

IN THE COURT OF APPEAL

BETWEEN:

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 and ROSS MACKAY

(Applicants) Appellants

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA, and 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 MANITOBA

(Respondents) Respondents

APPELLANTS' FACTUM

May 24, 2022

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PART 1 – INTRODUCTION

1. This case is about whether the infringement of the Appellants' s. 2 *Charter* rights and freedoms by government actors exercising delegated powers by way of Manitoba's *Emergency Public Health Orders* ("PHOs") is demonstrably justified in a free and democratic society.

2. The *Charter* breaches in the present case have not been justified by the government. While they are pressing and substantial, they are not rationally connected to their objective, they do not impair *Charter* rights as minimally as possible, and their deleterious effects far outweigh their salutary effects. The Application Judge erred in finding the Respondents had met their onus of proving otherwise. The Application Judge further erred by finding:

- the Appellants' rights and freedoms were not restricted more than reasonably necessary and *ultra vires* s. 3 of *The Public Health Act*; and
- with respect to the constitutional division of powers, that the Legislature established sufficient limits on the delegated authority provided by *The Public Health Act*.

PART 2 – STATEMENT OF FACTS

3. On March 20, 2020, in response to the COVID-19 pandemic, the government declared a province-wide state of emergency under *The Emergency Measures Act*. From that point on, Manitoba’s Chief Public Health Officer Dr. Roussin (“CPHO”) and his subdelegate, Dr. Atwal, issued successive *PHOs* pursuant to alleged authority delegated under s. 67 of *The Public Health Act*. The Minister of Health, Seniors and Active Living Mr. Friesen (as he then was), approved the *PHOs*.¹

4. The Appellants include the following churches: *Gateway Bible Baptist Church, Slavic Baptist Church; Pembina Valley Baptist Church, Redeeming Grace Bible Church, Grace Covenant Church; Christian Church of Morden, and Bible Baptist Church*. The individual Appellants are Thomas Rempel, a deacon at Redeeming Grace Bible Church prohibited from worshipping in-person with his congregation;² Rev. Tobias Tissen, a minister at the *Church of God* who received fines and was subject to incarceration for continuing to hold church services;³ and Ross MacKay, a Manitoba resident who was

¹ 2021 MBQB 219 at para. 2 [Appellants’ Appeal Book (“AB”) Vol. 11 Tab 7B, p. AB2673].

² Affidavit of Thomas Rempel, affirmed January 7, 2021 at paras. 4-7 [AB Vol. 2 Tab 2H, p. AB469-70].

³ Affidavit of Tobias Tissen, affirmed January 5, 2021 at paras. 13-16 & Exhibit “D” [AB Vol. 2 Tab 2F, pp. AB418-419, 448]. Rev. Tissen is a co-Appellant herein; not the *Church of God*.

fined \$1,296 for attending a “Hugs Over Masks” rally to voice his human rights concerns.⁴

5. As found by the Application Judge, the *PHOs* “significantly affected the constitutional rights and freedoms to assemble and worship” of the Appellants herein.⁵ The harshest restrictions continued for months, from Nov. 12, 2020 to Feb. 11, 2021. Similar or identical orders were also found in the April 8, 2021 *PHO*, which was challenged as well.⁶

⁴ 2021 MBQB 219 at para. 9 [AB Vol. 11 Tab 7B, p. AB2676]; Affidavit of Ross Mackay, affirmed January 4, 2021 at paras. 4-9 & Exhibit “B” [AB Vol. 1 Tab 2C, pp. AB121-123, 130].

⁵ 2021 MBQB 219 at para. 2 [AB Vol. 11 Tab 7B, p. AB2673]; 2021 MBQB 219 at paras. 21, 75-83 [AB Vol. 11 Tab 7B, pp. AB2681, AB2710-14].

⁶ 2021 MBQB 219 at para. 6 [AB Vol. 11 Tab 7B, p. AB2675]; Amended Amended Notice of Application, s. 1(e) which defines the impugned Orders [AB Vol. 1 Tab 1, p. AB5].

PART 3 – LIST OF ISSUES

1. Issues on Appeal & Appellants’ Position

6. The Appellants appeal raises the following issues:

- **Issue 1:** whether the Application Judge erred in fact and in law in finding that the *PHOs*’ infringement of s. 2 of the *Charter* is constitutionally justifiable as reasonable limits under s. 1.
- **Issue 2:** whether the Application Judge erred in fact and in law in finding that the *PHOs* were not *ultra vires* s. 3 of *The Public Health Act*.
- **Issue 3:** whether the Application Judge erred in law in finding that the statutory delegation in ss. 13 and 67 of *The Public Health Act*, is constitutional.

7. With respect to the first issue, the Appellants’ position is that the Application Judge erred in his s. 1 analysis and conclusion that the limitation on s. 2 rights is reasonable and demonstrably justified. The *PHOs* were not a proportional response and the deleterious effect of the *PHOs* far outweighs any salutary benefits. The *PHOs* restrict the Appellants’ rights and freedoms

more than reasonably necessary and are *ultra vires* s. 3 of *The Public Health Act*.

8. On the third issue regarding impermissible delegation, the Legislature has failed to establish sufficient limits on the delegated authority provided in *The Public Health Act* or provide sufficient information to enable a reviewing court to review the substance of the *PHOs*.

