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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	)	APPEARANCES:
	)	
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,	)	ALLISON KINDLE PEJOVIC for the applicants
applicants,	)	
- 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,	)	MICHAEL A. CONNER DENIS G. GUÉNETTE for the respondents
respondents.	)	
	)	Judgment delivered:
	)	February 1, 2022

JOYAL, C.J.Q.B.

INTRODUCTION

[1] The parties have requested that this Court make a determination on costs. This determination follows two unsuccessful challenges brought by the applicants respecting

the constitutionality of various Emergency Public Health Orders (PHOs) made under ss. 13 and 67 of ***The Public Health Act***, C.C.S.M. c. P210 (***PHA***). Those orders challenged by the applicants were made and issued for the purposes of addressing the ongoing public health threat posed by the COVID-19 pandemic.

[2] Given the broader public significance of both legal challenges brought by the applicants (brought as they were in the context of the pandemic), the matters proceeded on an expedited basis. The respondents (Manitoba) rigorously defended against both challenges.

[3] Both challenges proceeded by way of application.

[4] One application proceeded by way of oral submissions over a period of two days. The second application involving the applicants' ***Charter*** challenge and Manitoba's s. 1 ***Charter*** defence, took place over a period of approximately 10 days. Respecting that second application, voluminous affidavit evidence was adduced, including many affidavits prepared by experts. A number of the affiants (expert and non-expert) were cross-examined in open court.

[5] Both applications were dismissed. The Court's decisions disposing of both applications were silent as to the issue of costs.

[6] The parties are unable to agree on costs.

[7] The "ordinary rule" suggests that in the ordinary course, costs are awarded to the successful party. The applicants contend that this is no ordinary case. They say that in the context of the pandemic (and the unprecedented and restrictive nature of the PHOs),

given the public interest nature of the legal issues and their status as public interest litigants, the ordinary rule should not apply. Manitoba disagrees.

ISSUE

[8] The sole issue for this Court's determination can be reduced to the following question:

> ***Given the nature of the public interest issues that were adjudicated by this Court in both applications, and given that Manitoba has all but conceded that the applicants are, by definition, public interest litigants, is this a case where there exists a justifiable exception to the ordinary rule (as to costs) and if so, should the Court exercise its discretion and decide not to order costs against the applicants?***

[9] For the reasons that follow, I have determined that this is indeed a case where there exists an applicable exception to the ordinary rule. I have further determined that in the unique and particular circumstances of this case, the Court is justified in exercising its discretion to decide not to order costs against the applicants.

RELEVANT LEGAL FRAMEWORK

The Discretionary Nature of Costs

[10] The decision to make an order of costs is discretionary. Section 96 of ***The Court of Queen's Bench Act***, C.C.S.M. c. C280, provides:

> **Costs**
>
> 96(1) Subject to the provisions of an Act or the rules, the costs of or incidental to, a proceeding, or a step in a proceeding, are in the discretion of the court and the court shall determine liability for costs and the amount of the costs or the manner in which the costs shall be assessed.

[11] Rule 57 of the Manitoba ***Court of Queen's Bench Rules***, Man. Reg. 553/88, puts forward various factors that the Court may consider in exercising its discretion to award costs:

> **Factors in discretion**
>
> 57.01(1) In exercising its discretion under section 96 of The Court of Queen's Bench Act, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,
>
> (a) the amount claimed and the amount recovered in the proceeding;
>
> (b) the complexity of the proceeding;
>
> (c) the importance of the issues;
>
> (d) the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding;
>
> (d.1) the conduct of any party which unnecessarily complicated the proceeding;
>
> (d.2) the failure of a party to meet a filing deadline;
>
> (e) whether any step in the proceeding was improper, vexatious or unnecessary;
>
> (f) a party's denial or refusal to admit anything which should have been admitted;
>
> (f.1) the relative success of a party on one or more issues in a proceeding in relation to all matters put in issue by that party;
>
> (g) whether it is appropriate to award any costs or more than one set of costs where there are several parties with identical interests who are unnecessarily represented by more than one counsel; and
>
> (h) any other matter relevant to the question of costs.

