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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 JAY CAMERON D. JARED BROWN 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,	)	HEATHER S. LEONOFF, Q.C. MICHAEL A. CONNER DENIS G. GUÉNETTE SEAN D. BOYD for the respondents
respondents,	)	
- and -	)	
THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA,	)	ANDRÉ SCHUTTEN TABITHA EWERT for the intervener
intervener.	)	
	)	Judgment delivered:
	)	October 21, 2021

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JOYAL, C.J.Q.B.

I. INTRODUCTION

[1] This application raises significant constitutional issues in respect of government imposed public health restrictions in the context of the COVID-19 global pandemic.

[2] On March 20, 2020, the Manitoba government ("Manitoba") declared a province-wide 'state of emergency' under ***The Emergency Measures Act***, C.C.S.M. c. E80. It did so in order to protect the health and safety of all Manitobans and reduce the spread of COVID 19. From March 2020 and well into the early summer months of 2021, pursuant to the authority delegated to him under s. 67 of ***The Public Health Act***, C.C.S.M. c. P210, Manitoba's Chief Public Health Officer Dr. Brent Roussin ("CPHO") and his subdelegate, Dr. Jazz Atwal, issued successive Public Health Orders ("PHOs") which significantly affected the constitutional rights and freedoms to assemble and worship. The Minister of Health, Seniors and Active Living Cameron Friesen (as he then was), approved the PHOs.

[3] In implementing those PHOs to address the crisis that is the COVID-19 pandemic, has Manitoba and its public health officials limited fundamental rights and freedoms in a constitutionally defensible manner? Can those PHOs be properly challenged on administrative law grounds and on the basis of Canada's constitutional division of powers (paramountcy)? Those are the principal questions that arise on this application and those are the issues with which this Court must grapple.

II. OVERVIEW

A. THE PUBLIC HEALTH CRISIS

[4] Since March 2020, Manitoba along with the rest of the world has been battling COVID-19, the worst global pandemic in over a century. As of May 2021, COVID-19 had infected over 120 million people and killed more than 2.5 million people worldwide. Most of the deaths have occurred in persons over age 60 or those with underlying health conditions. However, COVID-19 has also caused serious illness requiring hospitalization and admission to intensive care units ("ICUs") across a wide spectrum of ages. For some, COVID-19 has had prolonged health implications, though this phenomenon is not yet well understood. While new vaccines have been developed, much uncertainty remains due to the manifestation of variants of concern that are more infectious and virulent.

[5] SARS-CoV-2, the new human virus that causes COVID-19, is highly communicable. Without public health interventions, it is reasonable to believe that the virus will grow exponentially. Such a rapid transmission of COVID-19 through the community would overwhelm the healthcare system leading to many more deaths and serious illness than has been experienced thus far. Such developments can be seen elsewhere in the world. Accordingly, to stop widespread exponential growth, public health officials all over the world have purposefully taken measures to "flatten the curve" of the pandemic. 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.

B. THE APPLICATION

[6] The applicants challenge by way of application, the constitutionality of specific sections of Manitoba's Emergency Public Health Orders made on November 21, 2020, December 22, 2020, and January 8, 2021 (the "impugned PHOs"). They also challenge subsequent orders of a substantially similar or identical nature, including the order dated April 8, 2021, which were in effect at the time of the hearing of the application in May 2021. The applicants contend that the identified and specific sections of the impugned PHOs and the restrictions on public gatherings, gatherings in private residences and the temporary closure of places of worship, all infringe ss. 2(a), 2(b), 2(c), 7 and 15 of the ***Canadian Charter of Rights and Freedoms*** ("***Charter***"). They have also as already mentioned, challenged the impugned PHOs on administrative law grounds and under the division of powers (paramountcy).

[7] Specifically, the applicants request that this Court determine and declare that Manitoba's Emergency Public Health Orders, which prohibit and/or restrict religious, private in-home and public outdoor gatherings, violate their ss. 2(a), 2(b), 2(c), 7 and 15 ***Charter*** rights and that those violations cannot be saved under s. 1 of the ***Charter***. In the alternative, the applicants request a determination and declaration that the PHOs are *ultra vires* s. 3 of ***The Public Health Act***. In the further alternative, the applicants request that this Court find that the PHOs, which prohibit and restrict religious gatherings, are inoperative because they conflict with s. 176 of the ***Criminal Code of Canada***.

C. THE DEFENCE OF THE PHOS

[8] The respondents (Manitoba) concede that the restrictions on gathering had the effect of limiting the freedoms of religion, expression and peaceful assembly under s. 2 of the ***Charter***. Despite Manitoba's concession respecting s. 2, they do not concede the alleged breaches of ss. 7 and 15 of the ***Charter***. Manitoba submits that given their (Manitoba's) concessions respecting the breaches under s. 2, it is not necessary to address or decide the ss. 7 and 15 issues and that this Court's determinations respecting any ***Charter*** issue should be confined to those related to Manitoba's s. 1 defence. As it relates to Manitoba's concession that s. 2 of the ***Charter*** has been infringed, they (Manitoba) contend that the limits on any s. 2 rights are constitutionally defensible in that they are reasonable, proportionate and justified in order to address a serious public health emergency: a global pandemic with grave, sometimes deadly consequences.

D. THE APPLICANTS

[9] The applicants in this case include both churches and individual applicants. The churches are: Gateway Bible Baptist Church; Pembina Valley Baptist Church; Redeeming Grace Bible Church; Grace Covenant Church; Slavic Baptist Church; Christian Church of Morden; and, Bible Baptist Church. The individual applicants are: Thomas Rempel; Tobias Tissen; and, Ross MacKay. Thomas Rempel is a deacon at Redeeming Grace Bible Church. Tobias Tissen is a minister at the Church of God. Ross MacKay is a Manitoba resident who attended a "Hugs Over Masks" rally in Steinbach, Manitoba, on November 14, 2020. MacKay did so in order to voice his concerns about what he views

as violations of Manitoban's human rights flowing from the COVID-19 lockdowns. Following his attendance at that rally, MacKay received a fine in the amount of $1,296.

E. THE INTERVENER

[10] It should be noted that following a contested motion, intervener status was granted to The Association for Reformed Political Action (ARPA) Canada on the basis of the applicable and governing legal test[1]. ARPA Canada is a not-for-profit, non-partisan organization which describes itself as "serving" at the intersection of government (including the courts) and Canada's reformed Christian community — a distinct minority religious group in Canada.

[11] ARPA Canada submits that it directs its mission to reform churches in Canada who primarily attend 175 reformed congregations across Canada. ARPA Canada has had a long-standing commitment to public engagement in issues of freedom of religion and religious discrimination in Canada.

[12] Pursuant to the narrow terms of their intervention, counsel for ARPA Canada provided the Court with both written and oral submissions. They did not participate in the examination of witnesses.

[13] As undertaken, counsel for ARPA Canada did indeed provide submissions that augmented rather than merely duplicated the submissions of the other religious parties. In that regard, amongst other things, counsel for ARPA Canada addressed what it described as arguments in connection to the importance of institutional pluralism in a free and democratic society and the need for its acknowledgment and protection. Such

[1] See *Hutlet v. 4093887 Canada Ltd. et al.,* 2015 MBCA 25

institutional pluralism necessarily contemplates the ongoing existence and functioning of faith-based institutions which in various ways, may play an important and legitimate role in enhancing the many aspects of a person's and a community's health.

[14] Where relevant and applicable to my determinations, I have considered and taken into account the thoughtful and distinct aspects of ARPA Canada's submissions.

F. THE NATURE OF THIS APPLICATION AND HEARING

[15] This case proceeded by way of application and involved the filing of numerous affidavits many of which were accompanied by expert reports garnered and adduced by the respective parties. As part of this application, various cross-examinations took place in open court in connection to a number of the affidavits that were filed. That *viva voce* testimony and "on the record" cross-examination was conducted in respect of specific and selected affiant witnesses, including a number of the experts. This took place over several days.

[16] It should be noted that these reasons (in relation to the applicants' challenge to the constitutionality of the specific sections of the PHOs and their administrative law and division of powers arguments) are being released concurrently with this Court's reasons respecting separate and distinct arguments made by the same applicants in relation to an earlier application. In that earlier application, the applicants challenged Manitoba's authority to delegate to Manitoba's CPHO and his sub-delegate, powers that resulted in the issuance of successive PHOs, which the applicants contend dramatically alter the lives of Manitobans, including what they say have been broad infringements of their constitutional rights and freedoms. For the reasons provided in that concurrently released

judgment, the applicants' challenge was dismissed. (See ***Gateway Bible Baptist Church et al. v. Manitoba et al.***, 2021 MBQB 218.)

G. THE SCOPE OF THE COURT'S FOCUS, EXAMINATION AND DETERMINATIONS ON THIS APPLICATION

[17] It is not an exaggeration to say that the global pandemic has challenged governments the world over, including all Canadian governments and their connected public health agents and agencies at both the federal and provincial levels. In a federal state like Canada, in the context of a mercilessly persistent pandemic, it is to the provincial governments that a particularly heavy day-to-day burden and responsibility falls as they attempt — in sometimes very distinct and divergent ways — to achieve, in exceptional circumstances, the requisite balance between public health protection and the restriction of fundamental freedoms in a manner that is both reasonable and legally justifiable.

[18] Manitoba, like all other provincial governments, has been criticized in different quarters for alternately having done too little too late, or for having moved too quickly to "reopen" or to loosen various restrictions that had been put in place. Conversely, Manitoba has also been criticized for having gone too far with some of the restrictions imposed, restrictions which some critics say are incongruous and inconsistent in nature given the objectives of the PHOs and given where Manitoba has chosen to draw (or not draw) certain other lines as part of its response to the pandemic.

[19] Whatever the nature and variety of the criticism, in the years and perhaps months to come, with the luxury of hindsight and new evolving scientific clarity, a needed post-mortem may indeed be conducted respecting the speed and nature of Manitoba's response to the unprecedented public health threat that COVID-19 continues to

represent. With such a post-mortem, the criticisms may become even more focussed and perhaps, understandings may be more common and nuanced respecting what was both good and bad in the different aspects of Manitoba's response. Leaving aside what I stipulate in the next few paragraphs is the appropriately more narrow and constrained nature of this Court's focus, given the still ongoing, fluid and threatening nature of the pandemic, not only is any such "post-mortem" outside the jurisdictional sphere and expertise of this Court, it is also definitionally premature. Accordingly, this case and these reasons are not intended and should be not read as a substitute for any such eventual post-mortem. Neither should these reasons be read as either a validation or a second guessing of Manitoba's policy choices and the adequacy or efficacy of its public health measures put in place to contain COVID-19. Instead, my still important, but more limited task is to evaluate whether the impugned restrictions on the identified fundamental freedoms are constitutionally defensible and whether they are legally impugnable on administrative law grounds and on the basis of the applicants' division of powers argument.

[20] In carrying out my analysis in respect of the constitutional and administrative law issues that I set out below at paragraph 23 and in underscoring the point made in the previous paragraph, I am mindful that this case is not a public inquiry into the national and provincial responses to the pandemic. This is instead, a legal challenge to specific portions of the identified PHOs. In that connection, this Court should not have to be reminded that like any court case, this case is defined by the pleadings. Put simply, as this is not a public inquiry, this case is not and should not be a probe or questioning of

every aspect of Manitoba's handling of the pandemic nor a challenge to every public health order or restriction. To repeat, while such a broader public assessment may very well come in due course, this Court's focus must be on the constitutionality of the identified portions of the orders in question. Unless relevant to the specific constitutional determinations I must make, this Court must take care to not conflate that constitutional assessment with an undue judicial focus on the wisdom of Manitoba's broader policy choices as it relates to what may have been the inadequacies or adequacies of the particular timing, scope and nature of the public health restrictions. Although the evaluative line and relevant parameters can be sometimes difficult to discern in the context of an adjudication of a ***Charter*** challenge, as Justice Binnie colourfully commented, a court case "should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight".[2]

[21] While this Court on this application was the recipient of a large amount of evidence, the relevance of that evidence must be tested by reference to what is in issue and it is the amended notice of application and the now well-established constitutional tests that define what is in issue. In respect of their notice of application, the applicants have not challenged every PHO made during the pandemic or even all aspects of a single PHO. For example, there is no challenge to any quarantine or self-isolation order made under ***The Public Health Act*** (*Self-Isolation and Contact Tracing Orders* and *Self-Isolation Order for Persons Entering Manitoba*). The amended notice of application is confined to

[2] *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at paras. 40-41

particular sections of the three impugned PHOs made on November 21, 2020, December 22, 2020 and January 8, 2021 (and any subsequent order of a substantial or identical nature) and Manitoba has responded accordingly. Specifically, the applicants challenge the orders in effect from November 22, 2020 until January 22, 2021, in relation to:

- Gatherings at private residences: Order 1(1);
- Public gatherings: Order 2(1); and
- Places of worship: Orders 15(1) and (3) in the November 21, 2020 PHO, which became Orders 16(1) and (3) in the December 22, 2020 and January 8, 2021 PHOs.

