

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.

FACTUM OF THE RESPONDENTS

DEPARTMENT OF JUSTICE

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PART I - INTRODUCTION

1. On March 20, 2020, the Manitoba government declared a state of emergency in the face of COVID-19, the worst global pandemic in over a century. Public health officials implemented various restrictions on gatherings to slow the spread of COVID-19 to protect the health and safety of all Manitobans. These measures were similar to those taken in the rest of Canada and much of the world.

2. The Appellants challenged the constitutionality of certain emergency Public Health Orders (PHOs) in force from November 22, 2020 to January 22, 2021, during the height of the second wave of the pandemic. While the Respondents acknowledge these PHOs limited freedoms under s. 2 of the *Charter*, the gathering restrictions were justified under s. 1 to “flatten the curve” to reduce cases of death, serious illness and prevent COVID-19 from overwhelming Manitoba’s acute health care system. The PHOs, made in the face of scientific uncertainty inherent in a novel coronavirus, were reasonably tailored to the dire circumstances at the time.

3. Furthermore, this appeal is moot. The impugned PHOs have expired and no public health restrictions are in place today. A ruling on the validity of the impugned PHOs in effect during the second wave will have no bearing on the justification of hypothetical orders, in this or any future pandemic, which will necessarily depend on different circumstances and evidence.

PART II - STATEMENT OF FACTS

4. The Appellants challenge specific PHOs in effect during the second wave of the pandemic from November 22, 2020 to January 22, 2021.¹ Subject to exceptions, the impugned PHOs restricted gatherings at private residences, limited public gatherings to five people and restricted indoor gatherings at places of worship. Context is critical to the s. 1 *Charter* analysis. The application judge aptly summarized the urgent state of the COVID-19 pandemic as follows:

In that regard, it cannot be forgotten that 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. The healthcare system was under tremendous strain. As Manitoba had noted, “we were nearing the cliff edge”. In light of these serious circumstances, Manitoba and its witnesses have credibly and persuasively asserted and I accept, that 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 healthcare system. Those witnesses who testified on behalf of Manitoba and who were in a position to exercise the necessary authority, made it clear that they did not believe that they “could afford to get it wrong”.²

5. Epidemiological evidence and modelling data presented to the Chief Public Health Officer (CPHO) in the fall of 2020 revealed that, shortly after Thanksgiving on October 12th, Manitoba began experiencing exponential growth of COVID-19. New cases were doubling every two weeks. Test positivity rates had soared. Manitoba had the worst per capita number of active COVID-19 cases in the

¹ Reasons for Judgment, paras. 6, 21 [Appeal Book (“AB”) Vol. 11, TAB7B, pp. AB6275 and AB2681]. Order 1(1) of the November 11, 2021 PHO was also challenged.

² Reasons for Judgment, para. 201 [AB Vol. 11, Tab 7B, p. AB2759].

country, more than double the rate of the next closest province (Alberta).³

6. The surge in active COVID-19 cases corresponded with a large and rapid increase in hospitalizations and deaths.⁴ Most deaths occurred in people over age 60, but one third of hospitalizations and 44% of ICU admissions were under age 60. The median age for severe cases among Indigenous people was even younger.⁵

7. The healthcare system was under tremendous strain. Medical staff were redeployed to treat critical COVID-19 patients. Elective surgeries were postponed, resulting in a backlog of 16,000 cases.⁶ Modelling projected that Manitoba would reach its maximum ICU capacity by November 23, 2020. Hospitals reached a peak of 129 total ICU cases on December 10-11, 2020, 79% higher than the normal ICU capacity of 72.⁷ The application judge found Manitoba's modelling was reliable and correlated with what happened in reality.⁸

8. Swift and decisive action was essential to bring the spread of COVID-19 under control. The PHOs were intended as a "circuit break" to interrupt

³ Reasons for Judgment, paras. 70-72 [AB Vol. 11, Tab 7B, pp. AB2705-AB2708]; Affidavit of Carla Loeppky, Exhibit F, pp. 4, 7 [AB Vol. 6, Tab 3B, pp. AB1520 and AB1523].

⁴ Reasons for Judgment, para. 71(vii) [AB Vol. 11, Tab 7B, p. AB2707].

⁵ Reasons for Judgment, para. 58 [AB Vol. 11, Tab 7B, p. AB2700].

⁶ Reasons for Judgment, para. 71(viii) [AB Vol. 11, Tab 7B, p. AB2707].

⁷ Reasons for Judgment, para. 71 [AB Vol. 11, Tab 7B, p. AB2706]; Reply Affidavit of Lanette Siragusa, para. 5 [AB Vol. 10, Tab 3L, p. AB2606].

⁸ Reasons for Judgment, paras. 71(ix), (x), 74, 129, 149, 164, 264-265, 300, 303(i), 305, 322-323, 329 [AB Vol. 11, Tab 7B, pp. AB2707-AB2708, AB2709, AB2733, AB2739, AB2744, AB2779-AB2782, AB2798, AB2801, AB2802, AB2809-AB2810 and AB2812].

transmission chains and avoid even greater loss of life and serious illness.⁹ Prolonged close contact, especially indoors, spreads SARS-CoV-2.¹⁰ Gatherings at private residences were identified as a significant source of transmission.¹¹ Places of worship also posed a heightened transmission risk due to prolonged close contact and common activities like singing, hugging, handshakes and sharing communal items. Evidence existed of outbreaks at faith based settings in Manitoba and other jurisdictions.¹² The risk is lower outdoors, but remained for persons in close proximity, particularly if shouting or talking loudly.¹³ Notably, vaccines were not yet available.¹⁴

9. There was strong scientific evidence that transmission of SARS-CoV-2 occurred from a few days before symptom onset until about five days after.¹⁵ Screening for symptoms was not sufficient because pre-symptomatic persons may unknowingly transmit the virus.¹⁶

10. After carefully weighing all of the expert evidence, the application judge found that Manitoba had provided credible, reliable and cogent support to justify

⁹ Reasons for Judgment, para. 70 [AB Vol. 11, Tab 7B, p. AB2705].

¹⁰ Reasons for Judgment, paras. 5, 257 [AB Vol. 11, Tab 7B, pp. AB2674 and AB2776].

¹¹ Reasons for Judgment, para. 56, citing the January 5, 2021 Affidavit of Dr. Bhattacharya, Exhibit C, pp. 19, 26 [AB Vol. 11, Tab 7B, p. AB2699].

