine the risk of gathering including epidemiological data regarding transmission associated with religious activities. Indeed the epidemiological and other evidence relied on by Dr. Henry in B.C. to justify restrictions on gatherings including closing faith-based institutions very closely parallels the evidence Dr. Roussin relied on in Manitoba.[132] The overriding message was to reduce social contacts and stay home where possible.

156. Sometimes, decision-makers have the luxury of trial and error. This was not such a case. In Dr. Roussin's judgment, given the exponential growth in COVID-19, the uncontrolled community spread, the rise in deaths and serious illness and the impending crisis facing our hospitals, there was simply no room for error. He reasonably concluded we could not afford to take the risk.

157. In Public Health Law and Policy in Canada, the authors aptly explain:

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[131] Loeppky, para. 20, Exhibits G, H; Siragusa, para. 21
[132] *Beaudoin, supra* at paras. 27-44, 48-49, 226, 238-241 **[TAB 10]**

> Clearly, in responding to novel public health threats, authorities will often lack scientific facts and must make judgement calls about restricting individual liberties for the sake of protecting the population as a whole. As Laskin C.J.C. observed in *Oakes*: "It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance".[133]

158. Public health decisions to fight a pandemic require an exceptionally difficult balance and cannot be judged with the benefit of hindsight. Dr. Roussin's decision fell within a range of reasonable alternatives. He certainly had no basis to conclude that a "significantly less intrusive" measure would have been "equally effective" in flattening the curve.[134]

v. Proportionality of beneficial and deleterious effects

159. The final stage of the *Oakes* test considers the balance between the beneficial and deleterious effects of the limitation.

160. It has long been recognized that the potential to harm one's neighbours provides a reasonable basis for limiting the freedom to manifest one's beliefs, opinions and conscience. Freedom of religion must be exercised with due respect for the rights of others and subject to "such limitations as are necessary to protect public safety, order and health and the fundamental rights and freedoms of others". This does not repudiate religious freedom but rather facilitates its exercise in a way that takes the general well-being of others into account.[135] In *Multani*, Charron J. wrote:

> This Court has clearly recognized that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others (see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 337, and *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at para. 62).[136]

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[133] T Bailey et al, Public Health Law and Policy in Canada (4th ed., LexisNexis Canada 2019) at pp. 25-26 **[TAB 50]**
[134] *RJR-Macdonald Inc. v. Canada, supra* at para. 160 **[TAB 40]**
[135] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 178 **[TAB 46]**; *R. v. Big M Drug Mart Ltd.*, supra **[TAB 32]**
[136] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 26, 30 **[TAB 29]**

161. Even if the Applicants can demonstrate a sincere belief that a particular religious practice is essential to their faith and engenders a greater connection with the divine (e.g. corporate prayer or gathering in person), the court must still consider it impacts upon the rights of others. "Conduct which would potentially cause harm to or interference with the rights of others" is not automatically protected. Iacobucci J. cited John Stuart Mill who said "the only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."[137]

162. On the one hand, the Impugned PHOs restrict the ability to worship in person, which is of great importance to the Applicants. The orders also limit gathering to small numbers outside of one's private residence, but do not prevent gathering altogether. One could still meet with family and friends, albeit in small groups.

163. On the other hand, as important as gathering in-person to worship may be for some, in a pandemic this can put the health and lives of others at risk. The fact that other people's *Charter* rights (to life and security) are also at stake is an important consideration in the balance. The Impugned PHOs achieve a significant societal benefit: protecting the health and safety of others, especially the vulnerable. Sometimes freedom of religion and other *Charter* protections are outweighed by the greater good of protecting public health by preventing the spread of highly contagious disease.[138]

164. In assessing the proportionality of benefits and effects, it is also important to remember that the impugned restrictions were of limited duration. They were in effect only for as long as necessary to regain control over community transmission and alleviate the intense strain on our hospitals and ICUs.

165. As well, the orders did not target religious practices. Movie theatres, sports facilities, plays, lecture halls among other places were also temporarily closed as was dining in restaurants. The public health measures were necessarily broad based because of the nature of a pandemic. Manitoba submits that the benefits of the measures were surely proportionate to the temporary restriction on rights.