2. Court's Jurisdiction

9. Pursuant to s. 25.1(1)(b) and s. 26 of *The Court of Appeal Act*, this Honourable Court has jurisdiction pursuant to hear this appeal and may give the judgment requested by the Appellants.

3. Standard of Review

10. The issues raised by the Appellants are questions of constitutionality, which are questions of law.⁷ Such issues must be reviewed on a standard of correctness given the unique role of courts as interpreters of the *Constitution*.⁸

⁷ *Sagkeeng v Government of Manitoba et al*, 2021 MBCA 88 at para. 30 [ABOA Tab 41] citing *Housen v Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 36 [ABOA Tab 29].

⁸ *Stadler v Director, St Boniface/St Vital*, 2020 MBCA 46 at para. 52 [ABOA Tab 43].

PART 4 – ARGUMENT

ISSUE 1: Section 1 Analysis as it Relates to Section 2

1. The Section 1 Framework

11. The Respondents conceded and the Application Judge determined that the *PHOs* “limit and restrict the applicants’ rights and freedoms as found in ss. 2(a), 2(b), and 2(c) of the *Charter*.”⁹

12. The onus of proving that a limit or freedom guaranteed by the *Charter* meets the criteria of s. 1 rests upon the government, who are seeking to uphold the limitation. The civil standard of proof on a balance of probabilities applies.¹⁰

13. The use of the phrase “demonstrably justified” connotes a strong evidentiary foundation. The Supreme Court has stated that evidence should be “cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit”.¹¹

14. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, government must satisfy two “branches” or

⁹ 2021 MBQB 219 at paras. 8, 361 [AB Vol. 11 Tab 7B, pp. AB2676, 2824]. This is unlike *Hudson’s Bay Company ULC v. Ontario (Attorney General)*, 2020 ONSC 8046 at para. 4 [ABOA Tab 30].

¹⁰ *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at p. 136-137 [ABOA Tab 36].

¹¹ *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at p. 138 [ABOA Tab 36].

requirements: the objective of the *PHOs* must be pressing and substantial and the *PHOs* must be reasonable and demonstrably justified.¹²

15. The Appellants conceded in the trial below the pressing and substantial nature of the objectives of the impugned *PHOs*.¹³ However, the Appellants do not concede the second branch of the analysis, which asks whether there is proportionality between the objective and the means used to achieve it, according to three elements: “rational connection”, “minimal impairment”,¹⁴ and a “final balancing” between the deleterious and salutary effects of the law.¹⁵

2. The PHOs are not Reasonably or Demonstrably Justified

16. Taking into account the context in which the *PHOs* were made,¹⁶ they are not reasonable or demonstrably justified.¹⁷ The *PHOs* fail all three parts of the second branch of the *Oakes* test.

¹² *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at p. 140 [ABOA Tab 36].

¹³ 2021 MBQB 219 at paras. 293-295 [AB Vol. 11 Tab 7B, p. AB2795].

¹⁴ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 102 citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 55 [ABOA Tab 26].

¹⁵ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 122 [ABOA Tab 26]; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para. 45 [ABOA Tab 25].

¹⁶ 2021 MBQB 219 at para. 301 [AB Vol. 11 Tab 7B, p. AB2798]; 2021 MBQB 219 at para. 121 referring to points from Dr. Roussin’s cross-examination [AB Vol. 11 Tab 7B, p. AB2728]; see also Affidavit of Dr. Loepky, affirmed March 4, 2021 at para. 20 [AB Vol. 6 Tab 3B, p. AB1375]; 2021 MBQB 219 at paras. 66, 71, 186, 201, 301, 303, 328 [AB Vol. 11 Tab 7B, pp. AB2703, 2706, 2751, 2756, 2798, 2799, 2812]; Affidavit of Dr. Kettner, sworn, April 1, 2021 at para. 13, Exhibit B, pp. 22-23, 31-33 [AB Vol. 3 Tab 2O, p. AB578, AB634-35, 643-44]; Affidavit of Dr. Kettner, sworn, April 1, 2021, Exhibit B. p. 5 [AB Vol. 3 Tab 2O, p. AB617]; 2021 MBQB 219 at paras. 84-118 [AB Vol. 11 Tab 7B, p. AB2714-27].

Part 1: No Rational Connection Between the PHO's Objectives and the PHOs

17. The Application Judge devoted just two paragraphs to the rational connection analysis.¹⁸ While the rational connection test is not “particularly onerous”, it still requires a reasonable inference that the means adopted by the government help to bring about the objective.¹⁹

18. The Application Judge erred by failing to address whether the government has provided sufficient evidence to show that severe restrictions on outdoor gatherings specifically would bring about its stated objective. The only measure specifically referred to by the Application Judge was “the measures taken to limit gatherings, including in places of worship”.²⁰ He went on to state, “[a]s the evidence has demonstrated, the virus is spread through respiratory droplets. It is reasonable and logical to conclude as has been suggested, that the risk of transmission is particularly high in gatherings involving close contact for prolonged periods.”²¹

19. Based on this conclusion, it is apparent that he only considered the possibility of an indoor gathering. However, significantly, the same

¹⁷ *Thompson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877 at para. 87 (Justice Bastarache for the majority); *R. v. Bryan*, 2007 SCC 12 at para. 29.