¹² Reasons for Judgment, paras. 56, 71, 114-115, 148, 153, 195, 264, 274, 305 [AB Vol. 11, Tab 7B, pp. AB2699, AB2706, AB2725-AB2726, AB2739, AB2741, AB2753, AB2779, AB2784, and AB2802].

¹³ Reasons for Judgment, paras. 54, 46 [AB Vol. 11, Tab 7B, pp. AB2698 and AB2694].

¹⁴ Reasons for Judgment, paras. 144, 157-158, 169 [AB Vol. 11, Tab 7B, pp. AB2738, AB2742 and AB2746].

¹⁵ Reasons for Judgment, para. 55 [AB Vol. 11, Tab 7B, p. AB2698].

the PHOs:¹⁷

...I wish to be clear about my findings respecting the convincing factual foundation presented by Manitoba. In that connection, I say that notwithstanding some of the thought provoking testimony of some of the applicants' experts, I am persuaded by the evidence of Manitoba's experts and I find that the credible science that they invoked and relied upon, provides a convincing basis for concluding that the circuit-break measures, including those in the impugned PHOs, were necessary, reasonable and justified.¹⁸

11. The court rejected criticisms attacking the number of COVID-19 related deaths, the PCR test, modelling, pre-symptomatic transmission and the risk of transmission outdoors or at places of worship.¹⁹ At best, the Appellants' experts presented a "contrary, if not contrarian scientific point of view" but in no way undermined the credible science justifying the restrictions.²⁰

12. The impugned PHOs "helped realize the pressing and substantial objectives of protecting public health, saving lives and stopping the [exponential] growth of the virus from overwhelming Manitoba hospitals and its acute healthcare system".²¹

The PHOs minimally impaired rights and the salutary effects were proportionate to

¹⁶ Reasons for Judgment, para. 259 [AB Vol. 11, Tab 7B, p. AB2776].

¹⁷ Reasons for Judgment, paras. 164, 197, 322-323 [AB Vol. 11, Tab 7B, pp. AB2744, AB2754 and AB2809-AB2810].

¹⁸ Reasons for Judgment, para. 202 [AB Vol. 11, Tab 7B, p. AB2757].

¹⁹ Reasons for Judgment, paras. 87, 322-323 [AB Vol. 11, Tab 7B, pp. AB2716, AB2809-AB2810].

²⁰ Reasons for Judgment, para. 198 [AB Vol. 11, Tab 7B, p. AB2754].

²¹ Reasons for Judgment, para. 324 [AB Vol. 11, Tab 7B, p. AB2810].

any deleterious effects. Simply put, the PHOs averted a potential disaster.²²

PART III – POINTS IN ISSUE AND STANDARD OF REVIEW

13. The Appellants raise three issues in this appeal:

i. Were the limits on s. 2 *Charter* rights imposed by the impugned PHOs justified as reasonable limits under s. 1?

ii. Were the impugned PHOs *ultra vires* s. 3 of *The Public Health Act*?

iii. Were ss. 13 and 67 of *The Public Health Act* an unconstitutional delegation?

14. While jurisdiction is not in dispute, Manitoba submits this appeal is moot and should not be decided. In the alternative, the PHOs were demonstrably justified under s. 1 of the *Charter*. The administrative law question is subsumed in the minimal impairment analysis. The delegation to the CPHO was constitutional.

15. The constitutionality of the PHOs and the statutory delegation (issues i and iii) is reviewable on a standard of correctness. However, the application judge's assessment of evidence and findings of fact are entitled to deference and are only reviewable for palpable and overriding error.²³ Considerable deference is also owed to government when balancing *Charter* rights and broader societal objectives

²² Reasons for Judgment, paras. 74, 305, 334 [AB Vol. 11, Tab 7B, pp. AB2709, AB2802 and AB2817].

under s. 1, especially in complex areas of science and medicine.²⁴ The question of whether the PHOs are *ultra vires* s. 3 of *The Public Health Act* (issue ii) is reviewable on a standard of reasonableness.²⁵

PART IV - ARGUMENT

1. Preliminary Issue: The Appeal is Moot

16. The impugned PHOs have long since expired. The appeal is moot and this Court should decline to rule on the merits. In several cases, this Court has declined to exercise its discretion to adjudicate the constitutionality of repealed or spent legislation, even if an adversarial context remained, extensive judicial resources had already been expended and the case raised issues of great public importance.²⁶

17. When this Application was heard in May 2021, orders of a substantially similar or identical nature to the impugned PHOs were still in effect.²⁷ That is no longer the case. No gathering restrictions are currently in force. In *Kennett*, this Court distinguished a case where it might be appropriate to proceed with a moot

²³ *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2021 MBCA 85, paras. 41-46 [Respondent's Book of Authorities ("RBOA"), TAB 26].

²⁴ *Doré v. Barreau Québec*, 2012 SCC 12 at para. 57 [RBOA, TAB 19]; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras. 35, 37 [RBOA, TAB 14]; *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 456-464 [RBOA, TAB 36]; *Beaudoin v. British Columbia*, 2021 BCSC 512 at paras. 120-124, 216, 244 [RBOA, TAB 15].

²⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 65-68 [RBOA, TAB 16]; *Beaudoin, supra*, at paras. 216, 244 [RBOA, TAB 15].

²⁶ *Manitoba Métis Federation Inc. v. Canada (A.G.) et al.*, 2010 MBCA 71 at paras. 366-367, 370-374 [RBOA, TAB 27]. The mootness finding was upheld, 2013 SCC 14 at para. 132; *Kennett v. Manitoba (A.G.)*, 1998 CanLII 4960 (MBCA) at paras. 19, 31-33 [RBOA, TAB 22].

constitutional challenge because substantially similar legislation had been enacted.²⁸ Here, it is purely hypothetical whether any new public health restrictions, let alone orders substantially similar to the impugned PHOs, will be made in response to this or a future pandemic.

18. The factual record justifying any future constitutional challenge will necessarily be different and require a fresh constitutional analysis. Emergency public health orders can only be judged in light of the prevailing circumstances. The COVID-19 pandemic has been fluid and evolving. The situation in the spring of 2020 differed markedly from the summer and from the second wave in the fall of 2020 and thereafter. Notably, the impugned PHOs were made before the widespread availability of vaccines. A ruling on the validity of these expired PHOs will have little bearing on the s. 1 justification of hypothetical future orders.