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[137] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras. 61-63, 178 **[TAB 46]**
[138] T Bailey et al, Public Health Law and Policy in Canada, *supra* at pp. 27-29; *Carter, supra* at para. 95 **[TAB 50]**

166. The Applicants argue that the COVID-19 pandemic is not nearly as serious as public health officials in Manitoba and all around the world contend. They assert that the Impugned PHOs did more harm than good. In particular, they criticize the Impugned PHOs on the basis that:

i. Manitoba has artificially inflated the number of deaths.

ii. The PCR test is a flawed basis for decision-making because if an individual tests positive at a higher cycle thresholds (CT), that person may not have enough virus to be considered contagious.

iii. Our modelling data is flawed.

iv. We did not do any assessment of the collateral costs (e.g. economic effects and mental health) compared to the benefits.

v. There is no scientific evidence that the restrictions were necessary or that the virus spreads more easily at places of worship compared to retail outlets.

vi. We ought to have focused our protective measures only on the elderly and vulnerable and allowed everyone else to gather and circulate freely in society.

167. With respect, none of these criticisms is supported by the evidence or stands up to scrutiny.

(i) Deaths from COVID-19 are real

168. The deaths reported to Dr. Roussin were those that medical professionals have attributed to COVID-19. There is no evidence that anyone has artificially inflated the number of deaths. Determining cause of death can be complicated. If it reasonably appeared to a health professional that COVID-19 was a contributing factor it was counted for the purposes of epidemiology and surveillance. When determining how to fight a pandemic, public health officials do not have the luxury of time to review every death certificate and perform a chart audit on every patient. Manitoba follows the Canadian and World Health Organization's guidelines for classifying COVID-19 as a cause of death. Unless there was a clear alternative that was unrelated to COVID-19 (e.g. trauma), a person who contracts COVID-19 and dies is

counted as a death.[139] In any event, the evidence does not lie. When the number of COVID-19 cases spiked during the second wave, so too did the number of hospitalizations, ICU admissions and deaths in Manitoba.[140]

(ii) Positive PCR cases of COVID-19 are real

169. The Applicants allege that the PCR tests relied on by the Respondents are "well-known in the medical and scientific community to produce unreliable and misleading data, such as a high percentage of false positive results".[141] This is incorrect.

170. In fact, the PCR test is an extremely accurate test to identify the SARS-CoV-2 virus. It is the gold-standard. False positives are very rare (less than 1 in 1000 cases). In other words, 99.9% of the time, if someone tests positive using the PCR test, we can reliably say that person has the SARS-CoV-2 virus.[142]

171. However, the Applicants argue that the PCR test does not reliably identify all individuals who are still infectious with COVID-19 because it includes cases who test positive at higher CT values. The CT value represents the number of times the virus must be doubled in order to detect it. A higher CT indicates that a lower viral load was initially present in the subject. It is true that higher CT values are associated with lower likelihood of being able to grow the virus in cell culture (which is a way to test infectivity). This could signify that the person is not infectious but that is not necessarily the case. A particular CT value in isolation cannot be used to determine infectiousness. Infectiousness of each case must be assessed in the overall clinical context.[143]

172. As Dr. Bullard and Dr. Van Caeseele explain in their report, in no way does a PCR test indicate a false positive, even at a higher CT. It remains a true case of COVID-19. Moreover,

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[139] See Provincial Respiratory Surveillance Report – COVID-19 Technical Notes, cited in Bhattacharya, Exhibit C, at footnote 157. Manitoba relies on the "WHO International Guidelines for Certification and Classification (coding) of COVID-19 as a cause of death" found at https://www.who.int/classifications/icd/Guidelines_Cause_of_Death_COVID-19.pdf at p. 3
[140] Loeppky, paras. 16-18, Exhibits E and F; Roussin, paras. 100-106
[141] Amended Notice of Application, p. 8 (para. g)
[142] Affidavit of Jared Bullard ["Bullard"], Exhibit C, lines 123-124, 127-137
[143] Bullard, Exhibit C, Lines 140-170