¹⁸ 2021 MBQB 219 at paras. 296-297 [AB Vol. 11 Tab 7B, p. AB2796].

¹⁹ *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 143 [ABOA Tab 32]; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 SCR 199 at para. 154 [ABOA Tab 39].

²⁰ 2021 MBQB 219 at para. 297 [AB Vol. 11 Tab 7B, p. AB2796].

²¹ 2021 MBQB 219 at para. 297 [AB Vol. 11 Tab 7B, p. AB2796].

conclusion would not apply to outdoor gatherings. The risk of transmission is completely different. Yet, the government has not provided conclusive evidence of outbreaks resulting from outdoor events, or cases of COVID-19 being linked to people specifically gathering outdoors. Dr. Kindrachuk stated in cross-examination that “we have not seen broad transmission events” outdoors, and studies indicated “fairly unequivocally, that transmission events were much higher indoors than in outdoor settings.”²² Simply put, there is no study to support the *PHOs* which restrict outdoor gatherings.²³ It cannot be said that restricting outdoor gatherings at private residences or limiting outdoor gatherings in public places to 5 persons furthered the government’s objective.

20. In terms of places of worship, there was insufficient evidence linking the spread of COVID-19 to religious gatherings. Dr. Loeppky’s affidavit²⁴ provided a list of clusters. However, as pointed out by Dr. Kettner, one cannot assess the likelihood that these cases actually acquired their virus at a religious service.²⁵ Dr. Loeppky’s affidavit shows that of 633 cases reported in September 2020, 3.2% were “potentially” acquired at faith-based

²² Transcript of Proceedings, Vol. 3, May 5, 2021, Cross-Examination of Kindrachuk at T70 lines 19-34.

²³ Affidavit of Jason Kindrachuk, affirmed March 2, 2021, Exhibit B at p. 15 [AB Vol. 6 Tab 3A, p. AB1354].

²⁴ Affidavit of Dr. Loeppky, affirmed March 4, 2021 at para. 14 [AB Vol. 6 Tab 3B, p. AB1373].

²⁵ Affidavit of Dr. Kettner, sworn, April 1, 2021, Exhibit "B" at p. 32 [AB Vol. 3 Tab 2O, p. AB644].

settings.²⁶ A “potential” acquisition does not rise to the level required to justify closing churches. It also ignores the fact that, relative to other locations listed, churches placed nearly last in terms of being a threat and that many of the riskier locations were permitted to remain open, such as retail establishments (including big-box, grocery, alcohol and cannabis stores), universities, and financial and white-collar businesses.²⁷

21. Dr. Kettner stated that, as people spend less than one percent of their waking time at a place of worship, “[w]ithout a clear and reasonable protocol to determine the likeliest source of exposure, the probability that transmission happens elsewhere – such as a retail outlet, educational setting, or restaurant is, by exposure proportion, more likely.”²⁸ Indeed, the Application Judge noted that “Dr. Loeppky acknowledged that they cannot be certain that persons picked up their infection at church”.²⁹ The Application Judge failed to address Dr. Kettner’s expert evidence, particularly with respect to case numbers, hospital levels, death classification, and modelling projections. Dr. Kettner’s evidence

²⁶ Affidavit of Dr. Loeppky, affirmed March 4, 2021, Exhibit "E" at p. 17 [AB Vol. 6 Tab 3B, p. AB1496]; 2021 MBQB 219 at para. 115 [AB Vol. 11 Tab 7B, p. AB2726].

²⁷ Affidavit of Dr. Loeppky, affirmed March 4, 2021, Exhibit "E" at p. 17 [AB Vol. 6 Tab 3B, p. AB1496].

²⁸ Affidavit of Dr. Kettner, sworn, April 1, 2021, Exhibit "B" at p. 32 [AB Vol. 3 Tab 2O, p. AB644].

²⁹ 2021 MBQB 219 at para. 148 [AB Vol. 11 Tab 7B, p. AB2739].

demonstrated that government had failed to explain the risk of COVID-19 reasonably associated with worship.³⁰

22. As demonstrated by the evidence of Dr. Roussin, the government relied on a number of factors to determine what measures it deemed necessary to address COVID-19.³¹ The majority of these factors rely on a PCR test result or being in contact with a person who had a positive PCR test.³² The Appellants' evidence demonstrated that PCR tests are unreliable.³³

23. The Application Judge only partially acknowledged this point.³⁴ Instead of considering the implications of unreliable PCR tests, he minimized this evidence by suggesting the Appellants' argument was that positive PCR cases of COVID-19 are not "real". This is a misapprehension of the evidence. The unreliability of PCR tests shows that the *PHOs* imposed harsh restrictions on the Appellants even though there was no proof they

³⁰ Affidavit of Dr. Kettner, sworn, April 1, 2021, Exhibit "B" at pp. 35-36 [AB Vol. 3 Tab 2O, pp. AB647-48].

³¹ Affidavit of Brent Roussin, affirmed March 8, 2021 at para. 86 [AB Vol. 8 Tab 3F, p. AB 1887].

³² 2021 MBQB 219 at para. 121 [AB Vol. 11 Tab 7B, p. AB2728].