2. The Impugned PHOs are Justified under Section 1 of the *Charter*

19. To justify the limit on s. 2 *Charter* rights, the PHOs must have a pressing and substantial objective. Second, the PHOs must be proportionate to the objective. Proportionality will be satisfied when (i) a rational connection exists between the

²⁷ Reasons for Judgment, para. 6 [AB Vol. 11, Tab 7B, p. AB2675]. See also Orders 1, 2(1) and 20(1) of the *COVID-19 Prevention Orders* made May 8, 2021 [RBOA, TAB 1] and May 12, 2021 [RBOA, TAB 2].

²⁸ *Kennett v. Manitoba (A.G.)*, *supra*, at paras. 31-33 [RBOA, TAB 22].

means and the objective; (ii) the PHOs minimally impairs rights; and (iii) there is proportionality between the salutary and deleterious effects of the PHOs.²⁹

a) The importance of context and deference

20. The section 1 analysis is highly contextual and normative. The legislature and its delegates have the primary responsibility to make difficult choices that must balance a multitude of overlapping and conflicting interests. In particular, limiting rights is more apt to be justified when government must balance societal interests that are also protected by the *Charter*, such as preserving life and health during a public health emergency.³⁰ In *Hutterian Brethren*, McLachlin C.J. explained that courts will afford deference under s. 1:

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.³¹

21. In *Charter* challenges to COVID-19 restrictions, courts have been mindful that these are scientific and medical decisions requiring specialized expertise. As such, public health officials should not lightly be second guessed, especially when

²⁹ *Hutterian Brethren*, *supra*, at para. 108 [RBOA, TAB 14].

³⁰ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 94-95 [RBOA, TAB 17].

³¹ *Hutterian Brethren* at paras. 37, 35 [RBOA, TAB 14]; Reasons for Judgment, paras. 291-292 [AB Vol. 11, Tab 7B, pp. AB2793-AB2794].

there may be divergent opinions or schools of scientific thought.³² A justification under s. 1 does not require “scientific demonstration”.³³

22. Public health officials had to respond quickly to the sudden emergence of a novel virus, in a climate of scientific uncertainty, evolving knowledge and rapidly changing circumstances. The ameliorative effects of public health orders had to be balanced against potential negative effects, the severity of which were extremely difficult to predict or quantify. This context underscores the need for deference in assessing the COVID-19 PHOs under s. 1.³⁴

b) The PHOs served a pressing and substantial objective

23. The pressing and substantial objectives were obvious and conceded. The PHOs aimed to reduce the risk of spreading the virus by restricting gatherings and close contacts. More specifically, the objectives were to “save lives, prevent serious illness and stop the exponential growth of the virus from overwhelming Manitoba’s hospitals and acute health care system.”³⁵

c) The PHOs were rationally connected to the public health objectives

24. A rational connection requires the government to show a causal link between

³² *Beaudoin, supra*, at paras. 120-121, citing *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351 at para. 3 [RBOA, TAB 24]; *Trest v. British Columbia (Minister of Health)*, 2020 BCSC 1524 at para. 91 [RBOA, TAB 37].

³³ *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 137 [RBOA, TAB 32].

³⁴ *Taylor v. Newfoundland and Labrador, supra* at paras. 457-464; *Beaudoin, supra*, at paras. 120-121, 216, 244.

³⁵ Reasons for Judgment, para. 293 [AB, Vol. 11, Tab 7B, p. AB2795].

measure and the benefit sought, based on reason or logic. The threshold is low. The government need not prove that the measure will achieve its objective, only that it is reasonable to conclude the measure may further the goal.³⁶

25. Based on logic and common sense, the application judge had little difficulty finding that the PHOs were rationally connected to the goal of reducing the spread of COVID-19. The SARS-CoV-2 virus spreads through respiratory droplets and aerosols.³⁷ Since gathering poses a risk of transmission, especially with close contact for prolonged periods, it is logical that restricting gatherings and prolonged close contact will reduce the risk of spreading the virus. The rational connection between the PHOs and their pressing objective is plain and obvious.

26. The assertion that government has not provided conclusive evidence of outbreaks from outdoor events does not undermine the rational connection. The risk is higher indoors, especially in poorly ventilated areas, but this does not negate the risk of outdoor transmission with prolonged close contact.³⁸ Dr. Bhattacharya put into evidence one study that estimated indoor transmission accounted for 80% of COVID-19 transmissions. Climate is only one of many factors affecting the

³⁶ *Hutterian Brethren*, *supra*, at paras. 48, 51 [RBOA, TAB 14]; *Mounted Police Association of Ontario v. Canada (A.G.)*, 2015 SCC 1 at para. 143 [RBOA, TAB 28]

³⁷ Reasons for Judgment, para. 54 [AB Vol. 11, TAB 7B, p. AB2698]; Affidavit of Dr. Roussin, paras. 58, 97, Exhibit 20 (p. e71) [AB, Vol. 8, Tab 3F, pp. AB1880, AB1891 and AB1200].

³⁸ Reasons for Judgment, paras. 56, 257, 259 [AB Vol. 11, Tab 7B, pp. AB2699 and AB2776].

spread of the virus; behaviour and density were also powerful predictors.³⁹ Close proximity, talking loudly or yelling increases the risk,⁴⁰ behaviour one might expect to find at a crowded outdoor public event.

27. Ample evidence linked outbreaks of COVID-19 to gatherings at places of worship, in Manitoba and other jurisdictions.⁴¹ By definition, clusters of cases linking persons, place and time imply transmission at a location.⁴² Common activities at places of worship such as singing, hugging or sharing communal items also heighten the risk of transmission, poignantly illustrated by video evidence of a religious service that occurred contrary to the PHOs.⁴³

28. The Appellants compare the risk at churches with retail establishments and other locations. This is better addressed under minimal impairment. Pointing to the risk in other locations does not negate a rational connection between the impugned PHOs and the objective of reducing virus transmission.⁴⁴

29. Finally, the argument that PCR tests are unreliable is contrary to the evidence.

³⁹ Affidavit of Dr. Bhattacharya, Exhibit C, footnote 39 (p. 12) [AB Vol. 1, Tab 2D, p. AB201].

