SCC File No.: 40903

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA)

BETWEEN:

GATEWAY BIBLE BAPTIST CHURCH, PEMBINA VALLEY BAPTIST CHURCH, THOMAS REMPEL, GRACE COVENANT CHURCH, SLAVIC BAPTIST CHURCH, BIBLE BAPTIST CHURCH, TOBIAS TISSEN, and ROSS MACKAY

APPLICANTS
(Appellants)

- and -

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

RESPONDENTS
(Respondents)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

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 Applicants 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 acknowledged these PHOs limited freedoms under s. 2 of the Charter, the application judge found 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 a novel pandemic coronavirus, were reasonably tailored to the dire circumstances at the time.

3. The Manitoba Court of Appeal upheld the application judge's decision, finding he did not err in accepting and weighing the expert evidence which supported the PHOs, and rejecting the Applicants' experts' alternative theories and approaches.

4. In their leave application, the Applicants seek to have this Court re-weigh the evidence and come to alternative findings about what Manitoba ought to have done differently to protect the life and health of its citizens. In doing so, the Applicants also seek to reinvigorate arguments that were dismissed at trial and not appealed. None of this discloses an issue of national importance. Leave should be denied.

B. Statement of Facts

5. The Applicants challenged 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. 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]

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

7. 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

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[1] *Gateway Bible Baptist Church et al. v. Manitoba et al.*, 2021 MBQB 219 (*Gateway* MBQB), paras. 6, 21. Order 1(1) of the November 11, 2021 PHO was also challenged.

[2] *Gateway* MBQB, para. 201.

[3] *Gateway* MBQB, paras. 70-72.

[4] *Gateway* MBQB, para. 71(vii).

hospitalizations and 44% of ICU admissions were under age 60. The median age for severe cases among Indigenous people was even younger.[5]

8. 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]

9. 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 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 was lower outdoors, but remained for persons in close proximity, particularly if shouting or talking loudly.[13] Notably, vaccines were not yet available.[14]

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[5] *Gateway* MBQB, para. 58

[6] *Gateway* MBQB, para. 71(viii)

[7] *Gateway* MBQB, para. 71

[8] *Gateway* MBQB, paras. 71(ix), (x), 74, 129, 149, 164, 264-265, 300, 303(i), 305, 322-323, 329

[9] *Gateway* MBQB, para. 70

[10] *Gateway* MBQB, paras. 5, 257

[11] *Gateway* MBQB, para. 56, citing the January 5, 2021 Affidavit of Dr. Bhattacharya, Exhibit C, pp. 19, 26

[12] *Gateway* MBQB, paras. 56, 71, 114-115, 148, 153, 195, 264, 274, 305

[13] *Gateway* MBQB, paras. 54, 46

[14] *Gateway* MBQB, paras. 144, 157-158, 169

10. 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]

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

12. 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 Applicants' experts presented a "contrary, if not contrarian scientific point of view" but in no way undermined the credible science justifying the restrictions.[20]

13. The application judge found 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

[15] *Gateway* MBQB, para. 55

[16] *Gateway* MBQB, para. 259

[17] *Gateway* MBQB, paras. 164, 197, 322-323

[18] *Gateway* MBQB, para. 202

[19] *Gateway* MBQB, paras. 87, 322-323

[20] *Gateway* MBQB, para. 198

[21] *Gateway* MBQB, para. 324

PHOs minimally impaired rights and the salutary effects were proportionate to any deleterious effects. Simply put, the PHOs averted a potential disaster.[22]

14. The Manitoba Court of Appeal held the application judge did not err in finding Manitoba had discharged its onus under s. 1 of the *Charter,* "especially given his findings regarding the scientific and expert evidence that he accepted."[23] The Court of Appeal had "not been convinced that the application judge erred in his consideration of the evidence."[24]

PART II – STATEMENT OF QUESTIONS IN ISSUE

15. The Applicants state two issues they say are of national importance:

ISSUE 1: "How are constitutionally-protected activities to be juridically measured against comparable non-constitutionally protected activities" for the purposes of the minimal impairment analysis?[25]

- The Respondent says this does not raise a legal issue with the application of the *Oakes* test. Rather, it attacks the evidentiary findings of the application judge as to what activities were comparable in terms of risk of COVID-19 transmission, and therefore treated similarly under the PHOs. Moreover, this issue is a disguised re-articulation of the Applicant's s. 15 claim based on religion, which was dismissed and not appealed.

[22] *Gateway* MBQB, paras. 74, 305, 334

[23] *Gateway Bible Baptist Church et al v Manitoba et al*, 2023 MBCA 56 (*Gateway* MBCA) at para. 115.