from a public health perspective, there are important reasons for reporting all positive PCR tests, regardless of the CT value:

a) As noted, a high CT value might indicate that a person is no longer infectious but cannot rule it out. A CT value alone is not determinative. A person may have a low viral load (high CT value) because they are at the end of the disease progression and are no longer infectious.[144] On the other hand, the person may have a low viral load because they are only at the very early stages of the disease at the time of the test. The virus will begin to increase and become highly infectious.[145]

b) In any event, most PCR positive cases in Manitoba have not been at high CT values. An analysis of 5,825 SARS-CoV-2 positive results in Manitoba in December 2020 found that 75% of the positive test results had a CT value of under 30. To the extent that CT value can be used as an imperfect measure to assess likely infectiousness, the vast majority of Manitobans were likely infectious based on CT alone. Nor could we rule out infectiousness at higher CT levels.[146]

c) Further, even if a particular individual was no longer infectious at the time of the PCR test, we know they were likely infectious at some point. From a public health perspective, it is imperative to trace their contacts and follow up to prevent further secondary spread. Identifying all cases of COVID-19 also provides public health with an understanding of the extent of the pandemic. Regardless of whether the test subject remains infectious, contact tracing assists public health officials to identify potential locations of concern such as clusters or outbreaks. This allows more focused protection. Conversely, it may alert public health officials to wider community spread. It is important to recognize that the Applicants have not challenged any quarantine or self-isolation orders in the case at bar.[147]

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[144] Bullard, Exhibit C, lines 152-170
[145] Bullard, Exhibit C, lines 200-225
[146] Bullard, Exhibit C, lines 163-166, 193-199
[147] Bullard, Exhibit C, lines 173-225; Roussin, paras. 90-91

173. To the extent there is any dispute in the expert evidence, this Court should prefer that of Dr. Bullard and Dr. Van Caeseele. Dr. Bullard is the Associate Medical Director of Cadham Provincial Laboratory (CPL). His expertise is in both Infectious Diseases and Medical Microbiology. He has particular expertise on the RT-PCR test and has conducted primary scientific research on CT values. Dr. Van Caeseele is also an expert in Infectious Diseases and Medical Microbiology and is the Medical Director of CPL. While Dr. Bhattacharya's expertise is as a health economist, nothing on his CV suggests any specific expertise as a laboratory scientist, microbiology or RT-PCR diagnostic testing.

174. With respect, the Applicants have misconceived the role that the PCR test and CT values play in terms of the CPHO's determination of special measures to combat COVID-19. The PCR test simply indicates whether a case is positive for SARS-CoV-2. The CT value is not the driving factor for public health decisions. Dr. Roussin explained that assessing the seriousness of the public health threat depends on a wide range of factors including, among others: the total number of cases, the rate of growth (doubling time or Rt value), the extent of community transmission, outbreaks and clusters, test positivity rate and trend, contact tracing capacity, the potential for pre-symptomatic transmission and significantly, the burden on hospital capacity and our health care system.[148] The number of serious cases and their actual impact on people and the health care system is far more important than considering the absolute number of positive tests in isolation.

175. In the fall of 2020, the rising deaths and hospitalizations and the strain on our health care system were the critical factors. The increasing number of hospital and ICU admissions due to COVID-19 put the healthcare system in serious jeopardy. If capacity were exceeded, it would adversely affect the quality of life and even lead to death for COVID-19 and non-COVID-19 patients alike.[149] In fact, on November 17, Manitoba was actually contemplating the need for a triage policy to decide who would receive care and who would not if critical care resources were depleted. The peak number of ICU patients on December 10 and 11, 2020 due to COVID-19 was far in excess of usual ICU patients but was addressed through additional resources.[150]

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[148] Roussin, para. 86-87, 90-91
[149] Roussin, paras. 86, 89
[150] Siragusa, para. 17-19

176. Any concern about so-called "functional false positives" due to high CT values (a term not recognized in the medical literature) was wholly irrelevant in the face of the actual crisis facing Manitoba's health care system in November 2020, due to skyrocketing COVID-19 numbers, hospitalizations, ICU admissions and deaths. That was the primary consideration that demanded urgent action.[151]

(iii) Modelling projections have proven to be accurate

177. The Applicants doubt Manitoba's modelling data. Models by their very nature are inexact. They are projections of what is likely to occur in the future under different scenarios. The evidence was that in the fall of 2020, Manitoba was on track for a worst case scenario unless we dramatically changed course. That was the stark reality facing the province and public health decision-makers.