[22] Just as the relevance of the evidence is in large part rooted in the pleadings, so too is the relevant time frame. The COVID-19 pandemic is fluid and evolving. The situation in the spring of 2020 was markedly different from the summer of 2020, or from the fall of 2020 when the impugned PHOs were made, and from the circumstances existing today. Public health measures have necessarily and frequently varied in order to respond to the prevailing conditions of the COVID-19 pandemic. Manitoba's evidence and arguments are focussed on justifying the impugned PHOs in the relevant period from November 22, 2020 until January 22, 2021.

III. ISSUES

[23] Based on the initial pleadings filed by the applicants, this application raises the following issues:

***Charter Issues*:**

1. Did the restrictions on private gatherings, public gatherings or places of worship imposed in Orders 1(1), 2(1), 15(1) and 15(3) of the Public Health Order dated November 21, 2020, as subsequently amended on December 22, 2020 and January 8, 2021, limit rights under ss. 2(a), 2(b) or 2(c) of the ***Charter***?

2. Did the restriction on religious services at places of worship or the restriction on gatherings at private homes in the impugned PHOs interfere with the right to liberty or security of the person contrary to the principles of fundamental justice pursuant to s. 7 of the ***Charter***?

3. Did the closure of places of worship in the impugned PHOs discriminate on the basis of religion contrary to s. 15 of the ***Charter***?

4. If there are any violations conceded or determined in relation to ss. 2(a), 2(b), 2(c) and ss. 7 and 15 of the ***Charter***, can the restrictions in the impugned PHOs be justified as reasonable limits under s. 1 of the ***Charter***?

***Administrative Law Issue*:**

5. Were the impugned PHOs *ultra vires* because they failed to restrict rights or freedoms no greater than was reasonably necessary to respond to the COVID-19 public health emergency as required by s. 3 of ***The Public Health Act***?

***Division of Powers of Issue*:**

6. Were the impugned PHOs relating to places of worship inoperative under the doctrine of paramountcy because it conflicted with s. 176 of the ***Criminal Code***?

[24] Respecting the above questions in issue, for the reasons that follow, I have come to the following determinations:

a) Based on the position taken by Manitoba resulting in its appropriate concession, I have determined that the impugned PHOs do indeed limit and restrict the applicants' rights and freedoms as found in ss. 2(a), 2(b), and 2(c) of the ***Charter***.

b) In the circumstances of this case, it is necessary and just to address and decide the applicants' challenge respecting what they say were the alleged infringements to their ss. 7 and 15 rights under the ***Charter***. Having so considered the merits of the applicants' position in respect of those alleged breaches, I have nonetheless determined that the impugned PHOs did not infringe the applicants' ***Charter*** rights under ss. 7 and 15.

c) Insofar as Manitoba has conceded and I have found infringements of ss. 2(a), 2(b), and 2(c) under the ***Charter***, I have also determined that the restrictions in the impugned PHOs are constitutionally justifiable as reasonable limits under s. 1 of the ***Charter***.

d) Respecting the applicants' administrative law ground of review, I have determined that the impugned PHOs were not *ultra vires* (in any administrative law sense) and they met the requirements of s. 3 of ***The Public Health Act*** insofar as they restricted rights and freedoms no greater than was reasonably necessary in response to the COVID-19 public health emergency.

e) Respecting the applicants' division of powers ground, I have determined that the impugned PHOs do not conflict with the operation nor do they frustrate the purpose s. 176 of the ***Criminal Code*** and accordingly, they are not inoperative under the doctrine of paramountcy.

IV. LEGAL FRAMEWORK

[25] Given the positions taken by the parties on this application, I set out below for early reference, the following relevant provisions under the ***Charter***, ***The Public Health Act*** and the ***Criminal Code***.

[26] Sections 1, 2(a), 2(b), 2(c), 7 and 15 of the ***Charter*** provides as follows:

> **Rights and freedoms in Canada**
>
> 1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society
>
> **Fundamental freedoms**
>
> 2 Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly.
>
> . . .
>
> **Life, liberty and security of person**
>
> 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> . . .
>
> **Equality before and under law and equal protection and benefit of law**
>
> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[27] Section 3 of ***The Public Health Act*** provides as follows:

> **Limit on restricting rights and freedoms**
>
> 3 If the exercise of a power under this Act restricts rights or freedoms, the restriction must be no greater than is reasonably necessary, in the circumstances, to respond to a health hazard, a communicable disease, a public health emergency or any other threat to public health.

[28] Section 176 of the ***Criminal Code*** provides as follows:

> **Obstructing or violence to or arrest of officiating clergyman**
>
> 176(1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who
>
> (a) by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent an officiant from celebrating a religious or spiritual service or performing any other function in connection with their calling, or
>
> (b) knowing that an officiant is about to perform, is on their way to perform or is returning from the performance of any of the duties or functions mentioned in paragraph (a)
>
> (i) assaults or offers any violence to them, or
>
> (ii) arrests them on a civil process, or under the pretence of executing a civil process.
>
> **Disturbing religious worship or certain meetings**
>
> (2) Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.
>
> **Idem**
>
> (3) Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on a summary conviction.

[29] A more full discussion of these specific sections (along with the governing jurisprudence and the applicable legal tests) will be set out in the analysis section of this judgment.

V. STANDARDS OF REVIEW

[30] The issues in this case set out at paragraph 23 are all subject to different standards of review.

[31] Any review in respect of whether Manitoba has infringed any of the substantive ***Charter*** rights found under ss. 2, 7 and 15, is a review subject to a standard of correctness. However, if and where, as in the present case, a ***Charter*** right has been restricted, the standard of review respecting the justificatory framework (s. 1) may then become somewhat more complex. Where a ***Charter*** right has been infringed or restricted, the justificatory framework to be applied will depend upon the source of the breach. The salient question in that regard will be whether the source of the breach is connected to an administrative decision or statutory instrument.

[32] The issue to be determined by the Court as it relates to the standard of review in this case (concerning the justificatory framework on any ***Charter*** violations) is rooted in whether the CPHO's orders should be reviewed as delegated administrative decisions, or rather, more like statutory instruments. This question was addressed by Abella J. in ***Doré v. Barreau du Québec***, 2012 SCC 12. In that case, she noted a distinction between the analytical approach to be taken when reviewing the constitutionality of a law as compared to when reviewing an administrative decision that is said to violate the rights of particular individuals in a more administrative context. Where a court is reviewing the constitutionality of a law, the ***Oakes*** test is to apply (see ***R. v. Oakes***, [1986] 1 S.C.R. 103). Where a court is reviewing an administrative decision that is said to violate the rights of particular individuals, the question is whether that decision reflects a

proportionate balancing between the ***Charter*** rights and the objective of the measure. In the context of that review, the standard of review is reasonableness. It should be noted however, that if the administrative decision relates to whether an enabling statute violates the ***Charter***, the standard of review is correctness.

[33] In the present case, are the ***Charter*** infringing orders to be reviewed as delegated administrative decisions or more like statutory instruments?

[34] In ***Beaudoin v. British Columbia***, 2021 BCSC 512, at paragraphs 120, 124 and 212-221, Hinkson C.J. had occasion to apply the ***Doré*** framework to a review of the British Columbia chief public health officer's orders which orders *prima facie* violated s. 2 of the ***Charter***. Chief Justice Hinkson determined that the public health orders were more akin to an administrative decision under delegated authority than a law of general application. In that context, he determined that the chief provincial health officer was entitled to deference especially in the areas of science and medicine relating to COVID-19 and accordingly, the appropriate standard of review was reasonableness. Taking a different approach in the context of a similar challenge, the court in ***Taylor v. Newfoundland and Labrador***, 2020 NLSC 125, determined the case before it to be a ***Charter*** challenge to public health orders of general application issued by the province's chief medical officer of health. The court chose to apply the s. 1 ***Oakes*** test. In that instance, the orders at issue restricted travel into the province to prevent the spread of COVID-19.

[35] When I examine the background to the PHOs in the Manitoba context, I note that flowing from s. 67 of ***The Public Health Act***, Manitoba's CPHO exercises delegated

authority to issue PHOs with the approval of the minister. Different types of orders are contemplated under s. 67, some more specific and some more broad. In other words, some orders may apply to specific persons or places. For example, the CPHO may give directions to a particular healthcare organization to manage the threat or order a particular place to close. Some orders conversely, may be more broad where for example, the CPHO may restrict all public gatherings.

[36] When I examine the nature of the challenged PHOs in this case and the nature of their application, I am in agreement with Manitoba's suggestion that the impugned PHOs relating to gatherings and places of worship are, in essence, akin to legislative instruments of general application rather than an administrative decision that affects only particular individuals (see ***Springs of Living Water Centre Inc. v. The Government of Manitoba***, 2020 MBQB 185, at paragraphs 50-51). Given the nature of these orders, the restrictions on the ***Charter*** rights seem more appropriately reviewable under the justificatory framework of the s. 1 ***Oakes*** test rather than under the ***Doré*** framework. So while any restrictions on ***Charter*** rights found in this case will be reviewed and by necessity, justified under the s. 1 ***Oakes*** test, I, like Manitoba, acknowledge that the standard of review for these public health orders is not entirely clear or certain. It remains a reasonable argument that the impugned PHOs could also be properly reviewed as an administrative decision of delegated authority attracting the reasonableness review as set out under ***Doré***.

[37] Having now stipulated the reference point for review of possible justification of any ***Charter*** breaches in the present case (a review based on the ***Oakes*** test rather than

the ***Doré*** framework), I will once again note my agreement with Manitoba by saying that in the unique and particular circumstances of this case, little turns on the distinction between the ***Doré*** proportionality analysis and a formal application of the ***Oakes*** test under s. 1. As the Supreme Court of Canada has noted, the ***Doré*** proportionality analysis finds "analytical harmony" with and "works the same justificatory muscles" as the ***Oakes*** test (see ***Loyola High School v. Quebec (A.G.)***, 2015 SCC 12, at paragraph 40). Also, I note that under either framework, considerable deference is contemplated vis-à-vis the decision maker. Underscoring the point, Abella J. noted in ***Doré*** at paragraph 57 that both frameworks "contemplate giving a 'margin of appreciation', or deference, to administrative and legislative bodies" when balancing ***Charter*** rights and broader objectives. In this connection, I note that Chief Justice Hinkson in ***Beaudoin*** specifically observed that deference was particularly appropriate when a court is addressing complex areas of science and medicine in relation to COVID-19, which he quite reasonably acknowledged, courts are not well suited to resolve. I will return later in this judgment (at paragraphs 280-83) to the complex and nuanced subject of "deference" respecting the assessment of what may be reasonable and justified limits where governmental decision making infringe upon fundamental constitutional freedoms.

[38] If as I noted above, the standard of review when using the s. 1 justificatory framework (for ***Charter*** breaches) remains less clear, the standard of review respecting the administrative law and the division of powers issues are more certain.

[39] The administrative law question respecting the compliance of the impugned PHOs in relation to s. 3 of ***The Public Health Act*** is reviewable on a standard of

reasonableness (see ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65).

[40] The questions surrounding the paramountcy issue is properly characterized as a constitutional question relating to the division of powers, which accordingly, requires a review on a standard of correctness (***Vavilov***, at paragraph 55).

VI. THE EVIDENCE ADDUCED

[41] As noted, the evidence received on this application came by way of a voluminous number of affidavits (and in many cases, via the attached reports and associated documents) and by way of in-court cross-examination of many of those affiants, particularly those who provided expert opinion evidence. While occasional objections were made respecting the scope and/or relevance of some of the opinion evidence, the respective parties did not directly challenge the qualifications and expertise of the many learned witnesses who provided their opinion, both in their affidavits and later, *viva voce*. Many, if not most of the affiants and/or witnesses, 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. Despite the absence of any direct challenge to the qualifications and expertise of the party's respective expert witnesses, given the issues and the governing legal tests, the cogency, persuasiveness and the weight to be given much of that expert evidence was nonetheless called into question by both parties, directly and indirectly, in cross-examination and in oral and written argument.