The Ordinary Rule

[12] There is an established and prevailing rule (the "ordinary rule") that costs will be ordered in favour of the successful party. This ordinary rule was acknowledged by the Supreme Court of Canada in ***British Columbia (Minister of Forests) v. Okanagan Indian Band***, 2003 SCC 71 ("***Okanagan***"). The Supreme Court of Canada noted as follows (at paragraphs 20 – 22):

> 20 In the usual case, costs are awarded to the prevailing party after judgment has been given. The standard characteristics of costs awards were summarized by

> the Divisional Court of the Ontario High Court of Justice in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 1985 CanLII 1957 (ON SC), 51 O.R. (2d) 23, at p. 32, as follows:
>
> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
>
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
>
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
>
> (4) They are *not* payable for the purpose of assuring participation in the proceedings. [Emphasis in original.]
>
> 21 The characteristics listed by the court reflect the traditional purpose of an award of costs: to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards were described in *Ryan v. McGregor* (1925), 1925 CanLII 460 (ON CA), 58 O.L.R. 213 (App. Div.), at p. 216, as being "in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought".
>
> (2) Costs as an Instrument of Policy
>
> 22 These background principles continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them. The power to order costs is discretionary, but it is a discretion that must be exercised judicially, and accordingly the ordinary rules of costs should be followed unless the circumstances justify a different approach.
>
> [emphasis added]

[13] At paragraph 26 of ***Okanagan***, the Court also noted some of the policy objectives underlying the traditional approach to costs. In that regard, costs were identified as connected to a Court's concern with overseeing its own process. In that broader sense, a court need be concerned that the justice system works efficiently and in a just manner and if and where necessary, costs may act as a disincentive to the pursuit of meritless claims. An award of costs (or a decision to decline such an award) may also render the

legal system more accessible for litigants who properly seek to advance a legally sound position.

Exceptions to the Ordinary Rule

[14] At paragraph 22 of ***Okanagan***, the Supreme Court of Canada acknowledges that the ordinary rule continues to govern the law of costs in cases where there are no special factors that would warrant a departure from them. The acknowledgment of "special factors" establishes that there are exceptions to the ordinary rule.

[15] A case involving public issue litigants (even if broadly defined) where the decision has implications for the public at large and where the decision addresses complex issues of general public importance, may very well constitute an exception to the ordinary rule respecting costs. This exception was noted in ***Okanagan*** (at paragraph 27):

> In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

[16] Bringing an issue of public importance to the courts however, will not automatically entitle a litigant to preferred treatment with respect to costs (see ***Odhavji Estate v. Woodhouse***, 2003 SCC 69). A court must remember that the onus is on the unsuccessful party to explain why a court should depart from the ordinary rule that costs be awarded to the successful party. Absent special factors, the determination of which may be informed by well-recognized "background principles" and court rules, the ordinary rule, with its traditional purpose, will apply.

[17] The Supreme Court of Canada in ***Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)***, 2007 SCC 2, addressed the public interest exception to the ordinary cost rule in the context of a request by a party for advanced costs. The Court noted as follows (at paragraphs 34 and 35):