178. While Dr. Bhattacharya's report very generally questions the accuracy of some models,[152] the Applicants have filed no evidence challenging the validity of the particular modelling presented by Epidemiology and Surveillance in Manitoba and relied on by Dr. Roussin. To the contrary, the actual number of COVID-19 cases and hospitalizations over time have proven Manitoba's model to be quite accurate. For example, the model projected that for the week of October 19-24, the number of new cases could range between 217-1299 cases depending on various factors. The actual number of cases for that week came in close to the upper end at 1,038. The model projected there could be as many as 597 deaths by December 10, 2020 in the worst case. The actual number was 478, again close to the higher end of the range.[153]

179. Significantly, the model also projected that if stringent restrictions were put in place and the public mostly complied, the epidemic curve would flatten. That is exactly what happened. The interventions imposed by Dr. Roussin worked.

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[151] Roussin, para. 91, 100-106
[152] In fact, Dr. Bhattacharya himself relies on modelling in many of the articles he cites.
[153] Loeppky, paras. 15-18

(iv) Public health officials properly balanced collateral effects

180. Dr. Roussin bears the daunting responsibility of making decisions to protect us all from the COVID-19 pandemic. Public health official and government must balance a wide variety of competing rights and interests of Manitobans.[154] The potential for negative collateral effects of public health restrictions, such as the impact on mental health or adverse economic consequences must be taken seriously. The Applicants allege that the CPHO failed to take into account the potential negative impacts of the Impugned PHOs. This is incorrect.

181. First, Dr. Roussin affirms that collateral effects were top of mind for public health officials and the potential harms were balanced against the benefits and the severity of the pandemic. Understandably, pandemics are very hard on a population. People become sick, some gravely so and some die. People are afraid. It is acknowledged that the Impugned PHOs restrict our ordinary freedoms in a way that could potentially cause further strain and hardship. However, there is no easy metric. It is a very difficult balance. Decisions must be made quickly in real time in the face of much uncertainty. The burdens and benefits of public health orders have been constantly re-evaluated in a dynamic way as the pandemic progresses.[155]

182. Evaluating the precise harms caused is extremely complex and undoubtedly will be the subject of study for many years to come. While there is general evidence that mental health has deteriorated during the pandemic, it is very difficult to attribute the cause of suicide or depression or increases in addiction or overdoses solely or directly to the public health restrictions let alone the particular Impugned PHOs. There could be myriad contributing factors including the stress and fear associated with COVID-19 itself. Evidence relating to the impacts of "lockdowns" in general is not of assistance because the type and duration of measures vary in every jurisdiction. Gatherings have been restricted in Manitoba but our schools and a significant proportion of businesses have largely been open.

183. There is no persuasive evidence that the 13 week closure of places of worship and limitations on public or private gathering have caused suicides or economic harm, or that the potential harms outweighed the seriousness of the public health crisis in November.

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[154] *Beaudoin, supra* at para. 14 **[TAB 10]**
[155] Roussin, para. 87, 175

184. The admonition that courts must not judge s. 1 measures with the benefit of hindsight is particularly important here. Dr. Roussin did not ignore collateral effects. To the contrary, they have been the subject of study and will continue to be.[156] But it is unreasonable to suggest that Dr. Roussin or anyone in government can study in advance or with exacting precision how proposed measures would impact the public, particularly when the Impugned PHOs were intended to be a short-term circuit break and were reviewed regularly. What was known is that without decisive action, more people would die and our urgent care system could fail. Public officials had to address these immediate concerns, balanced against potential adverse collateral effects, which would greatly depend on how long measures remained in place. In the end, they lasted 13 weeks.