³³ Affidavit of Dr. Bhattacharya, sworn January 5, 2021, Exhibit C, pp. 37-38 [AB Vol. 1 Tab 2D, pp. AB226-227]; Affidavit of Dr. Bhattacharya, sworn March 31, 2021, Exhibit "A" at pp. 13-14 [AB Vol. 3 Tab 2N, p. AB566-67]; Affidavit of Thomas Warren, sworn March 30, 2021, Exhibit "B", at pp. 3-6 [AB Vol. 3 Tab 2M, p. AB536-39]; Affidavit of Dr. Kettner, sworn, April 1, 2021, Exhibit "B" at p. 10 [AB Vol. 3 Tab 2O, p. AB622].

³⁴ 2021 MBQB 219 at para. 121 [AB Vol. 11 Tab 7B, p. AB2728].

posed any risk of spreading COVID-19. There was a tenuous, rather than a rational, connection between the government's restrictions and objectives.

Part 2: The PHOs do not Minimally Impair s. 2

a. Measures must be carefully tailored

24. Under s. 1, the limit must impair the right or freedom “as little as possible”. This means that the impugned measure “must be carefully tailored so that rights are impaired no more than necessary”. A failure to “explain why a significantly less intrusive and equally effective measure was not chosen” may be fatal to the impugned measure.³⁵

25. The record in the present case discloses alternative measures which would give sufficient protection to the government's goal. Indeed, at exactly the same time, these alternative measures were being employed in other provinces. For example, Alberta,³⁶ Saskatchewan,³⁷ Ontario,³⁸ Nova Scotia,³⁹ PEI,⁴⁰ and Newfoundland & Labrador employed less restrictive measures.⁴¹

³⁵ *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at p. 139 [ABOA Tab 36]; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 54 [ABOA Tab 23].

³⁶ Alberta, “New mandatory provincewide measures to protect lives”, December 8, 2020, [online](#) [ABOA Tab 46].

³⁷ Saskatchewan, “COVID-19 Update: New Measures in Effect November 27”, [online](#) [ABOA Tab 53].

³⁸ Ontario, “Provincewide Shutdown”, Dec. 21, 2020, [online](#) [ABOA Tab 51].

³⁹ Nova Scotia, “Holiday Restrictions to Keep Nova Scotians Safe”, Dec. 16, 2020, [online](#) [ABOA Tab 50].

b. Other businesses permitted to operate with tailored restrictions

26. The availability of alternative measures is also clear when one considers businesses that were permitted to continue operating. Measures such as distancing, hand hygiene, and wearing masks were found to be sufficient to enable universities, public transportation and taxis, airports, movie sets, banks, big box stores, grocery stores, liquor and cannabis stores, and other workplaces such as lawyers at law firms and government offices to continue operating in person and indoors. Yet, churches, mosques, synagogues, temples, and other places of worship were closed for three months.⁴² When churches were finally opened in February 2021, they were only allowed to open at 10% capacity, while liquor stores remained permitted to fill to 25% capacity. The March 25, 2021 Order increased church capacity to 25%, while allowing liquor stores and other retail stores to be open at 50% capacity.

27. Schedule A of the November 21, 2020 *PHO* lists 77 types of businesses that were permitted to be open. One of the most questionable of these, which is not addressed by the Application Judge, is a “business that is

⁴⁰ Prince Edward Island, “Four new cases of COVID-19 in PEI, new public health measures announced”, Dec. 6, 2020, [online](#) [ABOA Tab 52].

⁴¹ Newfoundland and Labrador, “Special Measures Order (General — Alert Level 5)”, Feb. 12, 2021, [online](#) [ABOA Tab 49].

⁴² Manitoba, November 21, 2020 *PHO*, in effect from November 22 until December 11, 2020, Schedule A [ABOA Tab 11].

producing a motion picture or television show, if filming had started before these Orders came into effect”. Accordingly, it was permissible to film a fictional church service, but not to hold a real one in Manitoba.

28. The Application Judge stated, “[c]ertain 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 identified as of particular concern.”⁴³ Would film or television production fall in a similar category? If so, one may reasonably query why they are permitted to be open as long as they social distance. If social distancing permits film or television production to continue, then why would that not be a sufficient alternative for a place of worship?

c. Non-pharmaceutical interventions

29. The Respondents failed to demonstrate that the risks which Dr. Roussin associated with religious activities could not be mitigated by measures less extreme and drastic than the outright prohibition of in-person worship. Manitoba’s own witness, Dr. Kindrachuk discussed a number of

⁴³ 2021 MBQB 219 at para. 56 [AB Vol. 11 Tab 7B, p. AB2699].

studies that all say non-pharmaceutical interventions can drastically reduce the risk of spreading COVID-19.⁴⁴ These non-pharmaceutical interventions include masking, social distancing, symptom screening, and improved ventilation.⁴⁵ These additional or alternative measures could have been used in place of a full prohibition on indoor worship.

30. Dr. Bhattacharya stated that places of worship can safely hold indoor worship services by following guidelines recommended by the CDC, which include recommendations to protect staff who are at higher risk for severe illness, engaging in handwashing, mask wearing when social distancing is difficult, social distancing, disinfecting the worship space before and after each service, minimizing food sharing, encouraging symptomatic congregants to stay home, and posted signs about COVID-19 symptoms.⁴⁶ This could also be supplemented with temperature and symptom checking at the doors of places of worship with little or no detriment to infection control outcomes.⁴⁷

⁴⁴ 2021 MBQB 219 at paras. 56, 113, 114, 195, 264, 274, 305 [AB Vol. 11 Tab 7B, p. AB2699, 2725, 2753, 2779, 2784, 2802].