⁴⁰ Affidavit of Dr. Kindrachuk, Exhibit B, p. 12 [AB Vol. 6, Tab 3A, p. AB1351]; Affidavit of Dr. Roussin, para. 25, Exhibit 12 (p. 606, 609) [AB Vol. 8, Tab 3F, pp. AB1864, AB2038 and AB2041]; Reasons for Judgment, para. 56 [AB Vol. 11, Tab 7B, p. AB2699].

⁴¹ Affidavit of Dr. Kindrachuk, Exhibit B, p. 11-12 [AB Vol. 6, Tab 3A, pp. AB1350-AB1351]; Affidavit of Dr. Roussin, paras. 25-26, 155-160, Exhibit 12 and 13 [AB Vol. 8, Tab 3F, pp. AB1864-AB1865, AB1910-AB1911, and AB2024-AB2042]; Affidavit of Dr. Loepky, para. 14 [AB Vol. 6, Tab 3B, p. AB1373]; Reasons for Judgment, paras. 56, 114-115 [AB Vol. 11, Tab 7B, pp. AB2699, AB2725-AB2726].

⁴² Reasons for Judgment, para. 148 [AB Vol. 11, Tab 7B, p. AB2739]; Cross examination of Dr. Loepky, Transcript of Proceedings (Volume 4, May 6, 2021), pp. T7-8, T30, T33.

⁴³ Reasons for Judgment, paras. 114-115, 195 [AB Vol. 11, Tab 7B, pp. AB2725-AB2726 and AB2753].

Dr. Bullard, whom the application judge found to be credible and reliable, explained that PCR tests detect the presence of SARS-CoV-2 with an accuracy of over 99.9%. Experts on both sides agreed that PCR tests alone are not designed to determine if an individual case is currently infectious. That must be assessed in the entire clinical context.⁴⁵ However, as Dr. Roussin explained, at a population level, the total number of daily positive PCR tests provided a good picture of the “disease burden” in society, how fast the virus was spreading and how many cases would likely end up in hospital or ICU. It was a very important public health tool.⁴⁶

d) The PHOs minimally impaired section 2 Charter rights

30. The application judge correctly stated the minimal impairment test.⁴⁷ A measure minimally impairs rights unless a significantly less intrusive and equally effective means can achieve the objective in a real and substantial manner.⁴⁸

31. Perfection is not the standard, especially on complex social or scientific matters. A court will not find a provision overbroad simply because it can conceive of a less infringing measure. It is sufficient that the law fall within a

⁴⁴ Reasons for Judgment, para. 260 [AB Vol. 11, Tab 7B, p. AB2776].

⁴⁵ Reasons for Judgment, paras. 58, 126, 164, 180 [AB Vol. 11, Tab 7B, pp. AB2700, AB2731, AB2744 and AB2749]; Affidavit of Dr. Bullard, Exhibit C, 1, 104-108, 122-124, 135-137, 169-170 [AB Vol. 7, Tab 3C, pp. AB1687, AB1691, AB1692, AB1693 and AB1694].

⁴⁶ Reasons for Judgment, paras. 71, 126 [AB Vol. 11, Tab 7B, pp. AB2706 and AB2731].

⁴⁷ Reasons for Judgment, paras. 298-300 [AB Vol. 11, Tab 7B, pp. AB2797-AB2798].

⁴⁸ *RJR-MacDonald Inc. supra*, at para. 160 [RBOA, TAB 32]; *R. v. KRJ.*, 2016 SCC 31 at para. 70 [RBOA, TAB 23].

range of reasonable alternatives.⁴⁹

32. The PHOs were made at a time “when the community transmission of COVID-19 was raging” during the second wave of the pandemic. COVID-19 cases were doubling every two weeks, deaths were rising fast and “Manitoba’s hospitals and ICUs were in significant jeopardy of being overrun”. The application judge accepted there was an urgent need to “flatten the curve”.⁵⁰

33. The application judge correctly remarked that in attempting to protect the population from the ravages of the pandemic, the CPHO had to balance many complex and competing interests including economic, social, mental health, limited acute health care resources and public acceptance and compliance. This was no easy task and commands some deference.⁵¹

34. After noting the health crisis facing the province and Manitoba’s submissions as to why the impugned PHOs were necessary and minimally impairing, the court held “there is no convincing evidence that there existed significantly less intrusive measures that might have been equally as effective in responding to the real time

⁴⁹ *RJR-Macdonald*, *supra*, at para. 160 [RBOA, TAB 32]; *Hutterian Brethren*, *supra*, at paras. 53-54 [RBOA, TAB 14]; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 81 [RBOA, TAB 25].

⁵⁰ Reasons for Judgment, paras. 293-295 [AB Vol. 11, Tab 7B, pp. AB2795-AB2795].

⁵¹ Reasons for Judgment, para. 300 [AB Vol. 11, Tab 7B, p. AB2798]; C. Flood, B. Thomas and 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* [RBOA, TAB 38].

emergency facing Manitoba and its healthcare system”.⁵²

35. The Appellants relied heavily on Dr. Bhattacharya’s support of the Great Barrington Declaration, arguing that governments should focus protection only on the most vulnerable while allowing everyone else to live normally.⁵³ It is always possible to take a more laissez-faire attitude but simply put, accepting a greater risk of COVID-19 transmission meant accepting more deaths, hospitalizations, long-term illness and the risk of overwhelming the health care system.⁵⁴ Given the grave state of affairs, public health officials judged this risk to be too great. The ethical choice was to try to curb COVID-19 cases, while waiting for vaccines.

(i) Comparison with other jurisdictions

36. The Appellants point to less restrictive measures in other provinces to suggest Manitoba’s PHOs were not minimally impairing. It is overly simplistic to compare restrictions at a single point in time without a detailed understanding of the context of the pandemic in each jurisdiction. During the second wave, Manitoba had the highest per capita number of active COVID-19 cases in the country, more than double the rate of the next closest province (Alberta).⁵⁵ Less restrictive measures

⁵² Reasons for Judgment, paras. 301-305, 315-317 [AB Vol. 11, Tab 7B, pp. AB2798-AB2802 and AB2806-AB2807].

⁵³ Reasons for Judgment, paras. 288, 306-314 [AB Vol. 11, Tab 7B, pp. AB2792 and AB2803-AB2806].