[42] The following individuals provided an affidavit(s) on behalf of the applicants:

- Christopher Lowe - sworn December 30, 2020 and March 25, 2021 – *pastor at Gateway Bible Baptist Church*
- Thomas Rempel - affirmed January 7 and March 26, 2021 – *deacon at Redeeming Grace Bible Church*
- Riley Toews - affirmed January 5 and March 24, 2021 – *pastor at Grace Covenant Church*
- Tobias Tissen - affirmed January 5 and March 26, 2021 – *minister at The Church of God*
- Ross MacKay - affirmed January 4 and April 1, 2021 – *self-employed resident of Winnipeg, Manitoba, who attended the Hugs Over Masks rally in Steinbach, Manitoba on November 14, 2020*
- Dr. Jay Bhattacharya - sworn January 5 and March 31, 2021 - *a world-renowned epidemiologist, medical doctor, PhD in economics, and full professor at Stanford University*
- Dr. Thomas Warren - sworn March 30, 2021 – *infectious diseases specialist and medical microbiologist currently practicing in Oakville, Milton, and Georgetown, Ontario*
- Dr. Joel Kettner - sworn April 1, 2021 – *associate professor in the Department of Community Health Sciences at the College of Medicine, University of Manitoba. Former chief medical officer of health and chief public health officer for Manitoba (1999-2012), regional medical officer of health in urban, rural and northern parts of Manitoba (1990-1999), and clinical work in general practice, emergency urgent care medicine*
- David Hersey - sworn April 20, 2021 – *senior paralegal at the Justice Centre for Constitutional Freedoms in Calgary, Alberta*

[43] The following individuals provided an affidavit(s) on behalf of Manitoba:

- Dr. Jared Manley Peter Bullard – affirmed March 5 and April 29, 2021 – *associate professor and section head of infectious diseases in the Department of Pediatrics & Child Health and Medical Microbiology at the University of Manitoba; associate medical director of Cadham Provincial Laboratory*
- Dr. Carla Loeppky – affirmed March 4 and April 30, 2021 – *PhD in Community Health Sciences; director and lead epidemiologist in the Epidemiology and Surveillance Unit in the Department of Health, Seniors and Active Living with*

the Government of Manitoba; assistant professor in the Department of Community Health Services, Max Rady College of Medicine, University of Manitoba

- Dr. Jason Kindrachuk – affirmed March 2 and April 29, 2021 – *PhD in biochemistry; assistant professor and Canada research chair in emerging viruses in the Department of Medical Microbiology & Infection at the University of Manitoba. Currently seconded as part of a 12-month research partnership agreement at the Vaccine and Infectious Disease Organization at the University of Saskatchewan leading and facilitating national COVID-19 research response efforts*

- Szilveszter Jozsef Komlodi – affirmed March 5, 2021 – *assistant deputy minister of Fiscal Management and Capital Planning with the Treasury Board Secretariat of the Government of Manitoba*

- Lanette Siragusa – affirmed March 5 and April 30, 2021 – *provincial lead health service integration and quality, and chief nursing officer with Shared Health Manitoba and assistant professor with the College of Nursing, University of Manitoba*

- Dr. Brent Roussin – affirmed March 8 and April 30, 2021 - *Manitoba's chief public health officer*

- Dr. James Blanchard – affirmed April 20, 2021 – *professor in the Department of Community Health Sciences, University of Manitoba; Canada research chair in Epidemiology and Global Public Health; and executive director of the Institute for Global Public Health, University of Manitoba*

[44] Of the above identified list of affiants for both the applicants and Manitoba, the following were subject to in-court cross-examination:

- 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
- Dr. Joel Kettner

[45] The evidence set out by Manitoba in the affidavits (identified at paragraph 43) provides much of the relevant background and context to the impugned PHOs and the related administrative and constitutional issues. That evidence includes the foundational basis — scientific and otherwise — for Manitoba's decisions and line drawing in relation to the restrictions imposed in the accompanying and impugned PHOs. Conversely, the evidence produced by the applicants (identified at paragraph 42) includes contrary scientific expert opinion, which contrary evidence, calls into question some of the science inextricably tied to and relied upon by Dr. Roussin in his decisions to issue the impugned PHOs.

[46] In the section that follows, I set out the submissions of the parties respecting the evidence adduced. The submissions largely represent the positions of the parties as it relates to the evidentiary foundation for their respective positions, legal and factual. Although most of the evidence adduced has a more obvious relevance to the ***Charter*** issues, the evidence in this case is also pertinent to and constitutes a backdrop for the administrative law issue and to a considerably lesser extent, to the somewhat more purely legal question regarding the division of powers. The submissions reflect both the oral and written presentation by the parties to the Court and they include specific reference to the evidence.

VII. SUBMISSIONS OF THE PARTIES RESPECTING THE EVIDENCE ADDUCED

[47] The evidence adduced by both parties in this case was voluminous and often complex. To fairly represent their positions on the evidence presented, I set out below as fully as possible, the submissions made to the Court.

[48] The adjudication on this application (taking place as it does in the midst of a pandemic) represents one of the first cases in Canada where the constitutional challenge to the public health restrictions is accompanied by full and corresponding evidence challenging and attacking the science upon which the government in question (in this case Manitoba) relies. As such, it behooves this Court to ensure that while obviously summarized, as complete an account as possible of the evidence and the related positions of the parties is outlined. In this way, while my related and relevant legal determinations will be seen to dispose of the constitutional issues before me, they will also be seen as 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.

[49] As part of the presentation below setting out the submissions of the parties respecting the evidence on this application (both in affidavit and in cross-examination), I will where necessary and relevant (specifically in reference to the cross-examinations), provide my own assessment and evaluation of the evidence. I will do so in terms of its weight, cogency and persuasiveness in relation to the positions advanced by the parties and in relation to the relevant determinations I must make to decide this case, which determinations are made and further explained later in this judgment in the analysis

section. Those determinations should be assumed to be a product of a complete review of the available and in some cases, differing scientific evidence.

[50] Having observed, listened to and re-examined the totality of the evidence (and the submissions of the parties in respect of that evidence) it is my view that this is not a case where stark, zero-sum determinative findings of credibility need or will be made to rationalize divergent positions based on differing views and interpretations of what some say is the evolving scientific information. In other words, where, for example, the applicants' experts' evidence challenges Manitoba's experts on their interpretation of the science, absent a clear determination that the science that Manitoba's experts rely upon is wrong (a determination which I most definitely do not make), the determinative and salient question is not which experts do I completely accept or reject based on credibility or otherwise. Rather, to the extent differences in the expert evidence exists, the real question in the context of the issues that have been pled — particularly in relation to Manitoba's s. 1 defence — is whether there is nonetheless, a sufficiently sound and credible evidentiary basis (even in light of any opposing evidence) for Manitoba's claim that the limitations and restrictions placed on certain fundamental freedoms represent valid policy approaches which are reasonably justified and constitutionally defensible in Canada's free and democratic society. Put differently, after a review of any contrary scientific evidence and challenge, does there nonetheless remain a credible evidentiary record that supports Manitoba's position that any restrictions on the identified fundamental freedoms are rationally connected, minimally impairing and reasonable and

proportionate public health policy choices vis-à-vis what are acknowledged and conceded to be, Manitoba's pressing and substantial public health objectives?

A. SUBMISSION OF MANITOBA RESPECTING THE AFFIDAVIT EVIDENCE ADDUCED

[51] Given some of Manitoba's concessions respecting its infringement of s. 2 of the ***Charter*** and the resulting onus it bears under s. 1 to show that the infringements are justified in a free and democratic society, I will for the sake of coherence and clarity commence with the submissions made by Manitoba.

[52] To the extent the evidence does indeed support or establish what is set out below, Manitoba submits that if and where ***Charter*** infringements have occurred in the present case, they are infringements that are constitutionally defensible. In other words, Manitoba contends that the evidence reveals that there is a rational connection between the public health objectives and the impugned provisions and that the impugned restrictions minimally impair any ***Charter*** rights they infringe. No less important is Manitoba's position that the evidence demonstrates that any of the deleterious effects of the restrictions are far outweighed by the salutary benefits resulting from them.

(i) SARS-CoV-2 and the COVID-19 Pandemic

[53] On January 30, 2020, the World Health Organization declared the COVID-19 pandemic a Public Health Emergency of International Concern. COVID-19 is a disease caused by a novel coronavirus called SARS-CoV-2. The first case was identified in Wuhan, China, in December 2019 but soon spread all over the world. As of early March, there were 114 million cases and more than 2.5 million deaths. The numbers continued to

climb. The first known case of the virus in Manitoba was on March 12, 2020.[3] As of early February 2021 there have been over 30,000 cases in Manitoba and more than 2,500 serious cases including hospitalizations or deaths.[4]

[54] COVID-19 is highly communicable and contagious. The virus spreads from person to person through respiratory droplets and aerosols (smaller droplets) that are expelled when a person breathes, talks, coughs, sneezes, sings or shouts. It is primarily transmitted when the virus comes into contact with another person's nose, mouth or eyes. It may also be spread when a person touches another person (e.g., handshake) or touches a surface containing the virus and then transfers it to their mucous membrane.[5]

[55] Scientific studies have demonstrated that SARS-CoV-2 can be transmitted by persons who are asymptomatic (those who never develop symptoms) and especially those who are pre-symptomatic (those who do not yet display symptoms but will develop them). There is strong scientific evidence that transmission of SARS-CoV-2 primarily occurs from a few days before symptom onset until about five days after.[6] While healthy children (at least prior to the increasingly dangerous virulent variants) tend to experience less severe disease, they can transmit the virus. There is evidence that older children and teenagers can spread the virus as efficiently as adults.[7]

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[3] Affidavit of Dr. Brent Roussin [Roussin], paras. 21-22
[4] Affidavit of Dr. Carla Loeppky [Loeppky], Exhibit H
[5] Roussin, paras. 24-26, Exhibit 3; Affidavit of Dr. Jason Kindrachuk [Kindrachuk], Exhibit B, pp. 6-7
[6] Roussin, para. 26; Kindrachuk, Exhibit B, pp. 7-10
[7] Roussin, para. 26; Kindrachuk, Exhibit B, p. 10

[56] Since the virus is typically spread through respiratory droplets, gatherings involving prolonged close contact are of particular concern. According to Health Canada guidelines, a high-risk exposure (close contact) includes anyone who has shared an indoor space with a positive case for a prolonged period (15 minutes over a 24-hour period). Certain locations and activities pose a greater risk. Most transmission occurs in indoor settings, especially with poor ventilation. Singing, talking loudly or breathing heavily can also increase the risk of transmission. This explains why gathering in places such as fitness classes, theatres, restaurants, places of worship and choir practice are identified as of particular concern. Multiple super-spreader events have been linked to close contacts including at places of worship.[8] In Manitoba, Epidemiology and Surveillance identified a number of clusters or outbreaks in relation to faith-based gatherings or funerals in many regions of the province, which is consistent with data from other jurisdictions and the scientific literature.[9] For the same reason, private residences have been identified as a significant source of transmission.[10]

[57] COVID-19 entails a range of clinical symptoms. The most common symptoms include fever, cough, fatigue, shortness of breath, loss of appetite, loss of smell and taste. The disease can vary widely in seriousness. Some people remain asymptomatic. Others experience relatively mild symptoms or feel very ill but recover fully. But for some, COVID-19 is very serious leading to hospitalization, ICU admission or death. Older adults (over age 60) and people of any age with a variety of underlying medical conditions are

[8] Roussin, paras. 26-27, 155-160, Exhibits 12 and 13; Kindrachuk, Exhibit B, pp. 11-12
[9] Loeppky, para. 14; Roussin, para. 160
[10] Affidavit of Dr. Jay Bhattacharya, sworn January 5, 2021 [Bhattacharya 1], Exhibit C, pp. 19, 26

at greater risk of experiencing severe disease and outcomes. Among others, these underlying comorbidities include heart disease, lung disease, hypertension, diabetes, kidney disease, liver disease, obesity, along with other immunocompromised individuals (e.g., persons with cancer or undergoing chemotherapy).[11]

[58] In Manitoba, data current to February 8, 2021 shows that 8.1 per cent of all COVID-19 cases are very severe, resulting in hospitalization or death. While a large majority of deaths have occurred in people over age 60, fatalities are not limited to that category. Moreover, approximately one third of hospitalizations in Manitoba and 44 per cent of ICU admissions have been in persons under the age of 60.[12] Indigenous people in Manitoba are also more vulnerable to COVID-19. For example, a disproportionate number of COVID-19 cases (31 per cent) have been First Nations persons, more than half of which have been off reserve. Among First Nation individuals, the median age is 51 for hospitalizations and 57 for ICU admissions.