⁴⁵ Transcript of Proceedings, Vol. 3, May 5, 2021, Cross-Examination of Kindrachuk at T57 lines 1-19; Affidavit of Jason Kindrachuk, affirmed March 2, 2021, Exhibit B, pp. 13-15 [AB Vol. 6 Tab 3A, pp. AB1352-54].; 2021 MBQB 219 at para. 143 [AB Vol. 11 Tab 7B, p. AB2738].

⁴⁶ 2021 MBQB 219 at para. 112 [AB Vol. 11 Tab 7B, p. AB2725] referring to Affidavit of Dr. Bhattacharya, sworn January 5, 2021, Exhibit C, pp. 24-25 [AB Vol. 1 Tab 2D, pp. AB213-214].

⁴⁷ Affidavit of Dr. Bhattacharya, sworn January 5, 2021, Exhibit "C" at p. 8 [AB Vol. 1 Tab 2D, p. AB197].

31. Despite this evidence, the Application Judge did not consider non-pharmaceutical interventions as an alternative to the complete prohibition of in-person religious worship. The Application Judge acknowledged the Appellants' argument that "Manitoba could have imposed lesser restrictions on gatherings and places of worship (permitting for example, religious services of limited size as long as reasonable safety precautions were employed)". However, the Application Judge then dismissed this argument because Manitoba stated it could not "monitor hundreds of private places of worship or residences" and there was "no way to ensure that the precautions identified would always have been followed, properly or at all".⁴⁸ This finding neglects the fact that whether religious gatherings were occurring or not would still have to be monitored, even with a full prohibition. The government has failed to explain why a significantly less intrusive and equally effective measure was not chosen and should have been fatal to the impugned measure.

d. Length of time indoors

32. The Application Judge accepted the government's evidence that a distinguishing feature between retail and church settings is that "retail stores

⁴⁸ 2021 MBQB 219 at para. 305 [AB Vol. 11 Tab 7B, p. AB2802].

typically involve transient contact between individuals who are only in close proximity for a relatively short duration” while places of “worship are often gatherings of individuals who are in close contact for prolonged periods of time” and “religious services will often involve behaviours that carry a higher risk of transmission such as singing, choirs, and the sharing of communal items”.⁴⁹ There was no consideration by the Application Judge that any of these factors could be mitigated by measures other than a full prohibition.

33. The Application Judge accepted the government’s evidence that religious services involve prolonged contact among persons, comparable to movie theatres, plays, concerts, sporting events, and are different than retail environments that are “transactional in nature”.⁵⁰ This disregards the fact that the *PHOs* do not limit the amount of time in any manner that people spend at big box stores, grocery shopping, riding the bus, or being on set while filming a TV comedy show, among other permitted activities. In other words, under the *PHOs*, one could spend an entire day singing hymns in any of the exempted businesses, but not do so in a place of worship.

⁴⁹ 2021 MBQB 219 at para. 274 [AB Vol. 11 Tab 7B, p. AB2784].

⁵⁰ Affidavit of Brent Roussin, affirmed March 8, 2021 at para. 155 [AB Vol. 8 Tab 3F, p. AB 1910]; 2021 MBQB 219 at para. 274 [AB Vol. 11 Tab 7B, p. AB2784].

34. Given the government’s safety concerns, the present case is similar to *Multani v. Commission scolaire Marguerite-Bourgeoys*.⁵¹ In that case, the Supreme Court found that a total prohibition against wearing a kirpan to school (or requiring it be plastic or wooden) undermined a young student’s religious rights. The Court found the government’s prohibition was motivated by a pressing and substantial objective, namely to ensure a reasonable level of safety at the school. However, although the prohibition was rationally connected with that objective, it was not shown that the prohibition minimally impaired religious freedoms.⁵²

35. The Appellants’ *Charter* rights in the present case have been infringed in the most serious manner possible. The complete ban on and prohibition of corporate worship is at the extreme end of the spectrum in terms of the violation of their right to worship and assemble.

e. Private In-Home Gatherings

36. The government does not provide specific evidence that in-home gatherings have resulted in outbreaks of COVID-19. Dr. Loepky’s chart, which only outlines “potential” acquisitions of COVID-19, does not

⁵¹ *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [ABOA Tab 33].

⁵² *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 77 [ABOA Tab 33]. See also *Syndicat Northcrest v. Amselem*, 2004 SCC 47 [ABOA Tab 44].

specifically list in-home gatherings as the source of COVID-19 transmission.⁵³ The best data on pre-symptomatic and asymptomatic spread reveals that it occurs within households only 0.7% of the time.⁵⁴ As such, it would make sense to ask homeowners to do symptom and temperature checks of all guests and ask their guests not to visit if they are symptomatic.⁵⁵ To completely prohibit or severely restrict Manitobans from visiting friends or having family and friends over to visit is not minimally impairing the right to assemble.

f. Outdoor Gatherings

37. The Respondent failed to meet its burden of proof with respect to demonstrating that the restrictions on outdoor gatherings were minimally impairing or that they even considered measures short of full restrictions. For example, Dr. Loeppky's chart noted above regarding potential acquisition settings did not refer to outdoor settings at all. Dr. Kindrachuk stated that evidence of outdoor spread of COVID-19 is "elusive".⁵⁶

⁵³ Affidavit of Dr. Loeppky, affirmed March 4, 2021, Exhibit E, p. 17 [AB Vol. 6 Tab 3B, p. AB1496].