⁵⁴ Reasons for Judgment, paras. 158, 312-314 [AB Vol. 11, Tab 7B, pp. AB2742 and AB2805-AB2806].

⁵⁵ Reasons for Judgment, paras. 70-72 [AB Vol. 11, Tab 7B, pp. AB2705-AB2709]; Affidavit of Carla Loeppky, Exhibit F, pp. 4, 7 [AB Vol. 10, Tab 3K, pp. AB2472 and AB2475].

might have been warranted elsewhere but not here.

37. Manitoba's PHOs were carefully tailored to the severity of the evolving pandemic at a given moment.⁵⁶ Restrictions were regularly tightened or relaxed as required. For example, before the fall of 2020, places of worship could have up to 500 people or 30% of usual capacity. When the pandemic worsened in October 2020, the CPHO did not immediately eliminate gatherings. From November 12 to 20, 2020, gatherings at places of worship were reduced from 500 to 250 people or 20%. In the Capital Region, the limit was 100 people or 15%. Further restrictions were imposed only once the pandemic began to rage out of control.⁵⁷ Dr. Roussin testified, at that point, "we couldn't afford to get it wrong". When the second wave subsided, the CPHO loosened the gathering restrictions.

38. While measures across the country were not identical, from time to time other provinces imposed public health restrictions very similar to Manitoba. British Columbia, Quebec, Nova Scotia and New Brunswick all temporarily closed places of worship.⁵⁸ B.C., Alberta and Saskatchewan prohibited persons from gathering at

⁵⁶ Reasons for Judgment, para. 67 [AB Vol. 11, Tab 7B, p. AB2704].

⁵⁷ Reasons for Judgment, paras. 69-83, 303, 305 [AB Vol. 11, Tab 7B, pp. AB2704-AB2714, AB2799 and AB2802].

⁵⁸ *Beaudoin v. British Columbia*, *supra* [RBOA, TAB 15]; B.C. COVID-19 Prevention Regional Measures, November 13, 2020, Part A [RBOA, TAB 5]; B.C. Gathering and Events Order - January 8, 2021, Parts A, B [RBOA, TAB 6]; Québec Order in Council 1020/2020 (September 30, 2020 [RBOA, TAB 11]; Québec Order in Council 2/2021 (January 8, 2021 [RBOA, TAB 12]; [Nova Scotia News Release](#), April 27, 2021 - "New Restrictions for Entire Province" (effective April 28 to May 12, 2021) [RBOA, TAB 40]; [New Brunswick News Release](#), January 13, 2020 - "New Brunswick moving to Level 3 of winter plan" (effective January 14 to 30, 2022) – faith based services restricted to outdoor only [RBOA, TAB 39].

a private residence, inside or outside, with exceptions for persons living alone.⁵⁹ Newfoundland and Labrador, New Brunswick, Nova Scotia and PEI also prohibited gatherings outside of one's "household bubble", indoors and outdoors.⁶⁰

39. PEI restricted organized gatherings to 10 people. Alberta limited social gatherings at indoor and outdoor private or public places to 10 persons and at times, the only gathering permitted was a funeral service or wedding ceremony. Saskatchewan restricted private and public outdoor gatherings to 10 persons.

40. In January 2021, Ontario imposed a shelter-in-place order which required everyone to remain in their residence at all times except when necessary for one of the enumerated purposes. Gathering in a private residence or in public for social purposes was prohibited.⁶¹ Quebec ordered a curfew from 8:00 p.m. to 5:00 a.m. People were not allowed to leave their homes, with specific exceptions.⁶² Manitoba never had a shelter-in-place order or curfew.

41. The Appellants apparently do not accept any gathering limits or precautions.

⁵⁹ *Beaudoin v. British Columbia*, *supra*; B.C. COVID-19 Prevention Regional Measures, November 13, 2020, Part A, *supra*; B.C. Gathering and Events Order - January 8, 2021, Part A, B, *supra*; Alberta CMOH Order 38-2020, November 24, 2020, Parts 1 and 2 [RBOA, TAB 3]; Alberta CMOH Order 41-2020, December 8, 2020, Parts 1 and 2 [RBOA, TAB 4]; Saskatchewan Public Health Order, December 14, 2020, Orders (a) and (c) [RBOA, TAB 13].

⁶⁰ Newfoundland and Labrador Special Measures Order (General - Alert Level 5), February 12, 2021, s. 6 [RBOA, TAB 7]; [New Brunswick News Release](#), January 13, 2022, *supra*; [Nova Scotia News Release](#), April 27, 2021, *supra*; PEI COVID-19 Prevention and Self Isolation Order (December 8, 2020), ss. 22 and 23 [RBOA, TAB 10].

⁶¹ Ontario Reg. 11/21 under the *Emergency Management and Civil Protection Act*, ss. 1(1), 24, 25 [RBOA, TAB 8]; Ontario Reg. 82/20 under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, Schedules 4 and 9 [RBOA, TAB 9].

⁶² Québec Order in Council 1020/2020, *supra*; Québec Order in Council 2/2021, *supra*.

They also challenged the April 8, 2021 PHO, which permitted 25% or up to 100 persons in places of worship with proper distancing and masks.

(ii) Comparison with other businesses

42. The Appellants argue that temporarily closing places of worship was not minimally impairing because other businesses and venues such as retail and liquor stores were permitted to remain open, with physical distancing and masks.

43. The fact retailers or businesses listed in Schedule A could remain open does not imply the PHOs were too restrictive. As Dr. Blanchard testified, preventing transmission does not require treating all indoor gatherings equally.⁶³ The court accepted evidence that the risk at places of worship is greater than at retail stores and similar locations where contact is typically transient and for shorter duration.⁶⁴ The risk in places of worship was more comparable to theatres, restaurants, concert halls, arenas and indoor sporting events, which involve prolonged close contact between persons.⁶⁵ All of these venues were required to remain closed temporarily

⁶³ Reasons for Judgment, para. 160 [AB Vol. 11, Tab 7B, p. AB2743].

⁶⁴ Reasons for Judgment, paras. 56, 71, 114-115, 148, 153, 195, 264, 274, 305 [AB Vol. 11, Tab 7B, pp. AB2699, B2706, AB2725-AB2726, AB2739, AB2741, AB2753, AB2779, AB2784 and AB2802].