[59] For a certain segment of the population, COVID-19 has resulted in persistent long-term symptoms (sometimes serious), such as difficulty breathing. These "long hauler" cases are not limited to an older demographic. In one journal, it was estimated that 10 per cent of people infected with COVID-19 experienced prolonged symptoms. An Italian study suggested 44 per cent of recovered COVID-19 patients reported a worsened quality of life. However, further study is needed and it remains too early to draw any firm conclusions about the long-term effects.[13]

[11] Roussin, paras. 30-33
[12] Roussin, paras. 33-35, Exhibits 4 and 21; Loeppky, Exhibit H
[13] Roussin, para. 36; Kindrachuk, p. 15

[60] SARS-CoV-2, like all viruses, changes as it replicates. Many of these mutations are of little clinical significance. However, the more the virus is allowed to spread, the greater the opportunity for variants of concern to develop. These variants may exhibit increased transmissibility or disease severity. They may also impact the efficacy of vaccines or therapeutic treatments. As of the spring of 2021, three variants of concern have been identified, which are present in Manitoba.[14]

[61] SARS-CoV-2 is a new human virus. While far more is known about the virus today than at the beginning of the pandemic in early 2020, much uncertainty remains. The state of scientific knowledge continues to evolve rapidly and many studies continue around the world to shed light on difficult questions such as whether immunity is lasting after exposure or vaccination, the impact on children, variants of concern, potential long-term effects of COVID-19, the efficacy of non-pharmaceutical interventions, among many others. Studies are likely to continue long after the pandemic ends. Despite the uncertainty, public health decisions must be made quickly, in real time and under rapidly changing epidemiological situations as the pandemic unfolds. These decisions are based on the best available scientific evidence at the time.[15]

(ii) Manitoba's Pandemic Response

[62] The office of the chief public health officer along with the Department of Health and Seniors Care play a leading role in Manitoba's response to the COVID-19 pandemic. They work closely with many specialists in a variety of health disciplines. In February

[14] Roussin, paras. 28-29; Kindrachuk, Exhibit B, pp. 16, 17, 18
[15] Roussin, paras. 37-45; Kindrachuk, Exhibit B, pp. 14-17

2020, Manitoba established an Incident Command structure to manage the pandemic response. It is co-chaired by Chief Public Health Officer Dr. Brent Roussin and Chief Nursing Officer Lanette Siragusa of Shared Health Manitoba. In addition to the Incident Command, Manitoba has established a Testing Task Force to oversee testing initiatives, the Centralized COVID Cases and Contact Team to operate contact tracing and the Vaccine Task Force to plan and conduct vaccinations.[16]

[63] Notably, Dr. Roussin and his team continually review new scientific evidence as it emerges from around the world. He notes that officials in Manitoba work collaboratively with their counterparts and experts from across Canada and internationally to share knowledge, experience and best practices. The fight against COVID-19 has been the subject of extensive interjurisdictional coordination and efforts. The CPHO's office regularly participates in meetings of federal-provincial-territorial special advisory and technical advisory committees to coordinate the response and share the most up-to-date information about COVID-19. Weekly meetings are held among the chief medical officers of health from every Canadian jurisdiction. Canada's Chief Public Health Officer Dr. Tam, is also in regular contact with her international counterparts to keep abreast of evolving scientific knowledge and best practices.[17]

[64] When it comes to public health decision making, a wide variety of experts regularly share information upon which the CPHO can rely. This includes public health experts, epidemiologists, basic scientists such as virologists and immunologists, laboratory experts, acute care specialists and other health care professionals, policy analysts, the

[16] Roussin, paras. 15-19
[17] Roussin, paras. 42-45

Department of Health and Seniors Care and elected officials.[18] Dr. Roussin also brings to bear his expertise in Public Health and Preventive Medicine, a medical specialty concerned with the health of populations.

[65] In addition to meeting the requirements of ***The Public Health Act***, the CPHO follows the principles underlying sound and ethical public health decision making, namely: effectiveness, proportionality, necessity, least infringement and public justification. These principles have also been summarized as: (1) the harm principle; (2) least restrictive or coercive means; and, (3) reciprocity (public assistance for citizens who comply with their duties) and transparency (e.g., engaging with affected stakeholders).[19]

(iii) *Public Health Orders are Progressive and Responsive to the Course of the Pandemic*

[66] As Dr. Roussin explains, since March 2020, Manitoba has implemented a variety of measures in response to the COVID-19 pandemic, which are generally consistent with measures seen across Canada and the rest of the world. The public health consensus is that limiting the number and duration of contacts is necessary to prevent the exponential spread of SARS-CoV-2 and keep it within manageable limits. If the number of serious COVID-19 cases overwhelms our healthcare system, this will result in greater morbidity and death including for non-COVID-19 patients. Hence the need to "flatten the curve". The precise scope and extent of measures are informed by the circumstances of the pandemic, epidemiological evidence and a variety of key indicators such as the rate of growth, increases in serious outcomes (hospitalizations, ICU admissions and deaths), the

[18] Roussin, para. 41
[19] Roussin, para. 54

extent of community transmission, clusters, test positivity rates, capacity for testing and contact tracing and of critical importance, the strain on the healthcare system.[20]

[67] The public health orders are not static. Public health officials have continually monitored the fluid and evolving pandemic and have, they say, modified the public health measures progressively to ensure they are responsive to prevailing epidemiological evidence and proportionate.

[68] The early response to the pandemic in the spring of 2020 was characterized by limited knowledge and tremendous uncertainty. Public health officials had witnessed what had happened in places like Italy and New York. Starting in March 2020, indoor and outdoor gatherings, including places of worship, were limited to 50 people. Retail establishments remained open with physical distancing, but theatres and gyms were closed. Restaurants and hospitality premises were limited to the lesser of 50 people or 50 per cent capacity. Gathering limits were reduced to 10 on March 30. Starting April 1, business not listed in a schedule were closed except for online, pick up and delivery. Restaurants were restricted to delivery and take out. At no time did the PHOs place any restrictions on the delivery of health care. Fortunately, Manitoba was spared widespread community transmission and did not experience a large number of cases during the first wave of the pandemic in the spring of 2020.[21]

[69] Beginning May 22, 2020, the gathering restrictions were relaxed to allow 25 people indoors and 50 people outdoors, including places of worship. This reflected the growing understanding that the risk of transmission was greater in indoor settings. As the summer

[20] Roussin, paras. 58, 86-89
[21] Roussin, paras. 94-95

progressed, restrictions were gradually and progressively eased. By June 21, gathering sizes generally increased to 50 people indoors or 100 people outdoors. Many businesses opened to 75 per cent capacity subject to physical distancing requirements. By July 24, businesses could generally fully reopen at full capacity with physical distancing, unless otherwise specified in the orders. Religious services were permitted up to 500 persons or 30 per cent capacity. These restrictions continued essentially in this form until the fall. While life certainly did not return completely to normal, despite the ever-present spectre of COVID-19, the temporarily improving circumstances were accompanied by a significant relaxation of public health restrictions and more freedom to gather.[22]

(iv) Fall 2020 - The "Circuit Break"

[70] Things changed dramatically when the second wave hit in the fall of 2020. Particularly after Thanksgiving, the virus began to spread rapidly throughout the community in an uncontrolled manner. The Capital Region was placed under Level Red (Critical) restrictions by the end of October and ten days later, on November 12, the entire province followed suit. The rising number of serious COVID-19 cases was threatening to overwhelm the capacity of our hospitals and ICUs to cope. Manitoba's healthcare system was said to be on the precipice. Unless urgent action was taken to regain control of the virus and significantly reduce the number of hospitalizations and ICU admissions, Manitoba was on the verge of exceeding the ability to deliver urgent care for patients, whether for COVID-19 or otherwise. Swift and decisive action was seen as

[22] Roussin, paras. 98-99. A more detailed chronology of the public health orders pertaining to gatherings and places of worship leading up to, during and after the circuit break can be found at Roussin, paras. 107-154

essential. The impugned PHOs were intended as a "circuit break" to flatten the curve and avoid even greater loss of life or serious illness than was already being experienced.[23]

[71] The CPHO's assessment was based on a variety of key indicators, current epidemiological evidence and modelling presented to him on October 15 and again on November 10, 2020. This evidence included the following:

i) Manitoba was experiencing exponential growth of the virus. New cases were doubling every two weeks.[24] Cases escalated shortly after Thanksgiving (October 12). During the week of October 19-24, Manitoba had 1,038 new cases of COVID-19, close to the higher end of the projected range in the model. There was a significant spike of 480 new cases in one day on October 30. The case numbers were expected to continue rising, leading to greater hospitalizations and death.[25]

ii) Manitoba had the highest per capita rate of active COVID-19 cases in the country.[26]

iii) The test positivity rate had soared to over 10.5 per cent provincially.[27]

iv) Community spread had started to occur rampantly in all regions of the province.[28]

v) The dramatic rise in COVID-19 cases put the effectiveness of the contact

[23] Roussin, paras. 99-106, 147-151
[24] Loeppky, para. 16; Roussin, para. 102
[25] Affidavit of Lanette Siragusa [Siragusa], para. 15; Loeppky, paras. 16-17, Exhibits E, F, H
[26] Roussin, para. 102
[27] Roussin, para. 102
[28] Roussin, paras. 100, 102; Loeppky, para. 16

tracing program in jeopardy.[29] This is a key public health tool used to prevent the spread of a virus.

vi) Cases in young adults (aged 20-39) and seniors (aged 60 and older) were increasing very quickly. The latter group being at highest risk of severe outcomes. The impact on older and vulnerable populations was very concerning. First Nations had a test positivity rate of over 12 per cent and a disproportionate number of COVID-19 cases.[30]

vii) COVID-19 related deaths and hospitalizations were rapidly escalating. Epidemiological data shows that 7 per cent of people diagnosed with COVID-19 required hospitalization and 1.3 per cent will require ICU care.[31] When active cases of COVID-19 surge, the system can expect hospitalizations to rise about 10 days later.[32]

viii) The healthcare system was under tremendous strain. Elective surgeries were delayed because there was a need to redeploy medical staff to critical care, medicine and personal care homes to handle COVID-19 cases. This was exacerbated by the fact some hospital staff were also exposed to the virus.[33]

ix) Modelling presented on November 10 showed that Manitoba was tracking along the worst-case scenario in terms of number of cases. Case numbers

[29] Loeppky, para. 17
[30] Roussin, para. 103; Loeppky, para. 17
[31] Roussin, para. 103; Loeppky, paras. 9, 17
[32] Siragusa, para. 15
[33] Siragusa, paras. 10-11

were expected to rise to 400-1,000 new cases each day by December 2020. Deaths were also expected to rise sharply, potentially doubling to 219 on December 10 with an estimated range of up to 597 deaths on that date. In fact, as of December 10, Manitoba experienced 478 deaths, at the higher end of the projected range.[34]

x) Modelling projected that without intervention, the rapid rise in infections could soon overwhelm our acute care system. COVID-19 patients were projected to require Manitoba's total capacity to provide ICU care by November 23 and would require 100 per cent of Manitoba's capacity to staff clinical hospital beds by mid-December 2020, leaving no room for other patients. The model was based on a maximum ability to provide ICU care for 124 patients. Manitoba's pre-COVID ICU capacity was 72 patients so the system was already under significant strain. On November 17, there were discussions about developing a triage policy to determine who would receive care in the event critical care resources were depleted. Surgical wards were transitioned into COVID-19 Medicine Units and staff were redeployed to create additional ICU capacity.[35]

xi) There was concern that the rise in COVID-19 numbers would coincide with the Christmas holiday season when many hospital staff had planned vacation. Most staff were not able to pick up extra shifts to fill scheduling

[34] Loeppky, paras. 16, 18, Exhibits E and F, pp. 32, 39, 44, 46
[35] Roussin, para. 104 ; Siragusa, paras. 16-18; Loeppky, paras. 15-18, Exhibits E and F, pp. 32, 39, 44, 46

gaps due to stress and exhaustion.[36]

xii) Numerous protocols and precautions had been implemented to protect vulnerable populations in congregate living settings such as personal care homes and on First Nations communities. These measures worked well in the spring and summer but unfortunately, despite these efforts, outbreaks had occurred in these high-risk settings.[37]

xiii) Nine clusters associated with faith-based gatherings, including choir practice and funerals, were identified to have occurred in the fall of 2020.[38]

[72] As a result of added the burden of COVID-19, on December 10-11, 2020, Manitoba reached a peak of 388 hospitalizations and 129 patients in ICU.[39] Therefore, at its peak, COVID-19 resulted in significantly more patients who required ICU care than the system would normally handle (79 per cent more than the usual 72 patients).

[73] Dr. Roussin and public health officials took into account the unintended effects of the restrictions such as adverse economic or mental health impacts but in light of the gravity of the situation, believed these were the minimum measures necessary to protect public health.[40]

[74] After the restrictions were put in place, COVID-19 numbers began to decline, consistent with what the modelling predicted.[41] The Level Red public health measures implemented during the fall of 2020 along with the public's cooperation and compliance

[36] Siragusa, para. 20
[37] Siragusa, para. 22; Roussin, para. 165, Exhibits 14-16
[38] Loeppky, para. 14
[39] Siragusa, para. 19
[40] Roussin, para. 87
[41] Loeppky, para. 20, Exhibit F, pp. 50-51 and Exhibit G, pp. 15, 17

with those PHOs changed the trajectory of COVID-19 cases and eased the burden on acute care resources. Manitobans flattened the curve and avoided a disastrous situation.[42]

(v) The Impugned Public Health Orders

[75] November 12, 2020 was the first day of the province-wide "Circuit Break" PHO. At that time, places of worship had to close to in-person religious services. Gatherings were limited to five persons. Starting November 20, 2020, persons were also no longer allowed to gather in private residences subject to certain exceptions, including for health care, personal care and educational instruction or tutoring.[43]

[76] The applicants challenge specific orders from three PHOs that were in effect during three different time periods:

(i) Orders 1(1), 2(1), 15(1) and 15(3) of the November 21, 2020 PHO, in effect from November 22 until December 11, 2020.

(ii) Orders 1(1), 2(1), 16(1) and 16(3) of the December 22, 2020 PHO, in effect from December 23, 2020 to January 8, 2021.[44]

(iii) Orders 1(1), 2(1), 16(1) and 16(3) of the January 8, 2020 PHO, in effect from January 8 to January 22, 2021.