> 34 In essence, *Okanagan* was an evolutionary step, but not a revolution, in the exercise of the courts' discretion regarding costs. As was explained in that case, the idea that costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently was not a novel one. Policy goals, like discouraging — and thus sanctioning — misconduct by a litigant, are often reflected in costs awards: see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), vol. I, at § 205.2(2). Nevertheless, the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced. This suggests that policy and indemnity rationales can co-exist as principles underlying appropriate costs awards, even if "[t]he principle that a successful party is entitled to his or her costs is of long standing, and should not be departed from except for very good reasons": Orkin, at p. 2-39. This framework has been adopted in the law of British Columbia by establishing the "costs follow the cause" rule as a default proposition, while leaving judges room to exercise their discretion by ordering otherwise: see r. 57(9) of the Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90.
>
> 35 *Okanagan* did not establish the access to justice rationale as the paramount consideration in awarding costs. Concerns about access to justice must be considered with and weighed against other important factors. Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Office and Professional Employees' International Union, Local 378 v. British Columbia (Hydro and Power Authority)*, [2005] B.C.J. No. 9 (QL), 2005 BCSC 8; *MacDonald v. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412. By the same token, however, a losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs: see, e.g., *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 69; *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)* (1997), 1997 CanLII 2099 (BC SC), 4 Admin. L.R. (3d) 120 (B.C.S.C.). Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously: see *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 1994 CanLII 6510 (BC SC), 117 D.L.R. (4th) 395 (B.C.S.C.), at pp. 406-7, aff'd (1995), 1995 CanLII 1448 (BC CA), 126 D.L.R. (4th) 437 (B.C.C.A.).
>
> [emphasis added]

[18] In the ***Okanagan*** and ***Little Sisters*** cases, the Supreme Court dealt with the issue of costs on the basis of the parties seeking advance costs to allow public litigation to be pursued. In ***Friends of Toronto Cemeteries Inc. v. Public Guardian and Trustee***, 2020 ONCA 509, the Ontario Court of Appeal had occasion, as in the present case, to consider the issue of public interest litigation in the context of a party arguing that because the litigation was in the public interest, they should have no costs ordered against them despite the fact that they were unsuccessful. The court noted as follows (at paragraphs 18 and 23):

> [18] In *Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia*, 2015 ONCA 732, 343 O.A.C. 58, this court outlined factors to be considered in determining whether an unsuccessful litigant should be excused from paying costs because it was acting in the public interest. The factors include the nature of the litigants, whether the nature of the dispute was in the public interest, whether the litigation had any adverse impact on the public interest, and the financial consequences to the parties.
>
> . . .
>
> [23] Accordingly, we are prepared to accept the respondents' argument that they are both public interest litigants. This does not end the matter, however, as such a conclusion does not automatically preclude an adverse costs award: see *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at para. 35; Mark M. Orkin, *The Law of Costs*, loose-leaf, 2nd ed. (Toronto: Thomson Reuters, 1987), at §219.5.2. In our view, the respondents' status as public interest litigants does not excuse them from all costs consequences in the circumstances of this case, but it is a factor to consider when addressing quantum: *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1, leave to appeal ref'd, [2018] S.C.C.A. No. 255, at paras. 87-88. Indeed, in a given case it may be an important factor.
>
> [emphasis added]

[19] The Alberta Court of Appeal in ***Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)***, 2018 ABCA 254, at paragraphs 4 and 5, made reference to ***Little Sisters*** to underscore that there is no blanket exemption from exposure to costs in ***Charter*** litigation even though it is possible to say that most ***Charter*** litigation may be

in the public interest. While the court acknowledged that a broader public interest can justify denying a successful party its costs, generally, such will occur only where the losing party has no private interest in the outcome.

[20] For its part, the Manitoba Court of Appeal has also had occasion to apply the test in ***Little Sisters*** and ***Okanagan***. It did so in ***Hudson Bay Mining and Smelting Co., Limited v. Dumas et al***., 2014 MBCA 6. In ***Hudson Bay***, it was noted that costs can be declined where a public interest litigant pursues a novel case attempting to clarify a law of wide application to the public generally. In the circumstances of that case, however, the losing parties were not seen as public interest litigants.