185. The Supreme Court of Canada has held that a section 1 justification does not require scientific proof in an empirical sense. It is extremely difficult if not impossible to empirically prove in advance that potential economic and social costs of the impugned restrictions outweigh the benefits. In such circumstances, "it is enough that the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has." What is required is "rational, reasoned defensibility".[157]

186. Dr. Roussin also considered the principle of reciprocity, one of the core ethical principles of public health decision-making (along with the harm principle, least restrictive means and transparency). That is, the mutual sacrifice required of citizens to adhere to public health restrictions for the common good should be counterbalanced with economic and other supports to assist people.[158] Both the provincial and federal governments have implemented a wide array of economic, mental health, addictions and other supports to try to alleviate the burdens of the pandemic including public health restrictions.[159] These must be factored into the proportionality assessment.

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[156] Loeppky, Exhibit D.
[157] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 18 **[TAB 41]**; *Harper v. Canada (A.G.)* 2004 SCC 33 at paras. 77-79 **[TAB 20]**; Compare the evidence relied on in *Beaudoin, supra*
[158] Roussin, paras. 54, 175, Exhibit 9 (p. 18), Exhibit 11 (pp. 4-5)
[159] Affidavit of Szilveszter Komlodi

187. The Applicants also raise collateral harms that cannot in any way be attributed to the public health orders, let alone the specific Impugned PHOs at issue. For example, they refer to delays or cancellation of surgeries, childhood vaccinations or other important medical procedures. They fail to recognize that the public health orders have never prevented medical health professionals from providing health care from the outset of the pandemic. For example, the November 21, 2020 PHO expressly states that nothing in the orders prevents, restricts or governs the operations or delivery of services by a health professional.[160] The public health restrictions have had no impact on medical procedures, childhood vaccinations, cancer screening or other diagnostic tests. It is conceivable that some people, in consultation with their doctors and other health professionals, have refrained from seeking medical treatment out of fear of contracting COVID-19 but individuals have made their own decisions.[161]

188. In fact, the evidence shows that the reason for delays and cancellations of surgeries was directly attributable to the overall burden of COVID-19 itself on our hospital resources. As cases continued to rise, doctors and nurses had to be diverted to care for COVID-19 patients. Some hospital staff were also exposed to the virus adding further strain on finite resources. COVID-19 was the cause of delayed medical procedures, not any public health restrictions.[162]

189. Likewise, the Applicants discuss the harms of closing schools. Leaving aside that schools are not part of the Impugned PHOs specifically at issue in this Application, the public health orders expressly state they do not apply to a public or private school.

190. Manitoba takes very seriously the real concerns about mental health, suicide, addictions and economic effects of the pandemic. However, it is overly simplistic to say that the Impugned PHOs have directly caused more suicides or addiction. These are complex questions. There is also no evidence that the temporary closure of places of worship or restrictions on gatherings have had any economic impact on the Applicants. Be that as it may, the evidence establishes that public health officials were keenly aware of these potential collateral harms and

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[160] COVID-19 Prevention Order, November 21, 2020, Order 2(2), 15(4) and the exceptions to application on p. 13 **[TAB 3]**. While the precise language has varied, similar exemptions for health services has existed in all public health orders. For example, see Order 5 of the April 16, 2020 COVID-19 Prevention Order **[TAB 2]**.
[161] Siragusa, para. 5, 7
[162] Siragusa, para. 10-15

proportionately balanced them against the least restrictive measures necessary to address the immediate crisis.

(v) The scientific evidence about COVID-19 supports the Impugned PHOs

191. The Applicants allege that Manitoba has failed to properly consider whether the Impugned PHOs are based on credible scientific evidence.[163] To the contrary, there is ample scientific evidence justifying the restriction on gatherings and the temporary closure of religious services at places of worship.