[42] Siragusa, para. 21; Loeppky, para. 22
[43] Roussin, paras. 147-150
[44] The applicants do not challenge the PHO in effect from December 11 to December 22, however, there was no material difference from the orders that followed on December 22, 2020 or January 8, 2021

[77] Order 1 in each of these impugned PHOs dealt with restrictions on gatherings at private residences. The November 21 PHO provided:

> ORDER 1
>
> 1(1) Subject to subsections (2) and (3), a person who resides in a private residence must not permit a person who does not normally reside in that residence to enter or remain in the residence.
>
> 1(2) Subsection (1) does not prevent a person from entering the private residence of another person for any of the following purposes:
>
> (a) to provide health care, personal care or housekeeping services;
>
> (b) for a visit between a child and a parent or guardian who does not normally reside with that child;
>
> (c) to receive or provide child care;
>
> (d) to provide tutoring or other educational instruction;
>
> (e) to perform construction, renovations, repairs or maintenance;
>
> (f) to deliver items;
>
> (g) to provide real estate or moving services;
>
> (h) to respond to an emergency.
>
> 1(3) A person who resides on their own may
>
> (a) have one other person with whom they regularly interact attend at their private residence; and
>
> (b) attend at the private residence of one person with whom they regularly interact.

[78] Order 1 of the December 22, 2020 and January 8, 2021 impugned PHOs were substantially the same. Exceptions were added in subsection 1(2) for a landlord to enter a rented premises and for the purpose of moving residences. Subsection 1(3) was renumbered as 1(4). A new subsection 1(3) added an exception allowing persons to attend at a home-based business that was permitted to open under the PHO. A new

subsection 1(5) allowed university and college students to live at the private residence of another person in the community where the university or college is located.

[79] Order 2 in each of the impugned PHOs limited public gatherings to five people, except as otherwise permitted. The November 21 PHO provided:

> ORDER 2
>
> 2(1) Except as otherwise permitted by these Orders, all persons are prohibited from assembling in a gathering of more than five persons at any indoor or outdoor public place or in the common areas of a multi-unit residence.
>
> 2(2) This Order does not apply to a facility where health care or social services are provided or any part of a facility that is used by a public or private school for instructional purposes.
>
> 2(3) For certainty, more than five persons may attend a business or facility that is allowed to open under these Orders if the operator of the business or facility has implemented the applicable public health protection measures set out in these Orders.

[80] Order 2 remained substantially the same in the December 22, 2020 and January 8, 2021 PHOs. The one difference was that these two subsequent PHOs included the following exception for organized outdoor gatherings in cars, which had been put in place beginning on December 11, 2020:

> 2(2) This Order does not apply to an organized outdoor gathering or event which persons attend in a motor vehicle if
>
> (a) all persons stay in their motor vehicle at all times while at the site of the gathering or event;
>
> (b) persons in a motor vehicle do not interact with any person not in their motor vehicle while at the site of the gathering or event; and
>
> (c) all persons in a motor vehicle reside in the same residence or receive caregiving services from another person in the motor vehicle.

[81] Order 15 in the November 21, 2020 PHO limited gatherings at places of worship. It provided:

> ORDER 15
>
> 15(1) Except as permitted by subsections (3) and (4), churches, mosques, synagogues, temples and other places of worship must be closed to the public while these Orders are in effect.
>
> 15(2) Despite subsection (1), religious leaders may conduct services at places of worship so that those services may be made available to the public over the Internet or through other remote means.
>
> 15(3) A funeral, wedding, baptism or similar religious ceremony may take place at a place of worship provided that no more than five persons, other than the officiant, attend the ceremony.
>
> 15(4) This Order does not prevent the premises of a place of worship from being used by a public or private school or for the delivery of health care, child care or social services.

[82] Order 15 was renumbered as Order 16 in the December 22 and January 8 PHOs. The restrictions on places of worship remained substantially unchanged except that as of December 11, the following provision was added to allow places of worship to hold an outdoor religious service in vehicles, in accordance with subsection 2(2) discussed above:

> 16(4) This Order does not prevent a church, mosque, synagogue, temple or other place of worship from conducting an outdoor religious service that complies with the requirements of subsection 2(2).

[83] Starting on January 22, 2021, restrictions in impugned PHOs started to ease in light of improving indicators coming out of the Circuit Break, except in northern Manitoba and remote communities. First, outdoor gatherings were relaxed somewhat at private residences. The limit on funerals was expanded to 10 persons. On January 28, up to two persons could visit a private residence. As of February 12, the same PHO applied

province wide. Ten persons were now permitted at weddings and funerals. Places of worship could hold in-person services with up to 50 people or 10 per cent of usual capacity.[45] At the time of this hearing, a private residence could allow either two visitors or create a bubble with persons from another residence. Outdoor gatherings had been expanded up to 10 persons on private property or 25 persons on public property. Regular in-person religious services could have up to 100 people or 25 per cent of usual capacity.[46]

B. SUBMISSION OF THE APPLICANTS RESPECTING THE AFFIDAVIT EVIDENCE ADDUCED

[84] In addition to and separate from their positions on the other identified questions in issue, the applicants have adduced evidence which they submit demonstrates that Manitoba has not met the requisite onus so as to establish that the restrictions in the impugned provisions of the public health orders are constitutionally justified pursuant to the governing test in connection to s. 1 of the ***Charter***. The applicants submit that the totality of the evidence (which obviously includes their own experts and their cross-examination of Manitoba's experts) reveals that there is no rational connection between the public health objectives and the impugned provisions. Neither say the applicants is there persuasive evidence to support Manitoba's position that the impugned restrictions minimally impair the ***Charter*** rights they infringe. Further, the applicants insist that the

[45] Roussin, paras, 152-154. A more detailed history of the PHOs is set out in the affidavit at paras. 107-154

[46] COVID-19 Prevention Order (March 25, 2021)

deleterious effects of the restrictions are severe and they outweigh any salutary effects resulting from them.

[85] As part of their overall position as advanced in their own evidence and in their cross-examination of the various Manitoba experts, the applicants make certain key assertions. The applicants contend that:

- the modelling data that Manitoba used to justify the orders is flawed and unreliable;
- Manitoba failed or refused to estimate the potential years of life saved by these orders and weigh the results of those conclusions against the loss of life and profound damage resulting from the orders;
- Manitoba failed or refused to consider the opinions of between 45,000 and 50,000 medical doctors and scientists who authored and signed the *Great Barrington Declaration* advocating against "locking down" societies (the *Great Barrington Declaration* recommended taking more focussed and special precautions to protect the elderly in immunocompromised populations);
- Manitoba failed to conduct a risk assessment prior to enacting the orders and as a result, failed to account for significant harms to the public. The applicants argue that Manitoba failed or refused to correct course when they say certain legal, social and economic devastation of the orders became apparent. It is the position of the applicants that the lockdowns have caused deaths and other harms from suicide, domestic abuse, increased drug use, mental illness, delayed diagnosis and cancelled surgeries and other harms to society;

- Manitoba failed or refused to complete a cost-benefit analysis of what the applicants call "the lockdown" of the Manitoba population through the impugned orders and that Manitoba similarly failed over the progression of time, to conduct the necessary review of the disproportionate damage the orders have cost to society generally.

[86] While the applicants have argued that there are multiple factors which ought to lead this Court to the conclusion that Manitoba has not met their s. 1 onus, a fundamental part of their argument relates to what they say is the inadequacy or inconclusiveness of any supporting scientific evidence which the applicants have challenged and which they say is inextricably connected to Dr. Roussin's decisions to issue the impugned PHOs.

[87] In challenging Manitoba's scientific evidence with their own affidavit evidence and in the cross-examinations they conducted of Manitoba's expert witnesses, the applicants take aim at what they suggest is Manitoba's inadequate appreciation, misunderstanding and misuse of such factors as:

- the morbidity danger of COVID-19;
- the asymptomatic transmission of COVID-19;
- the RT–PCR testing, infectiousness and Cycle thresholds;
- herd immunity;
- the likelihood of any spread of COVID-19 outdoors;
- the ability to control the spread of COVID-19 in religious settings; and
- variants of concern.

[88] Some of the connected submissions of the applicants and their challenge to Manitoba's evidentiary foundation are set out below.

(i) Mortality Danger of COVID-19

[89] Dr. Jay Bhattacharya, a world-renowned epidemiologist, medical doctor, PhD in economics, and full professor at Stanford University, identified in his January 5, 2021 expert report that for a majority of the population, including the vast majority of children and young adults, COVID-19 poses less of a mortality risk than the seasonal influenza. According to a meta-analysis by Dr. John Ioannidis, the median infection survival rate from COVID-19 is 99.77 per cent. For COVID-19 patients under 70, the meta-analysis finds an infection survival rate of 99.95 per cent.[47]

[90] Dr. Bhattacharya wrote that a study of COVID-19 in Geneva published in the prestigious journal *The Lancet* provided a detailed breakdown of the infection survival rate: 99.9984 per cent for patients 5 to 9 years old; 99.99968 per cent for patients 10 to 19 years old; 99.991 per cent for patients 20 to 49 years old; 99.86 per cent for patients 50 to 64 years old; and 94.6 per cent for patients above 65 years old.[48]

[91] Manitoba's affiants do not dispute that COVID-19 poses the greatest risk of death to older people.

(ii) Asymptomatic Transmission of COVID-19

[92] In his January 5, 2021 affidavit, Dr. Bhattacharya identified two recent, significant peer-reviewed studies which found that asymptomatic spread of COVID-19 is significantly

[47] Bhattacharya 1, Exhibit C, p. 2
[48] Bhattacharya 1, Exhibit C, p. 3

lower than symptomatic spread. Specifically, one of the studies, a meta-analysis of 54 studies in the *Journal of American Medical Association Network Open,* confirmed that within households where none of the safeguards that restaurants are required to apply are typically applied, symptomatic patients passed on the disease to household members in 18 per cent of instances, while asymptomatic patients passed on the disease to household members in 0.7 per cent of instances.[49]

[93] Dr. Bhattacharya also cited another study of 10 million residents of Wuhan, China, who were tested for the presence of the virus. Only 300 cases of COVID-19 were found and all were symptomatic. Contact tracing identified 1,174 close contacts of these patients, and none of them tested positive for the virus.

[94] Dr. Bhattacharya concluded, based on his review of the medical literature, that asymptomatic individuals are on an order of magnitude less likely to infect others than symptomatic individuals, even in intimate settings such as households where people do not typically wear masks or socially distance. He concluded that the spread of COVID-19 in less intimate settings by asymptomatic individuals, such as in places of worship, is less likely than in households.

[95] Dr. Jason Kindrachuk, an infectious diseases specialist and assistant professor at the University of Manitoba, also discussed asymptomatic transmission. He concluded that while SARS-CoV-2 transmission is likely lower from individuals with asymptomatic infections as compared to symptomatic cases, those in the "pre-symptomatic" phase of disease appear to be able to transmit the virus similarly to symptomatic individuals.[50]

[49] Bhattacharya 1, Exhibit C, p. 8
[50] Kindrachuk, Exhibit B, pp. 9-10

[96] Dr. Bhattacharya had not previously addressed "pre-symptomatic transmission" of the disease in his January 5, 2021 expert report. In his responding affidavit, Dr. Bhattacharya attempted to address Dr. Kindrachuk's evidence by explaining that in his previously cited *JAMA Netw Open* meta-analysis study, the authors concluded that household transmission of the disease from asymptomatic and "pre-symptomatic" patients occurred 0.7 per cent of the time. He also revealed that many of Dr. Kindrachuk's studies were taken into consideration in the larger meta-analysis from *JAMA Netw Open,* which ultimately determined the vanishingly low rate of asymptomatic and pre-symptomatic transmission.[51]

(iii) *RT-PCR Testing, Infectiousness, and Cycle Thresholds*

[97] Dr. Bhattacharya explains in his January 5, 2021 report that the RT-PCR test for the SARS-CoV-2 virus is at the heart of the testing system adopted by Canada. He explains that the test amplifies the virus, if present, by a process of repeatedly doubling the concentration of viral genetic material. If the viral load is small, many doublings are required before it is possible to detect the virus. He explains that labs decide in advance how many doublings of the genetic material they will require before deciding that a sample is negative for the presence of the virus. This threshold or "cycle time" determines the rate at which a positive test result will be returned when the original sample does not include viral concentrations in sufficient amount to be infectious.

[98] Dr. Bhattacharya's evidence suggests that a higher-cycle threshold increases the false positive rate of the PCR test because even if a non-infectious viral load is present in

[51] Affidavit of Dr. Jay Bhattacharya, sworn March 31, 2021 [Bhattacharya 2] Exhibit A, p. 10

the sample obtained from the patient, a large number of permitted doublings could amplify whatever minute or fragmentary viral segment is present such that the test result is positive. A positive test result obtained in this fashion does not mean that such an individual is infectious or contagious. On the contrary says Dr. Bhattacharya, as an individual who tests "positive" using a high-cycle threshold is exceedingly unlikely, or even impossible, to be a transmission risk at all.