[21] In reviewing the jurisprudence, I would be remiss if I did not note the discussion found in the Federal Court judgment of ***Harris v. Canada***, 2001 FCT 1408. In ***Harris***, the Federal Court considered and applied five criteria from the Ontario Law Reform Commission's *Report on the Law of Standing* (Toronto: Minister of the Attorney General, 1989) for the purposes of determining the circumstances where costs should not be awarded against a person who commences public interest litigation. The five criteria were (at paragraph 222):

> (a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
>
> (b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
>
> (c) The issues have not been previously determined by a court in a proceeding against the same defendant.
>
> (d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
>
> (e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[22] ***Harris*** was recently followed by the Alberta Court of Queen's Bench in ***Elder Advocates of Alberta Society v. Alberta Health Services***, 2020 ABQB 54, where a class action law suit raised issues as to whether regulated accommodation charges paid by residents of nursing homes were higher than permitted under the governing legislation and discriminatory under the ***Charter***. In declining to award costs against the unsuccessful plaintiffs, the court noted (at paragraphs 44 and 45):

> [44] The Plaintiffs submit that these issues, whether the regulated charge was valid under the statute and the *Charter*, and whether the Defendants were unjustly enriched, are clearly issues of broad public importance.
>
> [45] All of the factors referred to in *Harris* are present. The issues raised in the class action are of public importance extending beyond the interests of the Plaintiffs. The individual Plaintiffs' pecuniary interest, perhaps $10,000 estimated by James Darwish, clearly did not justify the proceedings economically. The issues had not been previously determined, the Defendants had a superior capacity to bear the costs of the proceedings, and there is no suggestion that the Plaintiffs engaged in vexatious, frivolous or abusive conduct.

[23] The Alberta Court of Appeal upheld the trial judge's decision on costs and leave to appeal to the Supreme Court of Canada was denied (see ***Elder Advocates of Alberta Society v. Alberta Health Services***, 2021 ABCA 67).

[24] The jurisprudence discussed above clearly suggests that the public interest nature of a case may be relevant in determining a possible departure from the ordinary rule as to costs. However, as noted in some of the governing cases, the mere fact that a case raises ***Charter*** issues of public interest will not necessarily lead to an unsuccessful party being insulated from an order of costs. Instead, it is merely a factor that "opens the door" to the court considering whether the ordinary rule will be waived. Mindful of the applicable principles and relevant factors, courts will always be required to consider the unique and particular circumstances of each case.

SUBMISSIONS OF THE PARTIES

The Applicants

[25] The applicants submit that notwithstanding their obvious lack of success in their two applications, in the unique circumstances of this case, on a proper consideration of the factors set out in ***Queen's Bench Rule*** 57.01(1) and the principles discussed in the governing jurisprudence, their position as the losing party ought not to attract costs.

[26] The applicants confirm that their position on costs was put before the Court orally at the time of the first application ("the delegation hearing") on February 10, 2021. On that date, co-counsel for the applicants made the following submission:

> There should be no costs in this case. The reason there shouldn't be is because this has never happened before. Society has never encountered this type of scenario. The public has never suffered under this type of authority from a delegate. And I'm not saying that the CPHO is not also helping, but there's no doubt that there's an infringement that has been acknowledged by the Crown of civil liberties and *Charter* rights and freedoms. And so the applicants have not done anything wrong.
>
> And I'm going to touch on the fact that my friend relies on 130 years of delegated authority, but it's delegated authority with respect to eggs and milk and the regulation of taverns. This is something else entirely, and so the applicants have not done anything improper bringing this application. They've done it in a speedy fashion, with good faith, with clean hands, and it's an important point and it needs to be adjudicated. And for those reasons, My Lord, there ought to be no costs.
>
> …
>
> This matter is in the public interest, whether or not Government — this has never happened before, whether or not Government can delegate this kind of authority for this long a time without checks and balances is a matter broadly in the public interest. And so for that reason, as far as I'm concerned, the applicants should get a medal for bringing this case and not costs against them.

[27] It is the position of the applicants that the above comments are reflective of the applicants' position on costs not simply for the delegation hearing, but also for the ***Charter*** hearing, which they (the applicants) say were two parts of the same case.