192. Manitoba's PHOs are based on current scientific information and knowledge gathered from Canada and around the world, including peer reviewed articles, recommendations from the WHO and the Pan-Canadian Public Health Network's advisory committees as well as lessons learned from experience in Manitoba and other jurisdictions. As new scientific evidence emerges in relation to COVID-19, it is continually being reviewed and assessed. Officials in Manitoba work closely and collaboratively with their provincial and federal counterparts across Canada, sharing knowledge, experience and best practices. This includes public health experts, epidemiologists, basic scientists (for example, virologists and immunologists) and health care professionals, among others. Canada also collaborates with international experts.[164]

193. The evidentiary record provides ample basis to conclude that the restrictions on gatherings, including places of worship were necessary. Credible scientific and epidemiological evidence demonstrates that SARS-CoV-2 is a highly communicable disease that spreads primarily through respiratory droplets.[165] Pre-symptomatic transmission of the virus is a real concern, primarily a few days before symptom onset until about five days after.[166] Although younger children might not be a significant source of spread, older children and teenagers can transmit the virus as efficiently as adults.[167] Prolonged close contact in indoor settings with poor ventilation poses a higher risk of transmission.[168] Coughing, talking loudly or communal singing are more likely to

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[163] Amended Notice of Application, p 9 (para. k) and p. 15 (para. mm)
[164] Roussin, paras. 40-45, 88
[165] Roussin, para. 24, Exhibit 3; Kindrachuk, Exhibit B, p. 7
[166] Roussin, para. 26; Kindrachuk, Exhibit B, pp. 8-10
[167] Roussin, para. 26; Kindrachuk, Exhibit B, p. 10
[168] Roussin, para. 27, 83, 162, Exhibit 3; Kindrachuk, Exhibit B, p. 11-12

spread the virus. Thus choirs and singing in faith-based settings are of concern. Certain religious rituals such as sharing food or other items can also heighten the risk.[169] There is evidence of a number of faith-based clusters of COVID-19 in Manitoba and other jurisdictions in Canada and elsewhere.[170]

194. The Applicants argue that the risk of transmission in places of worship is no greater than retail stores. It is true there is risk of contracting the virus while shopping. That is why the orders only allowed retail stores to remain open to buy essential items in-person. All other items had to be purchased remotely. The purpose was to minimize the amount of in-person contact in retail settings to the extent possible. Similarly, restaurants were closed except for pick up or delivery. Gyms were closed. But the CPHO relied on evidence that the nature of the risk is different in a retail environment compared to a place of worship where people gather, sing and pray together for a prolonged period. The Applicants themselves discuss the importance of sharing religious meals and communion.

195. The degree of empirical precision the Applicants appear to demand before acting is unrealistic in the midst of a raging pandemic and without precedent. One cannot empirically prove exactly where an individual has acquired the virus, especially when fighting a pandemic in real time. However, the risks of such gatherings were known and epidemiological evidence allowed inferences to be drawn. Despite the absence of determinative scientific evidence, Dr. Roussin relied on all of the available evidence, drew reasonable inferences and applied common sense to what was known. The decision to close places of worship temporarily was rational, reasoned and defensible in the circumstances.[171]

196. In assessing scientific knowledge, the courts should be wary of second guessing scientific and medical matters necessary to manage a pandemic.[172] Dr. Roussin is entitled to deference.[173]

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[169] Roussin, para. 26-27, Exhibit 3; Kindrachuk, Exhibit B, p. 11-12
[170] Loeppky, para. 14; Roussin, para. 27, 155-160, Exhibit 3; Kindrachuk, Exhibit B, p. 11; See also *Beaudoin, supra* at paras. 15-18, which reviewed the incidence of virus transmission in religious settings in B.C. **[TAB 10]**
[171] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 18 **[TAB 41]**; *Harper v. Canada (A.G.)* 2004 SCC 33 at paras. 77-79 **[TAB 20]**; *RJR-MacDonald, supra* at para. 137 **[TAB 40]**
[172] *Beaudoin, supra* at paras. 120-121, citing *Lapointe v. Hôpital Le Gardeur*, [1992] 1 SCR 351 at para. 31 **[TAB 10]**; *Taylor v. Newfoundland and Labrador, supra* at paras. 457-458 **[TAB 47]**. *Trest v. British Columbia (Minister of Health),* 2020 BCSC 1524 at para. 91 **[TAB 49]**
[173] *Beaudoin, supra,* para. 124 **[TAB 10]**