⁵⁴ Affidavit of Dr. Bhattacharya, sworn January 5, 2021, Exhibit "C" at p. 8 [AB Vol. 1 Tab 2D, p. AB197]; 2021 MBQB 219 at paras. 92-96 [AB Vol. 11 Tab 7B, p. AB2717-19].

⁵⁵ Affidavit of Dr. Bhattacharya, sworn March 31, 2021, Exhibit "A" at p. 11 [AB Vol. 3 Tab 2N, p. AB564].

⁵⁶ Affidavit of Dr. Kindrachuk, affirmed March 2, 2021, Exhibit "B" at p. 15 [AB Vol. 6 Tab 3A, p. AB1354].

38. Furthermore, given the lack of evidence of outdoor transmission, simple and non-intrusive measures such as social distancing would have been more than sufficient to achieve the government's objective.

39. The Application Judge repeated the government's erroneous statement that "there has never been an order requiring persons to remain in their homes or to refrain from seeing friends and family in small groups".⁵⁷ He went on to state, "[a]lthough the impugned *PHOs* did limit gatherings inside homes while these orders were in effect, it was still possible for persons to visit outside of a residence as long as they complied with gathering size limits."⁵⁸ This is incorrect, and is a misunderstanding that undermines the s. 1 analysis. The November 19, 2020 *PHO* prevented any guests to a home, whether indoors or outdoors, unless they fell under the service exception or exception for persons who lived alone and could have a maximum of one guest.⁵⁹ Outdoor gatherings of a maximum of 5 persons were limited to public places and were not permitted at private residences.⁶⁰

⁵⁷ 2021 MBQB 219 at para. 250 [AB Vol. 11 Tab 7B, p. AB2773].

⁵⁸ 2021 MBQB 219 at para. 250 [AB Vol. 11 Tab 7B, p. AB2773].

⁵⁹ Manitoba, November 19, 2020 *PHO*, in effect from November 20 until December 11, 2020, Order 1. There were also exceptions for various services to be provided at home, for visits between parent and child, and for emergencies. See 2021 MBQB 219 at para. 77 [AB Vol. 11 Tab 7B, p. AB2711].

⁶⁰ *Ibid.*, Order 2. See also the Manitoba Backgrounder titled "Changes to COVID-19 Public Health Orders" regarding the Nov. 20, 2020 *PHO*, [online](#) [ABOA Tab 48].

40. The *PHOs* cannot be said to impair *Charter* rights as minimally as possible to achieve the objective of preventing transmission of COVID-19. Consequently, they are disproportionate and unjustified on this basis as well.

Part 3: The Deleterious Effect of the Impugned Restrictions Outweigh any Salutory Effect Resulting from Them

41. This final step requires that the salutary effects of the impugned law outweigh its deleterious effects.⁶¹ This allows for an assessment of whether the benefits of the impugned law in terms of the public good are worth the cost of the rights limitation.⁶² While the previous steps of the *Oakes* analysis are anchored to an assessment of the law's purpose, this final step takes into full account of the severity of the deleterious effects of a measure on individuals or groups.⁶³ This inquiry focuses on the practical impact of the law. The Supreme Court framed the issues here as follows: what benefits will the measure yield in terms of the collective good sought to be achieved; how important is the limitation on the right; and when one is weighed against the other, is the limitation justified?⁶⁴

⁶¹ *Frank v. Canada (Attorney General)*, 2019 SCC 1 at paras. 38, 76 [ABOA Tab 28].

⁶² *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 122 [ABOA Tab 26].

⁶³ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 76 [ABOA Tab 23].

⁶⁴ *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para. 45 [ABOA Tab 25].

a. Severe Deleterious Effects

42. The impugned *PHOs* have had the effect of prohibiting any person in the province from the exercise of certain rights which are both fundamental to the democratic nature of our society and involve what are for many sacred practices compelled by their most deeply-held convictions.

43. Preventing the in-person exercise of religion in a communal and a collective fashion as commanded by conscience and divine decree is a serious limitation of freedom of religion. The Supreme Court in *Loyola High School v. Quebec (Attorney General)* endorsed the following description of religious belief by Prof. Moon:

... Religious belief lies at the core of the individual's worldview. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. The individual believer participates in a shared system of practices and values that may, in some cases, be described as "a way of life". If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth.⁶⁵

⁶⁵ *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 44 [ABOA Tab 31].

44. The Appellants in this case have demonstrated how they have been denied their equal worth and how their practices or beliefs are being treated as less important or less true than the practices of others. Similarly, prohibiting the gathering of people for political protest, particularly at a time when government is encroaching on the people's most fundamental of rights and freedoms, is a serious restriction on freedom of expression and assembly.