[28] The applicants identify in their submissions numerous aspects of this case (from its public interest nature, the uniqueness and novelty of its issues to the fact that certain of the acknowledged and conceded ***Charter*** violations caused the litigants considerable emotional stress and anxiety), which they say provide justification for not visiting upon them "the harsh effect of costs".

[29] Given the extraordinary nature of the public health response to the pandemic, the applicants submit that the two applications involved a not surprising and salutary challenge to unprecedented and previously unlitigated issues that the applicants say were in the broader public interest and extend well beyond the immediate interest of the applicants. They note that the challenged public health restrictions on outdoor and indoor gatherings affected every single Manitoban, while the restrictions on religious gatherings affected tens of thousands of people of every faith whose places of worship were closed or had capacities limited.

[30] In summary, the applicants insist that an award of costs against them would send the wrong message to all Manitobans who have genuine concerns about the constitutional justification for acknowledged breaches to their ***Charter*** rights during the pandemic. In that spirit, the applicants contend that given the scope of the restrictions as contained in the PHOs, considerations of access to justice require that litigants like themselves be able to challenge a Public Health Order where such an order stipulates restrictions that involve conceded or alleged ***Charter*** breaches. The applicants assert that as litigants in this case, they are defending not only their own constitutional position, but also that they are "standing up for their fellow citizens' constitutional rights and freedoms". The applicants

argue that they should be able to do so without the dissuasive fear of large financial cost awards being made against them.

Manitoba

[31] As the successful party, Manitoba seeks their costs in the ordinary course. They submit that the onus is squarely on the applicants to cogently elaborate the basis on which they ask this Court to depart from the ordinary rule. Manitoba submits that the applicants have not met their onus.

[32] While all but conceding that the applicants are public interest litigants, Manitoba nonetheless contends that this is not a case of pure public interest litigation. Indeed, Manitoba notes that certain of the applicants engaged in acts of civil disobedience. Manitoba maintains that even if this was a case of pure public interest litigation, absent special factors, bringing an issue of public importance to the Courts will not automatically entitle a litigant to the preferential treatment that Manitoba says the applicants now seek.

[33] Manitoba also underscores that the fact that counsel for the government are in house to one of the parties is not a relevant factor in matters of costs (see s. 96(2) of ***The Court of Queen's Bench Act***). Indeed, s. 9 of ***The Department of Justice Act***, C.C.S.M. c. J35, stipulates that when government or any person is represented by Crown counsel, the Attorney General can claim for costs in the same manner as if external counsel had been retained.

[34] In addition to its argument that the applicants have not met their onus to demonstrate why the Court ought to depart from the ordinary rule, Manitoba, as represented by counsel for the Attorney General, submits that there is a strong basis for

the ordinary rule respecting costs to be applied in this case. It points to and made extensive submissions respecting factors that it says supported that position. In that regard, amongst other points, Manitoba argues that:

- The applicants sought an expedited hearing.
- The applicants made the case more complex than necessary.
- Manitoba itself did what they could to narrow the complexity of the case.
- The applicants, while raising matters of public interest, were parties nonetheless motivated by personal interests.
- Manitoba was forced to divert its resources from battling the pandemic to simultaneously battling against a broad based litigation challenge.

[35] In short, Manitoba emphasizes not only that the applicants have not satisfied their onus to demonstrate special factors, but also, that the applicants own conduct revealed a shotgun and complicating "strategic litigation approach" that is particularly deserving of cost consequences.

DISCUSSION AND DECISION

[36] In seeking the application of the ordinary rule as to costs, Manitoba's position is a reasonable one in law given that an award of costs does fall within the discretion of the Court and given that the onus is on the applicants to demonstrate special factors if the ordinary rule is to not apply. That said, after a careful examination of the jurisprudence and after consideration of the submissions of both parties, I am not persuaded by the submission of Manitoba and I find that in the unique circumstances of this case, the

requisite special factors do exist so as to warrant the departure from the application of the ordinary rule.