197. Very similar arguments were made by the petitioners in *Beaudoin*. They argued there was no evidence of a causal link between restrictions on religious services and a reduction in transmission and no evidence of transmission if religious services adhered to guidelines applicable to other in-person facilities like retail establishments.[174] It was argued that there was no evidence that the risks of religious gatherings were greater than in schools or retail settings. Chief Justice Hinkson rejected this simplistic analysis because it failed to account for key distinguishing features relied on to restrict religious gatherings including the ages of participants, the intimate setting and the presence of communal signing or chanting in religious gatherings.[175]

198. As in B.C., there is no basis to conclude Dr. Roussin's orders were arbitrary, irrational and disproportionate. To the contrary, the orders were based on "a reasonable assessment of the risk of transmission of the Virus during religious and other types of gatherings.[176] Chief Justice Hinkson's conclusions are entirely applicable to the situation in Manitoba:

> [239] I find that in making the impugned G&E Orders, Dr. Henry assessed available scientific evidence to determine COVID-19 risk for gatherings in B.C. including epidemiological data regarding transmission of the Virus associated with religious activities globally, nationally and in B.C., factors leading to elevated transmission risk in religious settings, and COVID-19 epidemiology in B.C.
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> [240] I also find that in making the impugned G&E Orders Dr. Henry was guided by the principles applicable to public health decision making, and in particular, that public health interventions be proportionate to the threat faced and that measures should not exceed those necessary to address the actual risk. Her orders are limited in duration and constantly revised and reassessed to respond to current scientific evidence and epidemiological conditions in B.C. [177]

(vi) <u>The CPHO applied focused protection</u>

199. The Applicants posit a theory based on the "Great Barrington Declaration" that Manitoba should have focused our efforts only on protecting those who were vulnerable to death – the elderly and immunocompromised – rather than imposing broader restrictions aimed at slowing community spread. According to this theory, young people (under age 60) should be free to

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[174] *Beaudoin, supra*, para. 150 **[TAB 10]**
[175] *Beaudoin, supra* at para. 226 **[TAB 10]**
[176] *Beaudoin, supra* at para. 222, 227-233 **[TAB 10]**
[177] *Beaudoin, supra* at para. 239-240 **[TAB 10]**

gather and circulate throughout society. The theory argues this would cause less harm associated with "lockdowns" while protecting those who are truly at risk from COVID-19.

200. Dr. Roussin agrees that public health measure should offer focused protection but disagrees with the approach advocated by the Applicants. Of course, Manitoba must focus our efforts to protect vulnerable populations such as those living in personal care homes, congregate settings and First Nations. However, that is not sufficient. Vulnerable people are integrated throughout society. People over age 60 are not confined to personal care homes. Moreover, the evidence shows that severe outcomes (hospitalizations, ICU and deaths) also occur in younger populations across a wide spectrum of ages. People of all ages are more susceptible to hospitalization and death if they have one of many underlying medical conditions such as heart disease, diabetes, kidney disease, high blood pressure, obesity or are otherwise immunocompromised. In Manitoba, about 40% of reported COVID-19 cases also had an underlying condition. Roughly one third or more of serious cases of COVID-19 (death or hospitalizations) occurred in people under age 60.[178] Of those patients admitted to ICU, over 42% were under the age of 60 (31.8% were 40-59 and 10.5% were 20-39 years of age).[179]

201. Our Indigenous population is also more vulnerable to severe outcomes from COVID-19 due to a variety of socioeconomic factors and underlying health conditions. For example, First Nations have been disproportionately affected by COVID-19 and more than half of those cases are off-reserve.[180]

202. Another concern relates to potential long-term health effects of COVID-19. Much more research in this area is needed but there is evidence of long-haul symptoms persisting even in young people.[181]

203. Therefore, focused protection certainly means protecting the vulnerable. But the position adopted by Manitoba and most jurisdictions is that we cannot protect vulnerable populations without also reducing the extent of community transmission overall. Further, it is imperative to slow the rate of SARS-CoV-2 in the community so that it does not overwhelm our limited health

[178] Roussin, paras 163-167; Loeppky, Exhibit H.
[179] Loeppky, Exhibit H
[180] Roussin, para. 168
[181] Kindrachuk, Exhibit B at p. 15

care resources. Notably, Dr. Bhattacharya's report focuses almost exclusively on mortality with virtually no mention of the impact that widespread community transmission has on our hospitals and ICUs. With respect, this is a serious omission.