⁶⁵ *South Bay United Pentecostal Church et al. v. Gavin Newsom, Governor of California et al.* No. 19A1044 (May 29, 2020, USSC) at p. 2 [RBOA, TAB 33]; *South Bay United Pentecostal Church et al. v. Gavin Newsom, Governor of California et al.* No. 20A136 (20-746) (February 5, 2021, USSC) at p. 2 per Kagan J. (dissenting) [RBOA, TAB 34].

during the second wave.⁶⁶

44. The Appellants highlight that the November 21, 2020 PHO allowed a movie or television set to continue filming. The PHO put a stop to any new gathering on film sets and only allowed productions already in progress before the PHO to complete filming. There is no evidence of how many film productions were permitted to complete. This is an example of the many difficult lines being drawn in an attempt to mitigate a global pandemic, which affected every aspect of society. It is why the Supreme Court has emphasized that s. 1 of the *Charter* does not demand limits be perfectly calibrated, judged in hindsight.⁶⁷

(iii) Physical distancing and masking

45. Manitoba accepts that measures such as masking and distancing help mitigate the risk of spread. However, these were insufficient during the crisis of the second wave. Despite Dr. Bhattacharya's opinion, symptom screening is of limited assistance due to pre-symptomatic transmission of the virus and because COVID-19 symptoms are non-specific.⁶⁸ Likewise, requiring property owners to modify ventilation systems in hundreds if not thousands of buildings was not an immediate practical solution.

⁶⁶ Reasons for Judgment, paras. 56, 114, 273-274 [AB Vol. 11, Tab 7B, pp. AB26969, AB2725 and AB2784-AB2785]; Affidavit of Dr. Roussin, paras. 155-156, 162 [AB Vol. 8, Tab 3F, pp. AB1910 and AB1912].

⁶⁷ *Hutterian Brethren*, *supra*, para. 37; Reasons for Judgment, para. 280 [AB Vol. 11, Tab 7B, p. AB2787].

⁶⁸ Reply Affidavit of Dr. Roussin, paras. 15-17 [AB Vol. 9, Tab 3J, pp. AB2217-AB2218].

46. Dr. Kindrachuk's evidence was that no single non-pharmaceutical intervention would act as a failsafe to reduce SARS-CoV-2 transmission. Curfews, lockdowns and closing/restrictions of congregation areas for small or large groups were the most effective strategies.⁶⁹ While other mitigation measures were also important, public health officials concluded they were not sufficient at that moment in the pandemic.

47. The application judge found it would not be possible to monitor hundreds of private places of worship or residences to assure additional precautions would be followed properly or at all. That was not, however, his only reason for rejecting the Appellants' minimal impairment arguments. Lesser restrictions had already been in place before the "circuit break" PHOs but they had not been successful at stemming the tide of COVID-19 in the second wave. For example, despite allowing smaller gatherings at places of worship, outbreaks continued to appear.⁷⁰

48. The Appellants acknowledge that religious services involve prolonged periods of close contact but argue that the PHOs did not restrict the time people could spend at big box or grocery stores. They suggest one could even spend the day singing hymns at a grocery store. It was sensible for the CPHO to take account of the ordinary activities and behaviour in various locations. It was reasonable for the

⁶⁹ Affidavit of Dr. Kindrachuk, Exhibit B, pp. 14-15 [AB Vol. 6, Tab 3A, pp. AB1353-AB1354].

⁷⁰ Reasons for Judgment, para. 303 (citing Dr. Loeppky), 305 [AB Vol. 11, Tab 7B, pp. AB2799-AB2802].

CPHO to consider that contacts in retail environments are typically transactional in nature, of shorter duration and usually do not involve groups singing.

49. Significantly, the “circuit break” was temporary. It was limited to a 13 week period when the pandemic was at its most dangerous point, cases were surging and the health care system was under enormous strain. Contrary to the Intervener’s submissions, it was not a complete ban on worship or even religious gatherings. Religious services could still occur remotely or outdoors in vehicles or up to five persons could gather outdoors in public places. Religious officials could attend a private residence for counselling or educational instruction or tutoring (Order 1(2)). Bible studies could happen online.⁷¹ The restrictions were relaxed once they had achieved the desired effect of regaining some control over the rate of transmission. Even sincerely held religious beliefs must sometimes yield if conduct potentially causes harm to or interferes with the rights of others.⁷²

(iv) Gatherings in private residences

50. Gatherings at private residences were identified as a significant source of COVID-19 transmission as acknowledged by the Applicants’ own expert.⁷³

51. The Appellants argue that homeowners could have simply checked the

⁷¹ Reasons for Judgment, paras. 303-304 [AB Vol. 11, Tab 7B, pp. AB2799-AB2802].

⁷² *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras. 58, 62-63 [RBOA, TAB 35]

temperature and symptoms of guests. Leaving aside that this approach is impractical and unenforceable, the application judge accepted evidence that pre-symptomatic individuals may unknowingly transmit the virus to unsuspecting persons.⁷⁴ Thus, screening for symptoms is insufficient because it would likely miss many cases of infection.

52. The application judge questioned Dr. Bhattacharya's evidence that pre-symptomatic transmission is rare because he had failed to distinguish between asymptomatic (never develop symptoms) and pre-symptomatic (prior to symptom onset) transmission in the scientific literature.⁷⁵ In contrast, Dr. Roussin and Dr. Kindrachuk cited scientific studies that demonstrated the virus can be transmitted before developing symptoms and that pre-symptomatic individuals appear to transmit the virus similarly to symptomatic individuals.⁷⁶ There was strong scientific evidence that transmission of SARS-CoV-2 occurs from a few days before symptom onset until about five days after.⁷⁷

53. The PHOs did not prohibit visiting family or friends. Up to five people could still gather at indoor and outdoor public places. Again, the limit was temporary

⁷³ Reasons for Judgment, para. 56 [AB Vol. 11, Tab 7B, p. AB2699], citing the January 5, 2021 Affidavit of Dr. Bhattacharya, Exhibit C, pp. 19, 26 [AB Vol. 1, Tab 2D, pp. AB208 and AB215].

⁷⁴ Reply Affidavit of Dr. Roussin, paras. 15-17 [AB Vol. 9, Tab 3J, pp. AB2217-AB2218]; Reply Affidavit of Dr. Kindrachuk, Exhibit A, pp. 6-7 [AB Vol. 9, Tab 3I, pp. AB2203-AB2204]; Reasons for Judgment, para. 259 [AB Vol. 11, Tab 7B, p. AB2776].