[37] Manitoba's submission includes argument and indeed a tone to that argument that suggests an impatience and irritation with both the timing and breadth of the applicants' challenges to the PHOs against which Manitoba has been required to defend. Insofar as that tone of argument was a discernable part of Manitoba's submission on costs and insofar as it is potentially representative of a broader public concern about this litigation generally, I wish to briefly address that impatience and frustration as a backdrop to the determinations I am required to make on the issue of costs.

[38] In the context of the uncertainties and insecurities surrounding a fluid and mercilessly persistent pandemic, most Manitobans nobly accepted (and continue to accept) with sad and sometimes frustrated resignation, the unprecedented restrictions contained in the applicable PHOs as inconvenient but reasonable limitations necessary to address the various threats posed by a worldwide public health emergency. Some, although not all of those same Manitobans, may have watched the challenges brought by the applicants in this case with a mix of frustration and anger. To the extent that any such sentiments existed and/or continue to exist in this regard, they are understandably rooted in the view that the legal challenges brought by the applicants (accompanied by some instances of isolated civil disobedience), represent more broadly, an unwillingness to join, with common purpose, in a difficult but necessary collective civic effort and sacrifice.

[39] While those sentiments are understandable and can be acknowledged, they cannot be permitted to displace what must be, for the purposes of my determination on costs, a dispassionate analysis based on both the unique circumstances surrounding this case and most importantly, the governing law.

[40] This Court's extensive written reasons categorically disposing of the two separate challenges brought by the applicants should be seen as a conscientious and thorough attempt to address both the scientific evidence and the legal issues which the applicants insisted required urgent judicial assessment, clarification and pronouncement. The legal issues with which this Court was required to grapple in the applicants' two challenges, went to the root and scope of Canada's fundamental and constitutionally protected freedoms. With the impartiality that accompanies judicial independence — a fundamental pillar of any liberal democracy, but especially so at a time of crisis or emergency — this Court was required and able to provide an orderly and peaceful forum in which to address and evaluate not only the applicants' administrative and constitutional arguments, but as well, the applicants' challenge to the science upon which Manitoba relies. In so doing, this Court was given both the responsibility and the opportunity to bring the required first instance clarity and potential constitutional legitimacy to an unprecedented governmental response in respect of an extraordinary and never before seen public health emergency.

[41] In a matter that can be considered a case of first impression, the resulting clarity that follows a thorough evidentiary review, a rigorous legal debate, and a considered judicial pronouncement declaring the impugned restrictions constitutionally permissible, there is assistance provided to both citizens and government. The assistance comes in

the form of not only the adjudication of the specific dispute and challenge in question, but also, as a result of what is now a precedent. That precedent may assist in clarifying what might or might not be the possible demarcation lines for constitutionally permissible restrictions in respect of future PHOs issued in response to the ongoing pandemic.

[42] My comments and perspective in the above paragraphs should be understood to inform much of the analysis that I set out below in addressing what are some of the principles and factors to be considered in relation to Manitoba's request for costs pursuant to the ordinary rule.

[43] My determination in this case is premised upon an understanding of three propositions: 1) bringing an issue of public importance to the courts will not automatically entitle a litigant to preferred treatment with respect to costs; 2) the onus remains on the unsuccessful party to explain why a court should depart from the ordinary rule that costs be awarded to the successful party; and 3) that even where a case involves public issue litigants and what may be an issue of public interest where there are no special factors, the ordinary rule will continue to apply.

[44] Having acknowledged the important legal reference points that the above propositions represent in a case like the present, I will in the remaining portions of this judgment explain why I have determined that in the unique circumstances of this case, the applicants have satisfied me that there exist special factors warranting a departure from the ordinary rule.

[45] In coming to the determination I have, as suggested in ***Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia***, 2015 ONCA 732, I have carefully

considered whether the applicants were in fact acting in the public interest in pursuing an issue of broader public importance and if so, what unique or special factors exist in the circumstances so as to excuse them from cost consequences.