45. In addition to the effects on these protected *Charter* rights, mental health issues have risen dramatically, which can be seen not only in national studies but also within the government's own evidence. The *PHOs* which restrict gatherings in homes, outdoors, or in churches have caused immense stress, depression, anxiety, despair, and a crisis of conscience to the Appellants and many other Manitobans. The social isolation which results from these kinds of *PHOs* causes serious problems and behaviours. A UBC study highlighted the self-reported increase in suicidal thoughts and increased substance abuse among residents of Manitoba and Saskatchewan in 2020.⁶⁶

⁶⁶ Affidavit of Dr. Bhattacharya, sworn January 5, 2021, Exhibit "C" at p. 23 [AB Vol. 1 Tab 2D, p. AB212].

46. Dr. Bhattacharya outlined the immense psychological harm from social isolation, which has caused sharp rises in drug overdoses in Canada. Social isolation of the elderly has contributed to a sharp rise in dementia-related deaths.⁶⁷ A Canadian Mental Health Association survey found that nearly 1 in 5 young adults had suicidal thoughts, and 18% of Manitobans surveyed said they had increased substance abuse since the start of the *PHOs* in March 2020.⁶⁸

47. Dr. Loeppky's affidavit provided a sobering glimpse into the negative mental health issues that Manitobans have suffered during the pandemic. In 2020, alcohol-related hospitalizations increased by 112%, especially in people aged 25-44.⁶⁹ The monthly number of calls to the Winnipeg Fire and Paramedic Service where a patient received naloxone for a suspected opioid overdose in Winnipeg went from just over 50 in February and March 2020, to well over 200 in July 2020.⁷⁰ The monthly number of Manitobans hospitalized due to an intentional injury increased by 109% from April-

⁶⁷ Affidavit of Dr. Bhattacharya, sworn January 5, 2021, Exhibit "C" at p. 15 [AB Vol. 1 Tab 2D, pp. AB204].

⁶⁸ Affidavit of Dr. Bhattacharya, sworn January 5, 2021, Exhibit "C" at p. 24 [AB Vol. 1 Tab 2D, pp. AB213]. See also Canadian Centre for Substance Abuse and Addiction & Mental Health Commission of Canada, "Mental Health and Substance Use During Covid-19", Summary Report, October 13-November 2, 2020 & November 19-December 2, 2020 [ABOA Tab 47].

⁶⁹ Affidavit of Dr. Loeppky, affirmed March 4, 2021, Exhibit "D" at p. 20 [AB Vol. 6 Tab 3B, p. AB1454].

⁷⁰ *Ibid.*, Exhibit "D" at p. 5, 21 [AB Vol. 6 Tab 3B, pp. AB1439 & AB1455].

August 2020.⁷¹ During this same period, there was an increasing trend “especially noted for self-harm-related hospitalizations” with suicide attempts going from less than 60 persons per month to over 100.⁷² From April to August 2020: substance use-related hospitalizations increased by 62%; alcohol-related hospitalizations increased by 112%; and opioid-related emergency room or urgent care visits increased by 240%.⁷³ Violence-related calls to Winnipeg Police saw a 55% increase from April to August 2020.⁷⁴

48. Dr. Roussin stated in his affidavit that he sought to impose the least restrictive measures necessary. Yet, as Dr. Kettner noted, he did not provide a transparent strategy and response plan.⁷⁵ There has been no evidence of a cost/benefit analysis which would assist in determining whether alternative, less restrictive measures were considered and why they were rejected.

b. Limited Salutary Effects

49. Dr. Bhattacharya explained that lockdowns do not work. His peer-reviewed study, published after his first expert report was drafted, found that there were no significant benefits on case growth from more restrictive non-

⁷¹ *Ibid.*, Exhibit "D" at pp. 5, 23 [AB Vol. 6 Tab 3B, p. AB1457].

⁷² *Ibid.*, Exhibit "D" at pp. 23-24 [AB Vol. 6 Tab 3B, pp. AB1457-58].

⁷³ *Ibid.*, Exhibit "D" at p. 5, 19-20 [AB Vol. 6 Tab 3B, pp. AB1439 & AB1453-54].

⁷⁴ *Ibid.*, Exhibit "D" at pp. 6, 42 [AB Vol. 6 Tab 3B, pp. AB1439 & AB1476].

⁷⁵ Affidavit of Dr. Kettner, sworn, April 1, 2021, Exhibit "B" at p. 28 [AB Vol. 3 Tab 20, p. AB640].

pharmaceutical interventions.⁷⁶ He explained that the best peer-reviewed study evaluating the efficacy of lockdowns was published in March 2021 in *Scientific Reports*. It considered the effects of lockdown type non-pharmaceutical interventions on COVID-19 mortality in 87 regions globally. The primary finding was that in the vast majority of cases there is no detectable effect of lockdowns on COVID-19 mortality.⁷⁷ The comparison of California and Florida provides a helpful illustration of how lockdowns do not work.⁷⁸

50. In terms of indoor worship, the restrictions prevented individuals from an indoor gathering that would only represent a small fraction of their time spent indoors in a given week. Had more minimally impairing non-pharmaceutical interventions been employed, any potential salutary effects would have been even less significant. In terms of outdoor gatherings, government did not meet their burden of proving the restrictions had any salutary effect given the lack of evidence on outdoor transmission.