[24] *Gateway* MBCA at para. 127.

[25] Applicants' Memorandum of Argument, para. 19.

ISSUE 2: "Does reliance on the precautionary principle satisfy the state's onus under section 1 to provide 'cogent and persuasive' evidence to justify *Charter*-infringing measures?"[26]

- The Respondent says this issue does not arise in this case because neither the application judge nor the Court of Appeal purported to rely on the precautionary principle as a proxy for evidentiary requirements.

16. While it does not factor directly into either of the stated issues, the Applicants also suggest that there is discord in the jurisprudence between British Columbia and Manitoba. This relates to the constitutionality of restrictions on outdoor gatherings.[27] The Respondent simply notes that what the Applicant is referring to is a British Columbia decision where a surviving portion of subsequently reconsidered and rescinded orders was held to be of no force and effect on the basis of the Crown's concession.[28] This does not establish conflicting guidance from the court nor carry precedential weight.

PART III – STATEMENT OF ARGUMENT

The Evidentiary Context

17. The evidence before the application judge was voluminous. It included 16 affidavits and expert reports from a variety of witnesses who "had impressive medical, nursing and/or academic backgrounds in areas related and relevant to public health generally, and in some cases, virology and immunology more specifically."[29]

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[26] Ibid.

[27] Applicants' Memorandum of Argument, paras. 7 and 33.

[28] *Beaudoin v British Columbia*, 2021 BCSC 512, at para. 145 (aff'd 2022 BCCA 427; leave denied, *Brent Smith, et al. v. Attorney General of British Columbia, et al.,* 2023 CanLII 72130 (SCC)).

[29] *Gateway* MBQB, para. 41.

18. It also included in-court cross-examinations of ten witnesses, nine of them experts: Tobias Tissen; Dr. Jay Bhattacharya; Lanette Siragusa; Dr. Jason Kindrachuk; Dr. Carla Loeppky; Dr. James Blanchard; Dr. Brent Roussin; Dr. Jared Manley Peter Bullard; Dr. Thomas Andrew Warren; and Dr. Joel Kettner.[30]

19. The evidence included "full and corresponding evidence challenging and attacking the science upon which the government in question (in this case Manitoba) relie[d]."[31]

20. The application judge gave "a purposeful consideration but ultimately, a clear rejection of much of what the applicants submit as their foundational challenge to the science upon which Manitoba has relied and acted."[32]

21. In an overall assessment of the evidence, the application judge held:

> [198] … in the face of Manitoba's otherwise reliable and credible expert witnesses (an assessment which the cross-examinations did not change), absent a more persuasive and conclusive evidentiary challenge to Manitoba's witnesses and their evidence, the evidence of the applicants and their challenge on cross-examination represent at best, a contrary if not contrarian scientific point of view. While that view and challenge may be deserving of rigorous consideration in the ongoing scientific conversation, as it was presented in this case in the affidavits and on cross-examination, it did not demonstrate or satisfy me that Manitoba has failed to discharge its onus in the context of the s. 1 justificatory framework. Manitoba's position and its supporting expert evidence represent an appropriately "all things considered" reasonable basis for the decisions that it took respecting the restrictions that were ultimately imposed — decisions which I find on the evidence, were made on the basis of credible science.[33]

22. He was entitled to come to this view, and none of the application judge's factual determinations were displaced on appeal.

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[30] *Gateway* MBQB, para. 44.

[31] *Gateway* MBQB, para. 48.

[32] *Gateway* MBQB, para. 48.

[33] *Gateway* MBQB, para. 198.

ISSUE 1 – Activities and venues with comparable risk were treated comparably

23. In advancing this issue, the Applicants set out a litany of activities or places they say were similar to places of worship, yet given less stringent treatment under the PHOs.[34] Because religious activities are *Charter*-protected, they say places of worship should have been allowed to stay open with other measures in place.

24. The difficulty for the Applicants is that this does not disclose an issue with the legal role of comparison under the minimal impairment analysis. Rather it shows that they disagree with the application judge's finding that the level of risk associated with places of worship was "similar to movie theaters, sports facilities, plays, restaurants or other venues that involved prolonged periods of contact (see paras 56, 114, 274)" which were similarly restricted.[35] The Court of Appeal affirmed that "it was open to the application judge to accept the evidence of Dr. Roussin as to the reasons for the distinctions drawn when determining the measures to be taken for different activities based on risk."[36] Thus, the Applicants are simply continuing to disagree with the application judge's factual determinations, rooted in the expert evidence, on the appropriate risk comparators.

