**SCC COURT FILE NO.: 40903**

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

**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)**

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**REPLY TO RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL (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)**
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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**PEJOVIC LAW**
[redacted]

**Allison Pejovic**
Tel: [redacted]

**Counsel for the Applicants**

**SUPREME ADVOCACY LLP**
[redacted]

**Eugene Meehan, K.C.**
**Thomas Slade**
Tel.: [redacted]

**Agent for Counsel for the Applicants**

**MANITOBA JUSTICE,**
**LEGAL SERVICE BRANCH**
Constitutional Law Section
[redacted]

**Charles Murray**
**Samuel Thomson**
Tel: [redacted]

**Counsel for Respondents**

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**This Test Case is About the Government's Failure to Consider the Public Health Orders' Impact on *Charter* Rights**

***Respondents' Assertion that Applicants' Trying to Re-Argue Section 15 is merely a Distraction***

1. At its core this appeal is about obtaining guidance from this Honourable Court as to whether the state must preserve Canadians' rights to engage in constitutionally-protected activities during a public health crisis before permitting them to engage in non-constitutionally protected activities, and whether the "precautionary principle" satisfies the state's section 1 onus to provide "cogent and persuasive" evidence to justify *Charter*-infringing measures.

2. The Respondents' attempt to paint the Applicants' Leave Application as a "disguised re-articulation of the Applicants' s. 15 claim based on religion,"[1] is a red herring and thus a distraction from the significant issue of the state's responsibility to consider the impacts of emergency orders on *Charter* rights. In essence, the Respondents are saying that a comparison between different activities is not required in the section 1 analysis regarding section 2 rights.

3. The danger with this approach is highlighted squarely in the present case where churches are forced to be closed, while an entire NHL team continued to practice together indoors with their coaches and staff, competitive athletes practiced at indoor training facilities, actors and film crews continued to film movies, and university students continued to attend indoor university classes for prolonged periods of time. Further, outdoor gatherings were restricted to five people, while indoor gatherings at big box retailers were permitted for hundreds of people at a time.

4. Three provincial Courts of Appeal[2] have considered, to varying degrees, such comparisons within the minimal impairment branch of the *Oakes* section 1 analysis in cases challenging COVID-19 restrictions on religious settings. None have suggested that such a comparison is inappropriate within the section 1 analysis, or that it is strictly reserved for a section 15 *Charter* claim. However, none of these three Courts of Appeal have given fulsome consideration of accommodations for *Charter* protected activities such as worship, gathering, or expression, as a

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[1] Respondents' Response to the Applicants' Application for Leave to Appeal to the Supreme Court of Canada, dated October 18, 2023, at paras. 15 and 27 ("Respondents' Response")

[2] *Gateway Bible Baptist Church et al v Manitoba et al*, 2023 MBCA 56, at paras. 91-96; *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134, at paras. 116-119; *Beaudoin v. British Columbia (Attorney General),* 2022 BCCA 427, at para. 303. See also *Beaudoin v. British Columbia*, 2021 BCSC 512, at para. 229

priority above accommodations for non-*Charter* protected activities, within their minimal impairment analyses. This is precisely where guidance is needed.

***How do Charter Rights Meaningfully Inform Decisions About Public Health Orders?***

5. The Respondents argue that "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."[3] The Respondents have completely ignored the importance of this Honourable Court's guidance on how *Charter* rights are to meaningfully inform these types of decisions. Even when the underlying decisions are medical or scientific in nature, that cannot mean that *Charter* rights can be disregarded.

6. The Respondents made a similar argument with their assertion that, "The Applicants' true concern here is that the application judge preferred the expert evidence led by Manitoba, rather than its own experts."[4] Here, the Respondents have missed the significance of the consideration of the *Charter* in the state's decision-making process. The Applicants are not concerned with one expert over another; they are concerned with the lack of the state's consideration of the impact of the public health orders on *Charter* rights. The experts do not make their assessments based on *Charter* rights – that falls to the decision-makers who rely on that expert evidence. There is no indication in this case that the decision-makers considered such *Charter* values, which is the crux of the issue that the Applicants assert is of national importance.

***The Crown's Concession Speaks to What Will be Done in the Future***

7. The Respondents argue that there is no discord in the jurisprudence between British Columbia and Manitoba relating to the constitutionality of restrictions on outdoor gatherings because the B.C. Crown conceded that the restriction on outdoor gatherings violated section 2 of the *Charter*, as opposed to the court striking the restriction down as unconstitutional.[5] A Crown concession speaks to what will be done in the future. If there was another pandemic in British Columbia, the government would presumably not prohibit outdoor gatherings based on its previous

[3] Respondents' Response, at para. 4
[4] *Ibid.*, at para. 33
[5] *Ibid*., at para. 16

concession. By contrast, Manitoba would appear to take the opposite stance, judging by the decisions below and the position it continues to take before this Court.