⁷⁵ Reasons for Judgment, para. 168 [AB Vol. 11, Tab 7B, p. AB2746].

⁷⁶ Affidavit of Dr. Kindrachuk, Exhibit B, p. 10 [AB Vol. 6, Tab 3A, p. AB1349].

during the worst phase of the pandemic.

(v) Outdoor gatherings

54. It was acknowledged that the risk of transmission was higher indoors but this did not rule out transmission outdoors, especially in crowds with prolonged close contact.⁷⁸ Not surprisingly, other provinces have also imposed restrictions on outdoor gatherings, recognizing the risk of transmission.

55. Dr. Kindrachuk's report stated that the role of virological and biophysical factors in transmission, including the viability in indoor and outdoor settings, remained elusive and required further study. Therefore, adherence to non-pharmaceutical interventions should remain the focus of the global response pending further research.⁷⁹

56. Public health officials cannot be faulted for taking a precautionary approach. Given the difficulty of enforcing physical distancing and mask wearing in outdoor public places, it was reasonable to limit the size of gatherings. At this point in the pandemic, there was little room for trial and error.

57. The Appellants have misinterpreted the application judge's comments at

⁷⁷ Reasons for Judgment, para. 55 [AB Vol. 11, Tab 7B, p. AB2698].

⁷⁸ Reasons for Judgment, paras. 5, 257 [AB Vol. 11, Tab 7B, pp. AB2674 and AB2776].

⁷⁹ Affidavit of Dr. Kindrachuk, Exhibit B at p. 15 [AB Vol. 6, Tab 3A, p. AB1354].

para. 250. He correctly stated the PHOs have never required people to remain in their homes and it was “still possible for persons to visit outside of a residence as long as they complied with gathering size limits.” He was not suggesting people could gather outdoors at a private residence. This is evident from his reference to “gathering size limits” which could only mean the five person gathering limit at public places under Order 2. No outdoor gathering size limits applied at private residences, because they were prohibited under Order 1.

58. In summary, the court rightly concluded the PHOs were minimally impairing:

...I find that in examining the exponential growth in COVID-19, the uncontrolled community spread and rise in deaths and serious illness, not to mention the impending crisis facing the healthcare system, Dr. Roussin reasonably concluded that a quick and clear response was required. The difficult balancing that Dr. Roussin was required to perform left him to make a decision and tailor measures which I have determined fell within a range of reasonable alternatives. I am far from convinced that in the context in which Dr. Roussin was operating, there was any basis to conclude that “a significantly less intrusive” measure or measures would have been “equally effective” in flattening the curve.⁸⁰

e) The Salutary and Deleterious Effects of the PHOs were proportionate

59. At the final stage of the *Oakes* test, the application judge carefully weighed the effects of the impugned PHOs and concluded that “the evidence unquestionably demonstrates that the salutary effects of the limitation far outweigh

⁸⁰ Reasons for Judgment, para. 316 [AB Vol. 11, Tab 7B, p. AB2806].

those effects that may be characterized as deleterious”.⁸¹

60. On the evidence as a whole, the application judge firmly refuted the Appellant’s argument that public health restrictions on gatherings do not work or have no significant benefits.⁸² He did not accept Dr. Bhattacharya’s opinion to the contrary. Instead, he accepted the opinions of Manitoba’s experts and the general public health consensus that although gathering restrictions did not stop transmission altogether, they were necessary to prevent the exponential spread of the virus and keep it within manageable limits.⁸³ In fact, curfews, lockdowns and closing/restriction of congregation were “the most effective strategies” to reduce transmission.⁸⁴ That is what happened in Manitoba after the PHOs were implemented, consistent with modelling projections.⁸⁵ Even Dr. Bhattacharya conceded that non-pharmaceutical interventions can reduce the peak number of infections.⁸⁶ The PHOs were necessary and appropriate measures to stop the exponential growth of COVID-19, lessen serious illness and death, and preserve the limited capacity of our health care system.⁸⁷

⁸¹ Reasons for Judgment, paras. 289, 319-320 [AB Vol. 11, Tab 7B, pp. AB2792, AB2807-AB2808].

⁸² Reasons for Judgment, paras. 319-324, 327 [AB Vol. 11, Tab 7B, pp. AB2807-2810 and AB2811].

⁸³ Reasons for Judgment, paras. 66, 121, 149, 158, 160 [AB Vol. 11, Tab 7B, pp. AB2703, AB2728, AB2739, AB2742 and AB2743].

⁸⁴ Affidavit of Dr. Kindrachuk, Exhibit B, p. 14-15 [AB Vol. 6, Tab 3A, pp. AB1353-AB1354].

⁸⁵ Reasons for Judgment, para. 74 [AB Vol. 11, Tab 7B, p. AB2709]; Cross examination of Dr. Roussin, Transcript of Proceedings (Volume 5, May 7, 2021) p. T72, l. 12-20.

⁸⁶ Reasons for Judgment, para. 169 [AB Vol. 11, Tab 7B, p. AB2746].

⁸⁷ Reasons for Judgment, para. 324 [AB Vol. 11, Tab 7B, p. AB2810].

61. These vital benefits must be weighed against any deleterious effects. Manitoba acknowledges that preventing in-person religious services had a negative effect on some persons for whom this was an important aspect of their religious beliefs. However, it was still possible to congregate remotely indoors or outdoors in vehicles or small groups at outdoor public places. The Appellants' religious practices were not treated as less important than others. The restrictions attenuated the risk of contracting a potentially deadly disease. The restrictions were only in effect for as long as necessary to regain control over community transmission and alleviate the intense strain on our hospitals and ICUs.

62. The Supreme Court has long recognized that the potential to harm one's neighbours provides a reasonable basis for limiting the freedom to manifest one's beliefs. Protecting public safety, health and the rights of others does not repudiate religious freedoms but rather facilitates its exercise in a way that takes the well-being of others into account.⁸⁸ The right to congregate indoors had to be balanced against the need to protect the health and lives of others, especially the vulnerable.