[99] Dr. Bhattacharya asserts that the PCR test is not the gold standard for determining whether a patient is infectious. He says that from an epidemiological point of view, infectivity measurement is more important than a measurement of whether the virus is present, since it is possible for a patient to have non-viable viral fragments present, a positive PCR test, and yet not be infectious. He cites a study published in the *European Journal of Clinical Microbiology & Infectious Diseases*, which determined that culture positivity of the virus decreased progressively by Ct values to reach 12 per cent at a Ct of 33. That means only 12 per cent of the samples spun at a Ct of 33 had a positive culture. Further, no culture was able to be obtained from samples with a Ct of greater than 34. Dr. Bhattacharya also cited a study published in top epidemiological journal *Eurosurveillance*, which found that if 27 cycles are needed for a positive test, the false positive rate is 34 per cent; if 32 cycles are needed for a positive test, the false positive rate is 92 per cent; if more than 40 cycles are needed for a positive test, the false positive rate is nearly 100 per cent.[52]

[52] Bhattacharya 1, Exhibit C, p. 37

[100] Dr. Bhattacharya noted that the WHO published an Information Notice on December 8, 2020 warning users of PCR tests and that it had received user feedback on an elevated risk for false SARS-CoV-2 results when testing specimens using PCR test.[53]

[101] The applicants acknowledge the evidence of Dr. Jared Bullard, a microbiologist employed by Manitoba who works in the Cadham Provincial Lab ("CPL") where all of the PCR tests are analyzed for COVID-19. Dr. Bullard provided an affidavit on behalf of Manitoba wherein he explained how PCR tests work and explained his practice with those tests in the lab. He admitted that the CPL uses a total of 40 cycles of amplification. He explained that specificity is the proportion of people who do not have COVID-19 that the test will call negative, and that poor specificity results in false positives. He further explains that the specificity of the PCR test is greater than 99.9 per cent — i.e., less than 1 in 1,000 will have a false positive result.[54]

[102] He stated that SARS-CoV-2 is detectable by RT-PCR for up to three months.[55]

[103] Dr. Bullard referred to his own study which found that samples with a Ct value of 25 or greater did not grow SARS-CoV-2 in cell culture, and another study published in the *Clinical Infectious Diseases Journal* (also referred to in Dr. Bhattacharya's January 5, 2021 expert report) which found that for SARS-CoV-2 in cell culture, 70 per cent had a positive culture at a Ct of 25, 20 per cent had a positive culture at a Ct of 30, and less than 3 per cent had a positive culture at a Ct of 35. Dr. Bullard asserted that if an individual tests positive, he has the SARS-CoV-2 pathogen and has been diagnosed with COVID-19.[56] He

[53] Bhattacharya 1, Exhibit C, p. 38
[54] Affidavit of Dr. Jared Manley Peter Bullard [Bullard], Exhibit C, lines 85-86, 131-136
[55] Bullard, Exhibit C, lines 148-149
[56] Bullard, Exhibit C, line 217

concluded, however, that no single SARS-CoV-2 PCR Ct value in isolation can be used to determine infectiousness of a case and must be interpreted in the overall clinical context.[57]

[104] Dr. Bullard's expert report revealed that in December 2020, out of 5,825 positive PCR results in Manitoba, 18 per cent had a Ct of 25-30, 18 per cent had a Ct of 30-36, and 7 per cent had a Ct of 36-40.[58]

[105] In response, Dr. Thomas Warren, an infectious disease specialist and medical microbiologist and adjunct professor at McMaster University, agreed with Dr. Bullard that a positive PCR test represents the identification of SARS-CoV-2 virus fragments. Dr. Warren clarified however that a positive PCR test result did not necessarily indicate that the entire virus is present or that the patient has COVID-19. He responded to Dr. Bullard's assertion that a PCR has a specificity of greater than 99.9 per cent, and stated that while a positive test means there is a 99.9 per cent likelihood that the person has or recently had the SARS-CoV-2 virus in their body, it does not mean that the person is infectious or that they have COVID-19 disease (symptoms). In this regard, Dr. Warren concluded that the presence of SARS-CoV-2 virus as detected by PCR is necessary but not sufficient to indicate either infectiousness or COVID-19 disease properly defined.[59]

[106] In response to Dr. Bullard, Dr. Bhattacharya analyzed the December 2020 lab data and found that 25 per cent (1,456) of the 5,825 people that Manitoba considered a

[57] Bullard, Exhibit C, lines 157-170
[58] Bullard, Exhibit C, lines 193-195
[59] Affidavit of Dr. Thomas Warren [Warren], Exhibit B, pp. 3, 5-6

"positive" case in December 2020 had Ct values that strongly suggested they were not infectious.[60]

[107] Both Dr. Bhattacharya and Dr. Warren in response to Dr. Bullard referred to the second warning from the WHO on January 20, 2021 where it gave guidance on PCR testing which states: "health care providers must consider any result in combination with timing of sampling, specimen type, assay specifics, clinical observations, patient history, confirmed status of any contacts, and epidemiological information." Further, the WHO guidance advises: "the probability that a person who has a positive result (SARS-CoV-2 detected) is truly infected with SARS-CoV-2 decreases as prevalence decreases, irrespective of the claimed specificity."[61]

(iv) Herd Immunity

[108] Dr. Bhattacharya writes that the science strongly suggests that recovery from SARS-CoV-2 infection will provide lasting protection against reinfection, either complete immunity or protection that makes a severe reinfection extremely unlikely. He writes that herd immunity, a scientifically proven phenomenon, occurs when enough people have immunity so that most infected people cannot find new uninfected people to infect, leading to the end of the pandemic.[62] He suggests a strategy of "focused protection" to better protect the elderly while allowing the rest of society to live their lives.[63] This approach of "focused protection" has been endorsed by over 50,000 scientists, physicians

[60] Bhattacharya 2, Exhibit A, p. 13
[61] Warren, Exhibit 8, p. 3; Bhattacharya 2, Exhibit A, p. 14
[62] Bhattacharya 1, Exhibit C, p. 33
[63] Bhattacharya 1, Exhibit C, p. 34

and other medical professionals and is set out by Dr. Bhattacharya (its co-author) in the *Great Barrington Declaration*.

[109] Dr. Kindrachuk disagrees with Dr. Bhattacharya's approach and cites the example of Manaus Brazil, which he states was devastated by the first wave of the pandemic with 4.5-fold excess mortality. He cited a seroprevalence study which found that 76 per cent of the Manaus population was infected with SARS-CoV-2 and had antibodies by October 2020, but virus transmission continued anyway with a devastating surge of SARS-CoV-2 infections by mid-January 2021. He concluded that the data from Brazil provides supportive evidence that a herd immunity approach through natural infections could have devastating impacts on public health.[64]

[110] In reply, Dr. Bhattacharya points out that the Manaus Brazil example is based on a single, flawed, seroprevalence study conducted in Manaus in mid-2020. He states that the 76 per cent estimate was not based on a random survey, but on blood donors, who are a very select group of people in the developing world. He illustrates that the seroprevalence among the blood donors was 52 per cent, which was adjusted upwards based on questionable mathematical modelling of waning antibodies. He also states that it is impossible to conclude that lockdowns in a single location are a good strategy to control the epidemic.[65]

[64] Kindrachuk, TAB 8, pp. 16-17
[65] Bhattacharya 2, Exhibit A, p. 18

(v) Spread of COVID-19 Outdoors

[111] The applicants insist in their submissions that Manitoba has not provided any scientific evidence that COVID-19 transmits easily outdoors or that being outdoors amongst other people is a risk to the Manitoba population.

(vi) COVID-19 Spread in Religious Settings

[112] Dr. Bhattacharya asserts that places of worship can safely hold indoor worship services, with minimal effect on the spread of COVID-19 disease, by following guidelines recommended by the CDC. Such guidelines include recommendations to protect staff who are at higher risk for severe illness, engaging in handwashing, mask wearing when social distancing is difficult, social distancing, disinfecting the worship space before and after each service, minimizing food sharing, encouraging symptomatic congregants to stay home, and posted signs about COVID-19 disease.[66]

[113] He referred to medical studies which revealed that church attendance provides psychological benefits for attendees, especially for adolescents. He also referred to medical studies which showed the psychological benefits provided by communal singing in the process of worship which is shown to foster a sense of belonging and connectedness that is crucially important with measurable effects on mental health.[67]

[114] Dr. Roussin's reasoning for closing places of worship in November 2020 is that activities at those places are comparable to theatres, concert halls, or indoor sporting

[66] Bhattacharya 1, Exhibit C, pp. 24-25
[67] Bhattacharya 1, Exhibit C, p. 25

events, and involve prolonged contact between persons, which could include hugging, handshaking, choirs, singing, and sharing items.[68]

[115] In Dr. Carla Loeppky's affidavit, she refers to clusters associated with attendance at faith-based events between August 2020 - February 2021. She also includes a chart which is called "Potential Acquisition Settings are Diverse" in which it is identified that in the one-month period of September 1, 2020 – October 2, 2020, 3.2 per cent of cases were potentially acquired at faith-based settings.[69]

(vii) Variants of Concern

[116] Dr. Kindrachuk and Dr. Roussin[70] first raised the issue of "Variants of Concern" (VOC) in their affidavits. (I note by way of judicial notice that since the hearing of this matter, public and scientific concern for VOCs have become even more acute.) Dr. Kindrachuk states in his affidavit that variant B.1.1.7 has increased transmissibility ranging from 30 - 70 per cent over circulating non-VOCs and has been associated with increased risk of severe and fatal disease in hospitalized patients. He recommends decreased community transmission to reduce the potential for additional emergence of VOCs. [71]

[117] In response, Dr. Bhattacharya explained that VOCs do not escape immunity provided by previous infections or by the COVID-19 vaccines. He states that the presence of VOCs pose little additional risk of hospital overcrowding or excess mortality, and that such predictions are based on faulty modelling. He cites Florida as an example of a

[68] Roussin, paras. 155-156
[69] Loeppky, Exhibit E, p. 17
[70] Roussin, paras. 28-29
[71] Kindrachuk, TAB B, p. 16

jurisdiction where UK variant B.1.1.7 is widespread but cases have dropped sharply. He explains that vaccines have decoupled the growth in COVID-19 cases from COVID-19 mortality. While cases in Canada have gone up in March 2021, deaths have continued to fall.[72] Finally, Dr. Bhattacharya points out that if restrictive public health measures did not work to protect Canadians from the less infectious COVID-19, there is little reason to expect that they would work to suppress VOCs.[73]

[118] Having examined in the two previous sections the submissions and positions of Manitoba and the applicants respecting the initial and responding affidavit evidence that was adduced, I now turn to the cross-examination that was conducted by both parties of some of the selected affiants. I then proceed to provide the Court's assessment of all of the evidence, including that which was heard in any of the cross-examinations.

VIII. THE CROSS-EXAMINATIONS ON THE AFFIDAVITS

[119] As earlier noted, the applicants' challenge to what Manitoba contends is the supporting scientific evidence for the impugned PHOs continued in their (the applicants) cross-examinations of the selected Manitoba affiants. So too did Manitoba in its own cross-examination of the selected applicants' affiants continue with its defence of a scientific evidentiary foundation, which (in the context of its response to an unprecedented pandemic) Manitoba maintains constitutes a sound and compelling basis for the public health policy choices and restrictions contained in the impugned PHOs.

[72] Bhattacharya 2, Exhibit A, pp. 8-9
[73] Bhattacharya 2, Exhibit A, p. 10

[120] With the above in mind, the Court paid close attention to all of the cross-examinations conducted. I present below only a selected sampling of some of the segments of the cross-examinations that the respective parties deemed particularly relevant and which they wished to highlight for the Court's consideration.

A. THE APPLICANTS' CROSS-EXAMINATION OF SELECTED MANITOBA AFFIANTS

(i) Dr. Brent Roussin

[121] Although all of Manitoba's witnesses came under scrutiny in the course of the applicants' cross-examinations, the cross-examination of Dr. Roussin represented a particularly significant part of the applicants' challenge to Manitoba's position. The applicants highlighted a number of points from Dr. Roussin's cross-examination. These points included the following:

- That there are no social scientists or economists on his public health team;
- That he acknowledged that the most common transmission of the virus appears to be from infectious droplets or aerosols discharged from an infected person by exhaling, coughing, talking loudly, or similar activities;
- Asymptomatic spread is not a significant driver of infection and spread of the virus;
- Variants of Concern are not what caused Dr. Roussin to implement the public health orders;
- For most infected people, the symptoms they experience will be mild, of short duration, largely benign, and followed by a full recovery and complete return to normal health;
- 91.9 per cent of all cases of COVID-19 in Manitoba did not have a severe outcome, hospitalization or death;
- The 8.1 per cent of cases suffering a severe outcome are primarily over the age of 60, with significant comorbidities and amongst the Indigenous community;

- Manitoba has known the cohorts most at risk of severe outcomes since the beginning of the pandemic;
- There is a distinction between the SARS-CoV-2 virus, and the disease COVID-19 (meaning symptoms or pathological effects from infection by the virus);
- PCR tests identify the presence of SARS-CoV-2 virus RNA fragments;
- A positive PCR test for the presence of SARS-CoV-2 virus fragments is considered a case of COVID-19 disease in Manitoba;
- A positive PCR test indicates the person would have been exposed to the virus potentially 100 days earlier;
- Public health does not know if a positive PCR test is infectious or infected with the virus;
- Public health is aware that the test could have detected only dead viral fragments in the person's nose;
- Public health is not provided with Ct values and has not mandated reporting of Ct values;
- Dr. Roussin acknowledges that Ct value is inversely correlated with infectiousness of the sample tested;
- Dr. Roussin is aware of the research conducted by Dr. Bullard and Dr. Loeppky, which found low probability of infectiousness in positive PCR tests even at cycle thresholds lower than 25;
- Dr. Roussin is also aware that studies indicated only 28.9 per cent and 31 per cent of the positive PCR tests sampled were likely infectious;
- Manitoba will cycle tests up to 40 cycles to find a positive result;
- The public is not told if a positive case is infectious and public health is not told if the positive case has the disease COVID-19;
- It is not generally explained that a positive case may not be able to infect anyone else or that it may be a case of an old exposure going back some 100 days;
- Dr. Roussin acknowledges that the number of positive cases is one of the most important factors in deciding to implement the public health orders;
- The public health measures have generally not stopped community

transmission of the virus;

- While the knowledge of the virus has evolved, the public health response has not;
- Both COVID-19 and influenza have a one- to three-day pre-symptomatic period;
- Dr. Roussin acknowledges that some jurisdictions did not implement public health measures like the ones implemented in Manitoba (see Sweden for example);
- Cases peaked on November 12, 2020, and trended downward after that and hospitalizations peaked on December 10 and 11, 2020;
- There were 3,084 clinical beds in Manitoba as of November 30 and 173 ICU beds in Manitoba as of November 30, 2020;
- There were 129 patients in the ICU both COVID and non-COVID;
- The change to permit churches in cars did not result from a change in the science;
- The only study conducted on harms resulting from the public health orders was the November 1, 2020 document found at Exhibit "D" to the affidavit of Dr. Loeppky; and
- Manitoba has not produced any data about the rate of transmission of the virus in settings other than churches with which to compare the relative risk in different settings.