25. The Applicants' further argument, which was before both the application judge and the Court of Appeal, is that places of worship should have been allowed to stay open with lesser measures. This argument continues to "ignore[] the fact that lesser restrictions had already been in place before the impugned PHOs. Unfortunately, they could not stem the dire situation that had developed by the time the impugned PHOs were put in place."[37] It was a matter of fact that lesser interventions, short of closure, had been applied to places of worship and had not been effective.

26. Underlying the Applicant's position is a theme that it was unfair to place greater restrictions on places of worship (which are constitutionally protected), while other places of various

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[34] For example, see Applicant's Memorandum of Argument, para. 26.

[35] *Gateway* MBCA at para. 92.

[36] *Gateway* MBCA at para. 94.

[37] *Gateway* MBCA at para. 99.

sorts remained open. Constitutionally protected activities (like religious practices), they say, must in some way receive greater leeway in the context of pandemic protective measures than other places or activities.

27. This is a veiled attempt to reinvigorate the Applicants' s. 15 *Charter* arguments which were dismissed by the application judge and not appealed. The Applicants argue here that places of worship were "singl[ed] out" for "disparate treatment" as they had stringent limitations while "comparable secular conduct" did not.[38] Thus, they allege that "Charter-protected rights of religious worship" were trumped by "economic interests".[39]

28. The Applicants brought a s. 15 claim in the then Manitoba Court of Queen's Bench, alleging they were being discriminated against on religious grounds, for the same reason articulated in the Application for Leave: others were treated differently.

29. The Applicant's s. 15 claim was succinctly stated by the application judge as follows:

> [269] It is the position of the applicants that the impugned PHOs discriminate on the basis of religion in that they classify liquour, cannabis and big-box retailers as "essential" and therefore allow them to remain open. The applicants contend that the PHOs classify churches and religious gatherings as "non-essential" and for that reason require them to close. Put simply, the applicants submit that it is discriminatory to allow people to assemble in liquor and grocery stores, but not worship at church.[40]

30. The judge, however, found that the religious nature of in-person worship services was not the basis upon which a distinction was made in allowing certain businesses to remain open, rather it was based on an analysis of the nature of activities involved and a balancing of risk of transmission:

> [273] Insofar as the applicants are accurate in stating that certain retailers (those listed in Schedule A) were permitted to remain open for in-store purchases of "essential items" while places of worship were required to remain closed for in-person services, those closures were not because

[38] Applicants' Memorandum of Argument at para. 34. Emphasis added.

[39] Applicants' Memorandum of Argument at para. 27.

[40] *Gateway* MBQB at para. 269.

> religious services are viewed as inessential or less important. Rather, those closures were rooted in the government's position as found and supported in the evidence, that the nature of such gatherings pose a heightened risk of transmission (see the evidence of the witness Dr. Brent Roussin).
>
> [274] It is essential to note that the impugned PHOs do not create any distinction based on religious beliefs or the religious or non-religious nature of the location. Any distinction between facilities that could remain open and those required to close was based solely on the level of risk of viral transmission posed by the type of gathering or activity. … the nature of religious services will often involve behaviours that carry a higher risk of transmission such as singing, choirs, and the sharing of communal items (see the evidence of the witnesses Tobias Tissen, Riley Toews, Christopher Lowe, and Thomas Rempel). Places of worship have been treated very much like movie theatres, sports facilities, plays, restaurants or other venues that involve prolonged periods of close contact, which by extension, pose a higher risk of viral transmission. While no one would suggest that transmission cannot or does not occur in retail stores for example, the distinction in question is, as Manitoba has insisted, about balancing risk and not about religion.[41]

31. The fact that some retailers or businesses could remain open does not imply the PHOs were too restrictive, nor that there were other equally effective but significantly less intrusive measures available. The expert evidence accepted by the court suggested that preventing transmission does not require treating all indoor gatherings equally.[42] The application judge 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.[43] 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. All of these venues were required to remain closed temporarily during the second wave.[44]

32. The Applicants 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 was

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[41] *Gateway* MBQB at paras. 273 and 274. Emphasis added.

[42] *Gateway* MBQB, para. 160.

[43] *Gateway* MBQB, paras. 56, 71, 114-115, 148, 153, 195, 264, 274, 305.

[44] Gateway MBQB, paras. 56, 114, 273-274.

no evidence of how many, if any, film productions were permitted to complete, nor what the productions involved. The Applicants' bare speculation as to what, theoretically, might have been filmed is not an issue of national importance. This is simply an example of the many difficult lines being drawn by public health authorities in an attempt to mitigate a global pandemic, which affected every aspect of society. It is also an example of why this Court has emphasized that s. 1 of the *Charter* does not demand limits be perfectly calibrated when judged in hindsight.[45]

33. The Applicants' true concern here is that the application judge preferred the expert evidence led by Manitoba, rather than its own experts. But of course, the Application judge was entitled to do so. If the Applicants' wished to advance their claim that it was an impermissible distinction under s. 15 to close churches while allowing other non-constitutionally protected services and businesses to stay open, they ought to have appealed that issue. Their tactical choice not to forecloses that avenue.