51. Overall, the deleterious effects of the *PHOs* far outweigh their salutary effects, which have not prevented COVID-19 deaths or reduced

⁷⁶ Affidavit of Dr. Bhattacharya, sworn March 31, 2021, Exhibit "A" at p. 1 [AB Vol. 3 Tab 2N, p. AB554].

⁷⁷ *Ibid.*, Exhibit "A" at pp. 1-2 [AB Vol. 3 Tab 2N, pp. AB554-55].

⁷⁸ *Ibid.*, Exhibit "A" at pp. 2-4 [AB Vol. 3 Tab 2N, pp. AB555-557].

stress on the hospital system. As such, restrictions on gatherings are not “demonstrably justified in a free and democratic society”.

3. Judicial Treatment of COVID-19 Restrictions Outside Manitoba

52. Many jurisdictions have been much more careful at curtailing restrictions to the extent they infringe on fundamental rights of group worship or protest.⁷⁹ For example, in B.C., the government recognized that its public health orders overreached with respect to limiting s. 2(c) and (d) of the *Charter* and backtracked on those aspects of their orders.⁸⁰

ISSUE 2: Administrative Law Issue

53. Dr. Roussin’s and Dr. Atwal’s *PHOs* are not “reasonably necessary” as required by s. 3 of *The Public Health Act*. The restrictions imposed by the *PHOs* are far greater than “reasonably necessary”. As a result, the *PHOs* are *ultra vires* the Act; the Appellants adopt their s. 1 argument and say the *PHOs* also do not comply with section 3 of the Act.

⁷⁹ *Agudath Israel of American v. Andrew M. Cuomo*, USSC, App. No. 20A, Nov. 20, 2020, pp. 28-29 [ABOA Tab 22]; *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo*, 592 U.S. ___ (2020) [ABOA Tab 40]; *Father Trevor Burfitt v. Gavin Newsom*, Superior Court of California, County of Kern, BCV-20-102267, December 10, 2020 [ABOA Tab 27]; *South Bay United Pentecostal Church v. Newsom* 592 U.S. (2021); See also *Ritesh Tandon v. Gavin Newsom*, 593 U.S._ (2021), No. 20A151 [ABOA Tab 38]; *Reverend Dr. William J. U. Philip and Others*, [2021] CSOH 32, Outer House, Court of Session [ABOA Tab 37].

⁸⁰ *Beaudoin v British Columbia*, 2021 BCSC 512 at para. 147 [ABOA Tab 24].

ISSUE 3: Impermissible Delegation

54. Manitoba declared a state of emergency as a result of the COVID-19 pandemic⁸¹ and subsequently issued a number of orders with the goal of ensuring hospitals had adequate capacity and to flatten the curve on community transmissions.

55. Sections 13 and 67 of the *Public Health Act* vest sweeping authority in an unelected official, the CPHO. Section 67 provides for an array of powers, which can, under s. 13, be exercised by delegates (e.g., the CPHO subdelegating his authority to make public health orders to his Acting Deputy CHPO Dr. Jazz Atwal).

56. The concern with the general use of executive lawmaking powers during an emergency like the COVID-19 pandemic is that what “begins as a temporary, exceptional situation slowly creeps towards a sense of normality, a new normality defined by the long-term or perhaps even permanent erosion of civil liberties by executive fiat”.⁸²

57. The unrestrained and prolonged transfer of legislative power permitted by s. 67 of the *PHA* violates the text and the structure of the

⁸¹ Declared on March 20, 2020 as per section 10 of *The Emergency Measures Act*, CCSM c E80 [ABOA Tab 3]; 2021 MBQB 219 at para. 2 [AB Vol. 11 Tab 7B, p. AB2673].

⁸² Shaun Fluker & Lorian Hardcastle, "Executive Lawmaking and COVID-19 Public Health Orders in Canada" (2021) 25:2 Rev. Const. Stud. 145 at p. 3 ([SSRN](#)) [ABOA Tab 54].

Constitution. It is unconstitutional for a legislature to delegate broad lawmaking power of general application to an unelected public health official. This delegation is incompatible with the “basic structure” of the *Constitution* because it abrogates the right of discussion and debate.⁸³ While a temporary limitation on the checks and balances provided by legislative study, debate, amendment, and public consultation may be warranted in times of emergency, there has to be a limit.

Conclusion

58. The Appellants request the appeal be allowed on the basis that the *PHOs* which prohibit and/or restrict religious, private in-home, and public outdoor gatherings violate their ss. 2(a)(b)(c) *Charter* rights, and that those violations cannot be saved under s. 1. In the alternative, the Appellants request that this Honourable Court find the *PHOs* are *ultra vires* s. 3 of the *Public Health Act*. The Appellants further request that ss. 13 and 67 be found unconstitutional to the extent they allow for impermissible delegation.

⁸³ *Ontario (Attorney General) v. OPSEU*, 1987 CanLII 71 (SCC) at para. 151, [1987] 2 SCR 2 at p. 57 [ABOA Tab 34].

Costs

59. The Appellants do not seek costs and ask that no costs be awarded against them, given the public interest nature of the legal issues.

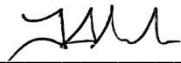
Estimate for Oral Argument

60. Counsel for the Appellants estimate requiring 2 hours for oral argument.

DATED this 24th day of May, 2022.

 Eugene Meehan Q.C.

Eugene Meehan, Q.C.



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