63. While restricting outdoor gatherings limited the size of political protest, the deleterious effect on free expression was tempered by the fact that many means of expression remained. Nothing precluded protest through petitions, emails, social

⁸⁸ *Syndicat Northcrest v. Amselem*, *supra*, at paras. 61-63, 178 [RBOA, TAB 35]; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at paras. 26, 30 [RBOA, TAB 29].

media, letters to the media or politicians.⁸⁹ Indeed, the PHOs did not prevent an outdoor protest involving many groups of five persons, provided each group was discrete, sufficiently spread out and did not interact with other groups.

64. The Intervener argues that the violation was more serious because the PHOs limit intersecting *Charter* rights under ss. 2(a), 2(b) and 2(c). While it might sometimes be relevant to consider independent *Charter* breaches, here the same gathering restriction simultaneously limits different s. 2 freedoms. Indeed, that is often so when public protest is limited (s. 2(b) and (c)) but courts have not suggested this means the deleterious effects of the restriction are greater.

65. The Appellants argue that the PHOs adversely affected mental health and increased substance abuse. Manitoba conceded that the PHOs had the potential for negative effects on mental health, which had to be taken seriously. The application judge found that, throughout the pandemic, Dr. Roussin and public health officials carefully considered and constantly balanced these potential negative collateral effects against the benefits of the PHOs.⁹⁰

66. The Appellants rely on a report included with Dr. Loeppky's affidavit (Exhibit D), which discussed various adverse health trends in Manitoba during the

⁸⁹ *County of Los Angeles Department of Public Health v. Superior Court (California Restaurant Association Inc.)*, 61 Cal.App. 5th 478 (California Court of Appeals, B309416, March 1, 2021) at pp. 10-12 [RBOA, TAB 18].

pandemic. Importantly, however, nothing in Dr. Loeppky's report indicated that the adverse effects on mental health were caused by the PHOs as opposed to the pandemic itself. Many of the trends existed pre-pandemic.⁹¹ The application judge specifically found there was general evidence that mental health had deteriorated during the pandemic, but it was not possible to attribute the cause of suicide or depression or increases in drug overdoses directly to public health restrictions, let alone the particular impugned PHOs. There was no convincing evidence that the temporary gathering restrictions caused any real or potential harms that outweighed the need to respond to the public health crisis.⁹²

67. Finally, the Appellants argue that some jurisdictions have taken a less restrictive approach (e.g. Sweden). Nonetheless, the impugned PHOs were generally consistent with measures taken across Canada and the rest of the world.⁹³

68. Ultimately, despite the undeniable hardships caused by the public health restrictions, the alternative would have put the health and lives of many vulnerable people at risk. The salutary effects of the PHOs far outweighed their deleterious effects. The court was mindful that it is extremely difficult, if not impossible, to

⁹⁰ Reasons for Judgment, paras. 330-331 [AB Vol. 11, Tab 7B, pp. AB2812-AB2813]; Cross examination of Dr. Roussin, Transcript of Proceedings (Volume 5, May 7, 2021) p. T72-79.

⁹¹ Cross examination of Dr. Roussin, Transcript of Proceedings (Volume 5, May 7, 2021) p. T74, l. 6-19.

⁹² Reasons for Judgment, para. 332 [AB Vol. 11, Tab 7B, p. AB2813].

⁹³ Reasons for Judgment, para. 66 [AB Vol. 11, Tab 7B, p. AB2703]; *Beaudoin v. British Columbia* [RBOA, TAB 15]; *Ingram v. Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806 [RBOA, TAB 21]; and see other provincial public health orders cited at paras. 37 to 40 above.

empirically measure in advance the potential costs of the restrictions against the benefits. It was enough to show there is a convincing justification.⁹⁴ Manitoba submits the CPHO's judgment is entitled to deference and in any event, the application judge's assessment was correct.

69. In summary, the impugned PHOs were implemented for a pressing and substantial objective of the highest order. In the grave circumstances of an unprecedented public health emergency, with deaths and hospitalizations escalating rapidly and the acute health care system on the precipice, the government's response was manifestly proportionate and demonstrably justified.

3. The Impugned PHOs comply with Section 3 of the Act

70. The application judge correctly held that the PHOs complied with s. 3 of the Act for the same reasons they minimally impaired rights under s. 1.⁹⁵ The CPHO's decision to impose the impugned PHOs as reasonably necessary was well supported by the scientific evidence and is entitled to deference.

4. Section 67 Delegation is Constitutional

71. The Appellants provide no authority to support the contention that delegating broad law-making power of general application to the CPHO is incompatible with

⁹⁴ Reasons for Judgment, paras. 326, 335 [AB Vol. 11, Tab 7B, pp. AB2811 and AB2815].

⁹⁵ Reasons for Judgment, paras. 341-345 [AB Vol. 11, Tab 7B, pp. AB2817-AB2818].

the “basic structure” of the Constitution. Since the seminal *Hodge* case, courts have repeatedly upheld the legislature’s authority to delegate very broad and general subordinate law-making power, “in the manner it chooses, to whom it chooses”.⁹⁶

72. The Appellants mischaracterize s. 67 as permitting “the unrestrained and prolonged transfer of legislative power”.⁹⁷ The CPHO is always subject to judicial review to ensure conformity with statutory and constitutional dictates.⁹⁸ The application judge gave cogent and comprehensive reasons for finding this ground had no merit.⁹⁹

PART V - RELIEF CLAIMED

73. The Respondents request that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Michael Conner
Counsel for the Respondents

DATED this 27th day of June, 2022.

Estimated Time for Oral Argument: 2 hours

⁹⁶ *Hodge v. The Queen* (1893), 9 App. Cas. 117 (JCPC) at p. 10, 11-14 [RBOA, TAB 20]; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras. 84-85, 123-125 [RBOA, TAB 31]; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras. 73, 83-88 and see para. 410 where, in dissent, Brown J. described the delegation as “breathtakingly broad” [RBOA, TAB 30].

⁹⁷ Reasons for Judgment, paras. 17-18, 30, 44 [AB Vol. 11, Tab 7B, pp. AB2679, AB2687 and AB2693].

⁹⁸ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *supra*, paras. 108-110 [RBOA, TAB 16].

⁹⁹ Reasons for Judgment, 2021 MBQB 218 at paras. 17-18, 30-33, 38-41, 44-49, 54-55 [AB Vol. 11, Tab 7A, pp. AB2653-2654, AB2659-2660, AB2662-2664, AB2665-2667, AB2668]

PART VI - LIST OF AUTHORITIES

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