[122] In addition to the above points extracted on cross-examination, additional detail and nuance were provided by Dr. Roussin touching upon the above and other matters.

[123] As part of his decision-making framework and team, he noted that an "Incident Command" structure (in which he and Lanette Siragusa lead) was created in February 2020. It flowed from an existing respiratory virus steering committee which they co-chaired in 2019. Manitoba had initiated an emergency response plan within the Incident Command structure before cases of COVID-19 arrived in Manitoba. Dr. Roussin

had also started participating in a special advisory committee with federal, provincial, and territorial chief public health officers in mid-January 2020.

[124] Dr. Roussin explained his approach as one meant to identify the most vulnerable people for severe outcomes and reduce overall transmission. Strategies included surveillance, case identification, contact identification and public health measures. The general goal was to minimize morbidity/mortality while also minimizing social disruption. While he did acknowledge that it was known that older people, primarily over 60, were the most vulnerable, it was also known that a significant portion of the population has underlying conditions that make them more vulnerable (lung disease, heart disease, diabetes, obesity and the immunocompromised).

[125] Although the current variant of concern was not a driver of the impugned PHOs, the fact that it was known that mutations occur in this type of virus was certainly a factor in Manitoba's response. In other words, unchecked transmission increases risk, which could then lead to more virulent VOCs.

[126] In the course of his being questioned extensively on case definitions, on the subject of what constitutes a case, on the subject of the PCR test and whether some persons with positive PCR tests are not likely to have been infectious at the time of the test, Dr. Roussin also responded by noting as follows:

> — The case definition is created at a national level — at the advisory committee. It is very consistent across the country, which accordingly, permits comparison;
>
> — The use of the total positive PCR tests per day (adjusted to remove duplicate tests) is for surveillance purposes. That is, it gives them a good picture of the "disease burden" in society;

— Leading up to the circuit break in November, he was accurately able to predict that hospital admissions would equal 7 per cent of the daily reported case numbers in 10 to 14 days. ICU admissions would equal 1.4 per cent;

— If the number of cases/positive tests is doubling in a certain time period, it will identify a trend and provide a very accurate picture of the spread of the virus;

— At a population level, with 1,000 tests per day, the PCR tool is very important;

— At the individual level, you need clinical assessment; direction for individuals to self-isolate depends on an overall assessment — positive cases are only directed to self-isolate if they cannot rule out infectiousness; and

— There is very little asymptomatic testing that occurs in Manitoba. Most asymptomatic testing is done of persons who have had significant exposure to a positive case.

[127] Dr. Roussin explained in his testimony about how he had an obvious concern for how the uncontrolled spread of the virus would have a significant impact on hospitals. In this regard, the impact would not just be the direct impact of COVID-19, but also the indirect impact flowing from a flood of cases into the hospital where non-COVID-19 patients would be affected as well. Indeed, this is what Dr. Roussin noted was happening in November and December when many surgeries had to be postponed, which in turn, has an effect on morbidity and mortality.

[128] Dr. Roussin's evidence was clear in saying that he did consider collateral harms that might flow from the PHOs. In that regard, he considered addiction, domestic abuse, and received reports from specialty leads in psychiatry and psychology in the health system. They reported back to him that the benefits of the measures still outweigh the harms. In short, Dr. Roussin was clear that he was engaged consistently with clinical

leads and specialists and was always considering the unintended consequences of the PHOs. He recognized that the restrictive PHOs can disproportionately impact communities, but he also recognized the much greater and disproportionate effect that widespread transmission could have on the vulnerable.

[129] On the subject of modelling, Dr. Roussin noted that he works with a team of modelers who are experts and highly specialized. They work at a national level with other modelers to provide the best information possible.

[130] Dr. Roussin provided evidence that in the late spring and early summer of 2020, ministers and MLAs led a widespread consultation with members of the faith community. This engagement and consultation included surveys and discussion after which, the feedback was brought back to public health. These consultations created a guidance document.

[131] When cross-examined about the restrictions with respect to places of worship, he provided a wide range of information respecting what was considered, balanced and attempted given the urgent public health objectives. In that context, he provided important information with respect to the assessment of risk and how the assessment of risk was in part based on how the virus transmits in a particular type of setting.

[132] Respecting the *Great Barrington Declaration* and the concepts of natural or herd immunity and focused protection, Dr. Roussin observed that much is still unknown in respect of the duration of immunity from infection in the context of COVID-19. This is especially so in relation to the variants of concern. Dr. Roussin emphasized vaccination as the preferred method of immunization, which has the benefit of not subjecting the

entire population to illness. As it relates to targeted protection, Dr. Roussin provided testimony and explanation with respect to Manitoba's approach.

[133] In reviewing Dr. Roussin's testimony and cross-examination, I can say that I found that he gave straightforward and credible evidence that assisted in augmenting and refining aspects of his affidavits. Even when he was forcefully challenged and required to address certain and occasional inconsistencies or incongruities in approach or method based on what was either incomplete, evolving or the sometimes imperfect science, Dr. Roussin provided clarifying background and explanations for his decisions and concerns, all of which were clearly rooted in his challenging duty performed pursuant to s. 3 of ***The Public Health Act***. It is a duty, which following his testimony, I find he performed reasonably in attempting to respond to a public health emergency with measures that, however difficult, restricted freedoms no greater than necessary. Leaving aside whether Dr. Roussin and Manitoba generally can be justifiably criticized for having taken some of their decisions too slowly and late (criticisms voiced by critics asserting a very different perspective than that of the applicants), the decisions and the accompanying balancing when they finally did take place, were nonetheless clearly based on *prima facie* current and reliable scientific information and knowledge gathered from Canada and around the world. The sources would have also included peer-reviewed articles, recommendations from the WHO and from the lessons learned from the experiences in other jurisdictions.

[134] In the end, Dr. Roussin presented as a dedicated chief public health officer, who as I will repeat later, relied on all of the evidence available, including the scientific

evidence, which despite its evolving and still incomplete nature, I find to be reliable. In doing so, Dr. Roussin drew reasonable inferences and applied common sense.

Lanette Siragusa, Dr. Jason Kindrachuk, Dr. Carla Loeppky, Dr. James Blanchard, and Dr. Jared Bullard

[135] In addition to Dr. Roussin, also subject to cross-examination by the applicants were the above noted Manitoba affiants. While all of these affiants provided important information in their affidavits and in their subsequent cross-examination testimony, their cross-examinations were not on my assessment, as determinative as the cross-examination conducted of Dr. Roussin. Accordingly, while I have fully considered and taken into account their affidavits and the challenges brought to them by the applicants (as highlighted in the oral and written submissions made by the applicants), I propose to deal with my account of their cross-examinations in a more summary fashion.

(ii) Lanette Siragusa

[136] Lanette Siragusa is the provincial lead health service integration and quality chief nursing officer. With Dr. Roussin, she is a principal participant in the Incident Command structure for COVID-19. She explained that her focus is on the clinical side of the province's health system response (and not the public health response). That focus includes all users of the health system, COVID-19 patients and all other patients.

[137] Ms Siragusa was challenged by the applicants with respect to the concerns in numbers and with respect to the degree to which the healthcare system was truly being overwhelmed. In cross-examination, she acknowledged that her team anticipated and planned for 173 ICU beds. Questions were raised with respect to the identified shortage and what were in fact the available beds vis-à-vis the number of patients in the ICU. In

respect of ICU capacity, Ms Siragusa explained that the reported numbers reflected both general ICU and cardiac ICU capacity (which is 14). She noted that this would not normally be an encroachment on cardiac ICU, but in the circumstances, it might have been necessary to encroach depending on the exigencies and priorities. As it relates to the report that medicine beds could be increased by more than 600 beds by November 30, 2020, she did not confirm that staffing was actually in place, but that a plan was in place. Equipment and supplies had been purchased, but it was still left to determine the needs of the patients.

[138] In the context of the pressures on the healthcare system, Ms Siragusa noted that with COVID-19 and the outbreaks, hundreds of staff were off sick. She also explained that even if there were 173 critical care spaces, in her view, the 129 patients represented a system that was at full capacity. Given the shortages of staff, nurses who had never worked in critical care were now being added. Even at 129 patients, Ms Siragusa noted that the staff and the physicians felt exhausted physically, mentally, and spiritually. In other words, the fact that 173 ICU spaces were identified did not necessarily mean that the person power was in place to do what needed to be done in the way it needed to be done. In short, the circumstances in mid-December 2020, were quite dire.

[139] Although Ms Siragusa noted that cancellation of surgeries were required, it was not the public health orders that gave rise to those cancellations. Cancellations were decided by medical clinical experts based on what was happening in the hospitals. The purpose was to provide for greater capacity to respond to COVID-19. In some circumstances, COVID-19 outbreaks occurred in hospitals. In those instances, staff

became infected and had to be isolated, which also contributed to the need to cancel surgeries.

[140] In the end, Ms Siragusa seemed to suggest that throughout the second wave, despite the incredible pressures, the system did not break. It was able to address the increase in usage from COVID-19 patients despite the challenges. She acknowledged that sacrifices were made to elective surgeries and that there would be repercussions from that. Nonetheless, in dealing with both COVID-19 cases and non-COVID-19 related patients, Ms Siragusa allowed that while the service that was provided was not always the "gold standard" it was the best that could be done in the circumstances.

(iii) Dr. Jason Kindrachuk

[141] In his cross-examination, Dr. Kindrachuk agreed with the WHO definition of "herd immunity" suggesting that it is the indirect protection from an infectious disease that happens when a population is immune through vaccination or immunity developed through previous infection. In this context, he acknowledged "in theory" it could be achievable through infection and if and when it occurs, it can slow or stop further spread of the virus in the community. Nonetheless, Dr. Kindrachuk insisted that it is challenging to determine when herd immunity will be reached, or if it can be reached. He noted that the Manaus Brazil study does not suggest that herd immunity is impossible, but it does suggest that there are challenges to trying to determine if and when herd immunity might be reached. He insisted that so far, herd immunity has not been proven for sustained immunity from natural infection.

[142] Dr. Kindrachuk maintained that vaccinations are the best means to achieve herd immunity. It is faster and safer than herd immunity through natural exposure. He noted that one important question relates to whether with natural immunity, such immunity is sustained for a long enough period of time to be able to reach a sustained herd immunity threshold.

[143] When questioned about other measures, he acknowledged that masks, physical distancing and handwashing are useful in preventing COVID-19 transmission as is proper ventilation for indoor spaces.

[144] Dr. Kindrachuk noted that because of the variants of concern, there is now an increased burden of disease on younger ages. They now are more vulnerable than they had been even in early 2020. Nonetheless, it was Dr. Kindrachuk's view at the time of his testimony (at the application hearing), that within a few months, vaccines and restrictions when used together, could turn the tide of the epidemic.

(iv) *Dr. Carla Loeppky*

[145] Dr. Carla Loeppky is the director and lead epidemiologist in the Epidemiology and Surveillance Unit with the Department of Health, Seniors and Active Living. Epidemiology information provides further evidence for the decision makers in respect of public health orders. Such reports were provided to Dr. Roussin, cabinet ministers and the health incident command group.

[146] In her cross-examination, Dr. Loeppky was challenged in respect of the lab reports that her department receives. In that regard, she acknowledged that they do not get information on symptom onset, nothing about pre-existing conditions, nothing about

immune response, nothing about the amount of virus in the sample, and nothing in respect of symptom to time to onset. Similarly, when Dr. Loeppky's department gets a positive test result, it has no idea of how infectious the positive patient is. Indeed, once a positive test is sent to Dr. Loeppky's department, it is a case of COVID-19.