Were the Applicants Public Interest Litigants?

[46] Although Manitoba has argued that the applicants were not pure public interest litigants, they did all but concede that for the purposes of my analysis, their status as public interest litigants would not be strenuously opposed. Manitoba's concession in my view is well founded.

[47] Notwithstanding the fact that some of the litigants had some direct stake in the outcome of this litigation, the public interest was also engaged in these proceedings. To the extent that certain of the applicants (Mr. Tissen and Mr. MacKay) had some financial interest in the outcome, that interest was clearly modest. Although Mr. Tissen and Mr. MacKay were issued some public health order violation tickets, the level of direct personal interest in the amount of the connected fines did not economically justify the legal proceeding nor did it render their involvement open to the accusation that they were motivated by pure personal interest.

[48] When I consider the nature of the dispute, it is difficult not to conclude that this proceeding does indeed involve issues in the public interest, which issues extend well beyond the immediate interest of the applicants. For example, the public health restrictions on outdoor and indoor gatherings affected every single Manitoban, which is a group in excess of a million people. So too did the public health restrictions affect

religious gatherings in a manner that impacted tens of thousands of people of every faith whose places of worship were closed or had capacities limited.

[49] Despite my clear rejections of the applicants' two challenges, the applicants are not wrong to submit that given the scope of the PHOs and the necessary restrictions implemented to address the pandemic, this litigation is one of the more significant constitutional law cases in Manitoba's history. Even acknowledging as Manitoba has argued that the expedited nature of the proceeding put considerable pressures on Manitoba and their experts, the legal issues were undeniably of clear public interest and importance. The evidence that was revealed at the hearing gave the public a rare and important window into the inner workings of the COVID-19 public health response and into how the various testing, modelling, and science generally, was properly used to justify significant public health restrictions during the COVID-19 pandemic.

[50] As suggested in ***Sarnia***, as part of my analysis to determine whether the unsuccessful litigants in this case were acting in the public interest, I have considered whether the litigation had any adverse impact on the public interest. In that connection, there is no discernable adverse impact on the public interest from this litigation and indeed, based on its clarifying and legitimating potential vis-à-vis the constitutional position of the government in respect of the impugned and any future PHOs, any adverse impact is far outweighed by the benefits of adjudicating the legal issues raised.

[51] Based on the above, I have determined that this is a case where the applicants are public interest litigants raising issues of public interest and public importance.

Special Factors

[52] Having determined the public interest nature of the litigants and issues, I now turn to address whether there exists in this litigation unique and special factors that warrant a departure from the ordinary rule. In some respects, my comments at paragraphs 39 to 43 have already addressed in a general way some of the unique and special factors underlying this litigation. To the extent that I have considered additional factors, some of those particularly relevant factors can be reduced to the following:

1. The exceptional nature of the crisis that is the COVID-19 pandemic, the nature of government's responding restrictions, and the specific nature of part of the applicants' constitutional administrative and scientific challenge, are all factors that make this a case of first impression.
2. Manitoba has conceded that important aspects of the PHOs breached certain ***Charter*** rights.
3. The public interest issues in this case raise particularly important and fundamental concerns about the justificatory basis for restricting constitutional freedoms in a time of public health crisis.
4. Even if some of the litigants had somewhat of an indirect interest and/or stake in the outcome of the litigation, the issues raised transcend the individual interests of the litigants alone.
5. The nature of the applicants' challenge involved in part, a frontal attack on the science upon which Manitoba relies and continues to rely in its implementation of certain public health restrictions. This was the first opportunity for a court

> to consider the science in the context of a challenge to the public health restrictions. The resulting full and comprehensive examination of the science and the corresponding cross-examination of the experts provided an opportunity to affirm the reliability of the science upon which the restrictions were based. It was also an opportunity to determine that much of the opposing science represents a perspective that is more contrarian than persuasive.