8. The real issue here, which this Court is being asked to resolve, is whether Canadians in one province have a robust *Charter* right to protest, while those in another province have that right curtailed?

***Guidance for the State on Drawing the Lines When Choosing What Charter and Non-Charter Protected Activities Stay Open During a Pandemic***

9. The Respondents try to minimize the egregiousness of Manitoba's choice to keep film productions running in Manitoba while churches were closed, brushing it off as "an example of the many difficult lines being drawn by public health authorities…"[6] This is just one good example of the necessity for this Court to step in and assist with guidance on **how** to go about drawing these lines while considering that some activities are protected by the *Charter*, and some are not.

10. The Applicants note that the Respondents made no attempt in their Response to address the other extreme examples of Manitoba prioritizing its economic interests (Winnipeg Jets' indoor practices, summer Olympians indoor training sessions, and university classes) over the interests of those Manitobans whose *Charter* rights to worship and assemble were being trampled upon. Neither of the courts below made evidentiary findings regarding why it was reasonable for Manitoba to close churches while these particular indoor settings remained open. These settings were not referenced or discussed by either of the lower courts.

***The "Precautionary Approach/Principle" is Changing the Section 1 Analysis***

11. In its factum before the Manitoba Court of Appeal, the Respondents encouraged the court to find that "Public health officials cannot be faulted for taking a precautionary approach."[7] Whether the Manitoba Court of Appeal referred to it as an "approach" or a "principle", the result was the same: the evidentiary onus on the state was weakened. This principle has crept into the Canadian COVID-19 jurisprudence without a solid foundation in law and this Honourable Court ought to set the record straight on its applicability within the *Oakes* analysis.

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[6] Respondents' Response, at para. 32

[7] Factum of the Respondents, dated June 22, 2022, (filed in the Manitoba Court of Appeal), at para. 56, **Tab 2**

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**The Respondents' Contentions & Brief Responses**

12. The Respondents refer to the Manitoba Court of Appeal's finding that "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."[8] But this statement is not based on any affidavit or cross examination evidence from this proceeding. None of Manitoba's affiants, including experts, ever expressed concern that outdoor gatherings specifically might pose a risk due to "crowds with prolonged close contact." The Respondents made that argument, both in their factum before the Manitoba Court of Appeal and orally, with no evidentiary basis specifically referencing outdoor gatherings. In fact, in making their argument above, the Respondents in their factum[9] cited no evidence, but rather the following paragraphs of the Application Judge's decision where he said nothing about outdoor gatherings:

- "Since SARS-CoV-2 spreads through contact, one important and effective public health measure to contain the disease is to limit gatherings, especially prolonged contact indoors."
- "The evidence as I have accepted it, suggests persuasively that prolonged close contact, especially indoors, transmits SARS-CoV-2."[10]

13. There has never been any actual evidence provided by the Respondents that any of their affiants specifically expressed a concern about outdoor settings. The only evidence that Manitoba's experts have ever provided about outdoor settings specifically was that of Dr. Jason Kindrachuk, where he wrote, "the role of virological and biophysical factors in transmission, including the viability in indoor and outdoor settings, remains elusive and requires further study."[11]

**All of which is respectfully submitted this 30th day of October 2023.**

A.K. Pejovic

Allison Pejovic
**Counsel for the Applicants**

[8] Respondents' Response, at para. 35
[9] Factum of the Respondents, dated June 22, 2022, (filed in the Manitoba Court of Appeal), at para. 54, **Tab 2**
[10] *Gateway Bible Baptist Church et al. v. Manitoba et al.,* 2021 MBQB 219, at paras. 5, 257 (Emphasis added)
[11] Respondents' Response, at para. 35 (Emphasis added)

**TABLE OF AUTHORITIES**

| APPLICANT'S AUTHORITIES | CITED AT PARAGRAPH NO. |
|---|---|
| **CASES** | |
| *Beaudoin v British Columbia*, 2021 BCSC 512 | 4 |
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**File No. AI22-30-09740**

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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.**

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## FACTUM OF THE RESPONDENTS

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**DEPARTMENT OF JUSTICE**
**Legal Services Branch**
**1230 - 405 Broadway**
**Winnipeg, MB R3C 3L6**

**Michael Conner**
**Denis Guénette**

**Tel: 204-945-2832**
**Fax: 204-945-0053**
**michael.conner@gov.mb.ca**
**denis.guenette@gov.mb.ca**

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## FACTUM OF THE REPONDENTS

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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].