ISSUE 2 – The precautionary principle was not relied on in this case

34. The Applicants tread familiar pathways, asserting (incorrectly) that there was no evidence to support restrictions on outdoor gatherings during the worst of the pandemic in Manitoba.

35. They repeat arguments made in the courts below, based upon a single, out-of-context word from one of Manitoba's expert witnesses, to the effect that evidence of outdoor transmission of the virus was "elusive".[46] The Court of Appeal corrected them on this point, citing the full context, but they persist in raising it:

> [111] Next, the applicants rely on Dr. Kindrachuk's testimony that evidence of outdoor spread is elusive.
>
> [112] Manitoba acknowledges that, while the evidence was that the risk of transmission was higher indoors, it could not be ruled out in outdoor situations, especially in crowds with prolonged close contact.

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[45] *Alberta v. Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 SCR 567 para. 37; Gateway MBQB, para. 280.

[46] Applicants' Memorandum of Argument, para. 35.

> [113] Manitoba clarifies that Dr. Kindrachuk's evidence was that "the role of virological and biophysical factors in transmission, including the viability in indoor and outdoor settings, remained elusive and required further study."[47]

36. Moreover, the application judge did not rely on the precautionary principle in this case.[48] There was a plethora of competing expert evidence. The trial judge was required to weigh and balance that evidence, which he did. The Court of Appeal endorsed his decision under the heading of "Outdoor Gatherings" on the basis of that evidentiary exercise, not on precaution in absence of evidence:

> [115] Based on all of the above, I am not convinced that the application judge erred in his conclusion that Manitoba had discharged its onus to demonstrate that the impugned PHOs minimally impaired the rights in question, **especially given his findings regarding the scientific and expert evidence that he accepted.**[49]

37. The Court did note that Manitoba had taken the position on appeal that it "cannot be faulted for taking a *precautionary approach* of limiting gathering sizes given the difficulty of enforcing physical distancing and mask wearing while outdoor at public places." This difficulty was supported in evidence. The Court of Appeal agreed, but did not in anyway suggest this submission should replace evidentiary requirements under *Oakes*.[50]

38. The Court of Appeal went on to note that the Ontario Court of Appeal had upheld gathering restrictions, and found the motion judge there did not err in referring to the precautionary principle.[51] The *obiter* observation of the Manitoba Court of Appeal that another appellate court, in another case, in another province had endorsed a trial judge's use of the

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[47] *Gateway* MBCA at paras 111-112.

[48] *Gateway* MBQB at paras. 298 to 317.

[49] *Gateway* MBCA at para. 115. Emphasis added.

[50] *Gateway* MBCA at para. 114. Emphasis added.

[51] *Gateway* MBCA at para. 116.

precautionary principle does not only fail to disclose an issue of national importance, it underscores that the precautionary principle was not truly in issue in the present case.

39. Even in the case cited – *Trinity Bible* – the Ontario Court of Appeal did not suggest the principle absolves governments of evidentiary requirements under *Oakes*. Rather it simply recognises that where there are threats of serious, irreversible damage, governments do not need to wait for scientific certainty or unanimity before taking preventive action.[52] This is sound reasoning, and could well have applied in Manitoba had it been raised at trial. This Court denied leave in *Trinity Bible*, where the precautionary principle was squarely raised and relied on.[53]

40. The Respondent submits no issue of national importance warranting this Court's intervention is made out. The Applicants' application for leave is based on its continuing preference for the evidence of its own expert witnesses and on issues which do not properly arise in the circumstances. As such, leave ought to be denied.

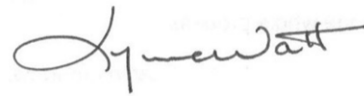
PART IV – SUBMISSION ON COSTS

41. The Respondent does not seek costs.

PART V – ORDER REQUESTED

42. The Respondents submits that the Application for Leave to Appeal ought to be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, Dated at Winnipeg, Manitoba this 18th day of October, 2023.



for:

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[52] *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134 at paras. 105-115.

[53] *Trinity Bible Chapel, et al. v. Attorney General of Ontario, et al.*, 2023 CanLII 72135 (SCC)

PART VI– TABLE OF AUTHORITIES & STATUTORY PROVISIONS

Case Law:	**Paragraph References (to Memorandum)**
Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37	32
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