[53] In considering the special factors identified above, I have weighed them against some of the arguments raised by Manitoba when they suggest that the applicants "strategic litigation approach" and their conduct generally, is deserving of cost consequences. Specifically, I have considered Manitoba's submissions that in insisting on an expedited hearing, the applicants simultaneously made the case more complex than necessary and they thereby obliged Manitoba to divert its resources from battling the pandemic to battling an unduly broad legal challenge.

[54] In response to the above assertions advanced by Manitoba, I acknowledge that the applicants did insist on expedited hearings and that the applicants' challenges were at times, somewhat broad. As it relates to the expedited nature of the hearings, it must be said that in the context of the ongoing pandemic, this Court itself acknowledged the necessity that any and all reasonable legal challenges be dealt with to the extent possible, in a focussed and expedited manner. It would seem obvious and hardly surprising that in the context of an extraordinary crisis like a pandemic, the judiciary, as the third branch of government, would assume its proper role in a manner so as to provide whatever expeditious legal clarity and oversight was necessary.

[55] I also acknowledge Manitoba's suggestion that the applicants may have made the case somewhat more complex and thereby forced Manitoba to divert added resources towards a defence. That said, the nature of Manitoba's defence to the applicants' legal challenges, which could not otherwise be pre-empted in law, involved the necessity of compiling both s. 1 ***Charter*** evidence and evidence that would have responded to the foundational arguments raised by the applicants in their challenge to the science. In the context of what were justifiable expedited hearings, where the applicants had a right to formulate the challenges they did, it was inevitable that some of Manitoba's experts would be called upon to provide foundational evidence of their own in defence of unprecedented restrictions (and conceded ***Charter*** breaches) and in defence of the science upon which they rely. While the resulting professional distraction and inconvenience in the middle of a pandemic is regrettable to say the least, its necessity cannot give rise to what might appear to be a punitive approach to costs.

[56] In light of the unique and unprecedented nature of this expedited proceeding, it is not surprising that there may have been steps that could have been more efficiently managed by the applicants. However, for the reasons already discussed, I am not of the view that the applicants' litigation conduct unnecessarily complicated the proceeding or was strategically intended to complicate matters. To the extent that there may have been conduct by the applicants that tended to complicate or lengthen unnecessarily the duration of the proceeding, the emphasis I wish to place on such conduct does not displace the many other factors I have considered which strongly militate against an order of costs.

CONCLUSION

[57] Against the backdrop of an extraordinary public health crisis and the connected and unprecedented public health restrictions, I have determined that the applicants are, for the purposes my determination on costs, public interest litigants who have raised issues of transcendent public importance and interest. I have also determined that in the unique and particular circumstances of this case, there exist special factors that warrant the departure from the ordinary rule governing the issue of costs.

[58] In the result, I have concluded that this Court is justified in exercising its discretion to decide not to order costs against the applicants.

[59] In ruling as I have on the issue of costs, I am responding as I must to the very particular and unique circumstances that surround what is in many ways, a case of first impression. That description is rooted not only in what need be identified as some of the never before litigated legal issues in the extraordinary context of a worldwide public health emergency, but also and more specifically, the description is rooted in what was the applicants' challenge to the scientific basis upon which Manitoba relied to issue the PHOs. The ***Charter*** application and hearing in the present case was the first time in North America that a factual scientific foundation for the PHOs was assessed (and affirmed) in relation to a constitutional challenge.

[60] Given the foregoing comments, I wish to be clear about future cases in Manitoba or elsewhere where similar challenges may be brought and a similar dispute may arise as to costs. Although every case will be determined on the basis of the governing law and the particular circumstances of the given case, my decision on costs in the present case

should not be understood as an invitation to litigate any and all challenges to pandemic restrictions in this Court of first instance (or in other such courts elsewhere) on the assumption that there will be no cost consequences for the losing party. By definition, as it relates to an otherwise unlitigated area of law or legal issue, a case of first impression can happen only once.

_____C.J.Q.B.