204. The data shows that on average, 7% of people with COVID-19 require hospitalization and 1.3% will require ICU care. Allowing the virus to circulate more broadly in the community will inevitably lead to many more COVID-19 cases, including infecting more vulnerable people. When cases rise exponentially, it puts a tremendous burden on our health care system as we already witnessed this past fall before the Circuit Break was implemented.[182] Even if only another 1% of Manitobans contracted COVID-19 (14,000 people), we can expect roughly an additional 980 hospital patients and 182 ICU patients.

205. Manitoba's approach has been multi-faceted. It has focused on the vulnerable but it has also focused on locations and activities that pose the greatest risk for outbreaks and community transmission. The goal is to keep growth of community transmission of the virus within manageable levels to enable our health care system to cope – to "flatten the curve". This is achieved by sticking to the fundamentals (physical distancing, masks, hand hygiene), contact tracing and minimizing super-spreading events, especially higher risk gatherings.

206. Sometimes this has meant putting more restrictions in certain regions of the province (e.g. Prairie Mountain Health Region in south-western Manitoba, the Capital Region or on a particular First Nation). Sometimes the focus is on a particular location in response to an outbreak or to protect a vulnerable facility (e.g. personal care home or an outbreak at a place of employment). It may require travel restrictions to protect more vulnerable populations (e.g. limit travel to northern Manitoba). Sometimes broader based restrictions are required to curb widespread community transmission. In all cases, the restrictions are calibrated to the severity of the pandemic and the risk to our health care system. This is the same approach taken across Canada and many jurisdictions throughout the world.[183]

207. While some may argue that the benefits are not worth the costs, public health measures are taken with the knowledge that provincial and federal governments provide a wide array of

[182] Roussin, para. 171-172
[183] Roussin, para. 174

economic and mental supports to help people cope.[184] While the Great Barrington Declaration speaks of the harms of "lockdowns" it is important to remember that a "lockdown" is not a defined term. It is a generic description. There is no one size fits all approach. The interventions employed and the level of government assistance provided in Manitoba and Canada may be quite different than in other jurisdictions like the United States. For example, in Manitoba, we have not mandated a curfew or required people to shelter in place as in some jurisdictions.

208. The Impugned PHOs imposed greater restrictions on gatherings and temporarily closed places of worship for a period of 13 weeks. This was part of a suite of measures necessary to reduce the exponential community spread of the virus, in the face of rapidly rising deaths and hospitalizations and an impending crisis in our hospitals and ICUs. In the face of these facts, Manitoba submits that Dr. Roussin's response was entirely proportionate, prudent and eminently reasonable. The limitation on the Applicants' *Charter* rights was justified.

[184] Roussin, para. 175; Affidavit of Szilveszter Komlodi

VI. CONCLUSION

209. Without question, pandemics are extremely hard on a population. They engender fear, anxiety and stress. Friends and family get sick, some seriously and tragically some die. It is also beyond doubt that public health measures that restrict our freedoms pose additional hardship. The Impugned PHOs expected all of us to curtail our basic human nature to gather together. They limited sincerely held religious freedoms, which are deeply personal. No one should minimize these effects. However, the CPHO and the government were acting on a public health imperative to protect the population from the serious dangers of COVID-19. At the same time, governments have tried to alleviate or mitigate, as far as possible, the adverse economic and mental health effects.

210. Our *Charter of Rights and Freedoms* is not only premised on protecting individual rights and freedoms but also on the fundamental notion that we must protect the overarching public welfare of society, especially the life and well-being of the most vulnerable among us. Sometimes we must ask citizens to make sacrifices for our neighbours and the collective greater good. The COVID-19 global pandemic is one such time.

ALL OF WHICH IS RESPECTFULLY submitted this 12 day of April, 2021.

Michael Conner and Heather Leonoff, Q.C.
Counsel for the Respondents

LIST OF AUTHORITIES

TAB

Legislation

Cases

Other