[147] She acknowledges that a clinical evaluation is not provided along with the positive PCR results. Dr. Loeppky's department reports all data to public health, but she acknowledges that report summaries to the media do not report how many test positive results are infectious. Despite that fact, it is Dr. Loeppky's view that the information they provide to the general public strikes a balance with providing important details on a daily basis. She does not think that adding information about infectiousness would be beneficial.

[148] When questioned about clusters of the virus, Dr. Loeppky explained that by definition, a cluster implies transmission. In those instances, one looks for symptomatic people linked by person, place and time — linkages, groupings, dynamics. This would not include positive people whose infectious period had ended months ago. As it relates to clusters in churches, Dr. Loeppky acknowledged that they cannot be certain that persons picked up their infection at church. In a cluster, there is an assumption that others got infected by the index case, although that cannot be certain. In reality, in every cluster, there will be an index case that got the infection from elsewhere and brought it to the location of the cluster.

[149] As it relates to the use of models, Dr. Loeppky acknowledged that models can be a very useful tool to help guide decision making. In the context of the current pandemic,

Dr. Loeppky noted a close correlation between models and what in fact happened in "real life".

(v) Dr. James Blanchard

[150] Dr. James Blanchard was cross-examined as someone who has experience in practicing medicine for two years in northern Manitoba, was a provincial epidemiologist in the 1990s and is currently assisting several countries (India, Pakistan and some African countries) in their COVID-19 response. While one of Manitoba's affiants, he is not currently advising Manitoba in respect of its COVID-19 response or strategy.

[151] In his cross-examination, he acknowledged that COVID-19 has many similarities to the flu, but that there are nonetheless, very important differences. These differences are what is important in understanding the epidemic's potential and control measures.

[152] Certain parts of Dr. Blanchard's evidence were juxtaposed with that of Dr. Kettner, one of the applicants' affiants. The evidence of Dr. Kettner suggests a response to COVID-19 that would be based on local epidemiological analysis and calculations. Dr. Blanchard disagrees with this approach and believes that a rapid and effective response should not be based predominately on what you discover locally. In that regard, Dr. Blanchard takes the position that it is possible to set policies based on what is learned elsewhere in the world and about how the virus behaves elsewhere. He notes that local calculation is not necessary. While it is necessary to understand the local context (for the purposes of the required rapid response), one nonetheless needs to use evidence acquired from elsewhere with respect to issues of transmissibility, fatality, etc.

Dr. Blanchard noted that it can often take too long to do a local analysis and that local information may not be as robust.

[153] It was the evidence of Dr. Kettner that the risk of acquiring the virus in church was low based on numbers of church-based clusters. However, Dr. Blanchard points out that such an opinion ignores the fact that cases were already low in Manitoba during that period when churches were open. Dr. Blanchard maintains that the virus can nonetheless spread in church settings. He also notes that Dr. Kettner appears to have examined the Manitoba experience without considering the potential for transmission if the virus became more widespread. It is in this context that Dr. Blanchard notes that it becomes useful to examine the situation elsewhere by which it is possible to observe what would happen and has already happened if the virus was widespread.

[154] Dr. Blanchard also noted in his evidence that vaccines are a major factor in protecting the vulnerable. He is not of the view that natural immunity protects the vulnerable and indeed points out the obvious, that the vulnerable would have to get sick first.

[155] Dr. Blanchard agrees that we do have to assess the impacts of policy and that public health measures can indeed have negative effects. Still, when a global examination is taken of the current pandemic, it is possible to see what has happened where there has been little control of the pandemic and how the results can often lead to chaos in healthcare systems and accompanying huge economic disruption. This chaos and disruption he points out are usually caused by the severity of the COVID-19 wave and not the public health measures.

[156] Importantly, Dr. Blanchard noted that on the subject of variants, Manitoba was correct to restrict gatherings because of the potential danger of the virus mutate. This concern is well-founded and arose early on because of what happened with similar viruses: SARS and MERS. Both of those viruses had high-fatality rates and there is a concern that the COVID-19 virus could similarly mutate to lead to even greater fatality rates and greater infectiousness.

[157] Dr. Blanchard noted that part of his concern with "focused protection" is that the increased number of actual cases needed to get to herd immunity would accentuate the risk of more mutations along with a much higher level of mortality and morbidity. To permit this to happen according to Dr. Blanchard, particularly before vaccines are distributed and properly in place, would be reckless public health policy.

[158] Dr. Blanchard maintained in cross-examination that transmission is slowed by public health policy and that a strategy to flatten the curve (reduce transmission) can effectively delay naturally-acquired immunity because the plan would be to provide immunity by vaccine instead of by infection (which involves getting sick). It is interesting to note that on the subject of immunity, it was Dr. Blanchard's position that assuming that 70 per cent infection is needed for herd immunity by natural infection, there would be a resulting 12,000 more deaths in Manitoba. In this connection, Dr. Kettner did not consider the impact on morbidity and mortality or the fact that if the policy of herd immunity through natural infection is followed, it would inevitably lead to many more fatalities.

[159] Dr. Blanchard raised serious questions about the impracticality of successfully implementing the approach advocated in the *Great Barrington Declaration*.

[160] As it relates to public health orders and the accompanying restrictions on churches, Dr. Blanchard views Dr. Kettner's approach as unwise policy. According to Dr. Blanchard, the purpose of restricting indoor gathering is to prevent transmission at a population level. That does not mean treating all indoor gatherings equally. While PHOs ought to be equally applied to similar settings, it is necessary for officials to look at how that application may function in terms of an impact on the epidemic more generally and on society. There is a difference between equitable impacts and equality in terms of how measures are applied. Coherence is important and that will involve balancing various considerations and impacts in respect of differing social and economic activities. It is important says Dr. Blanchard that policies are coherent and balanced in order to get the public to comply with the constraints.

(vi) *Dr. Jared Bullard*

[161] In his cross-examination, Dr. Jared Bullard confirmed that he provided advice in respect of Manitoba's public health response to COVID-19.

[162] He acknowledged that PCR tests do not look for the whole virus, but rather parts or fragments of the nucleic acid particular to SARS-CoV-2. He also noted that PCR tests do not detect replicative virus or infective virus and that PCR tests can pick up viral fragments in the back of the nose going back 100 days after the exposure to the virus. He also opined that PCR tests can pick up viral fragments in the back of the nose up to 60 to 90 days after infection by the virus. Also, it is possible for fragments of SARS-CoV-2

to be detected in the nose with a positive PCR test in a person who was never actually infected by the virus.

[163] He confirmed that Manitoba uses PCR test platforms that employ 40 and 45 cycles. The Ct value inversely correlates with the amount of genetic material in the sample tested. The higher the Ct value, the lesser amount of genetic material in the sample. The lower the Ct value, the higher the amount of genetic material in sample. Dr. Bullard pointed out that it is increasingly clear that there is a correlation between Ct value and the infectiousness of a PCR positive sample. Dr. Bullard noted that studies have found that amongst other variables considered, Ct value was significant in predicting infectiousness.

[164] As with Dr. Roussin, when I consider the affidavit evidence of Ms Siragusa, Dr. Kindrachuk, Dr. Loeppky, Dr. Blanchard, and Dr. Bullard (along with their roles described and opinions offered), they all provide credible and reliable assertive foundational evidence for Manitoba's position on its s. 1 defence. When I consider as well that evidence in light of the respective cross-examinations on their affidavits and the sometimes direct and indirect challenges made to the medical and scientific information used by those individual affiants and Manitoba more generally, there is no new or convincing basis that would cause me to conclude that either those affiants or Manitoba did not have the requisite medical and scientific basis upon which to rely for their opinions or in some cases, their actions. More specifically, following their cross-examinations, there is nothing that would persuasively suggest (as the applicants in this case have) that deaths from COVID-19 are not real, that positive PCR cases of COVID-19 are not real,

that Manitoba's modelling projections were proven incorrect and/or that in making the difficult decisions required of them, these public health officials failed to properly balance collateral effects.

B. MANITOBA'S CROSS-EXAMINATION OF SELECTED APPLICANT AFFIANTS

(i) Dr. Jay Bhattacharya

[165] As in the case of Dr. Roussin's cross-examination as conducted by the applicants, Dr. Bhattacharya's cross-examination as conducted by Manitoba represented a significant part of Manitoba's defence of its own position (and a response to the applicants' challenge) respecting the medical and scientific evidentiary foundation upon which Manitoba relies.

[166] Dr. Bhattacharya testified as an expert in health economics. He researches and writes primarily in the field of health outcomes related to various financial parameters in the United States, including Medicare, private insurance coverage, physician spending, the *Affordable Care Act*, NIH funding and the ownership of facilities. Prior to COVID-19, he had done limited work in respect of anything dealing with viruses and much of what he did was connected to economics. He acknowledged in the course of his cross-examination that his knowledge of immunology is based on his studies in medical school and the articles he has since read.

[167] When asked whether COVID-19 poses a risk to health, Dr. Bhattacharya acknowledged that for a segment of the population, COVID-19 may pose a significant risk of death. He also acknowledged that studies throughout the world have demonstrated that actual infections are much higher than known infections since many

people may choose not to get tested or do not recognize the need to be tested. Dr. Bhattacharya accepts that irrespective of the infection/fatality rate, COVID-19 has resulted in a very large number of deaths, including over 3 million worldwide, approaching 600,000 in the United States and as of the earlier part of 2021, 24,000 in Canada.

[168] On the subject of the spread of COVID-19 by individuals who do not display symptoms, Dr. Bhattacharya admitted that an important part of his opinion rests on the proposition that asymptomatic transmission of the virus is very rare. Indeed, it would appear that Dr. Bhattacharya did not distinguish between asymptomatic transmission and pre-symptomatic transmission, instead characterizing both concepts as "asymptomatic transmission". It was Dr. Bhattacharya's position in his second report that the "clear implication of this scientific fact is that many intrusive lockdown policies … could be replaced with less intrusive symptom checking requirements, with little or no detriment to infection control outcomes". Despite being confronted in the course of his cross-examination with commentary from the literature that one would have expected would precipitate more nuance in Dr. Bhattacharya's position, Dr. Bhattacharya continued to insist that asymptomatic transmission, including pre-symptomatic transmission, had an upper limit of 0.7 per cent secondary attack rate.

[169] Dr. Bhattacharya discussed non-pharmaceutical interventions in both his reports and noted that "lockdowns" delay infections into the future rather than preventing them from occurring altogether. He did agree that they can be used to reduce the peak number of infections and also agreed that delaying infections until vaccines can be made and made widely available was an approach that could be followed.

[170] When asked about the harms of "lockdowns" Dr. Bhattacharya acknowledged that the PHOs do not directly cause falling vaccination rates, declines in cardiac care, or declines in cancer screening or elective surgeries.

[171] Dr. Bhattacharya had earlier in one of his reports asserted that social isolation had contributed to a large rise in dementia related deaths. When confronted with the entirety of an article that he cited in his report, Dr. Bhattacharya acknowledged that there were in fact several reasons given for the increase in such deaths.

[172] Dr. Bhattacharya had opined in his reports that because of the social isolation relating to the lockdowns and restrictions, deaths due to suicide would increase. He did acknowledge when confronted with Canadian suicide statistics, that there was a drop in suicides in 2020.

[173] When asked in cross-examination about the reality that in Manitoba, even during the restrictions, persons could always go outside to socialize, walk, exercise, etc., with other persons, he noted that to the extent that those activities were not restricted, Manitoba may not have imposed a true "lockdown".

[174] Again, when speaking to the issue of harms during the lockdown, Dr. Bhattacharya acknowledged that provincial and federal economic policies designed to support workers and any legislation permitting persons to not work if they have particular vulnerabilities, would indeed act to assist in the protection of workers.

[175] On the subject of COVID-19 restrictions in children, Dr. Bhattacharya had earlier noted in his first report, various harms caused by school closures. Dr. Bhattacharya had

apparently not taken into account in his analysis, Manitoba's decision to keep schools open, a decision with which Dr. Bhattacharya indicated he agreed.

[176] Respecting recommendations around religious services and any related restrictions, Dr. Bhattacharya acknowledged in cross-examination that he had failed to note that the WHO has stated that if and where necessary, religious exercises should be conducted remotely and virtually wherever possible.

[177] On the subject of the *Great Barrington Declaration*, he acknowledged that there are significant disagreements about the policies flowing from the *Great Barrington Declaration*. He acknowledges that many scientists around the world do not accept his approach and indeed, feel that it is not appropriate. More specifically and in respect of the concept of "focused protection", Dr. Bhattacharya acknowledges that many of Manitoba's measures are consistent with the concept including the following:

- limiting visitors to PCHs and hospitals;
- limiting staff to work in one PCH;
- limiting the contact with different staff residents;
- PPE for staff;
- protecting the Indigenous population;
- workplace safety laws;
- amendments to employment laws to allow persons to stay home when sick;
- use of human rights laws to protect vulnerable employees;
- telehealth for vulnerable persons; and
- prioritizing health care workers, residents of PCHs and elderly for vaccinations.

[178] In response to questions concerning the *Great Barrington Declaration* and about which measures and how they might be reasonably implemented by government, Dr. Bhattacharya noted that it would be for government to determine how to best implement the principles of the declaration as it was not his role to do so.

[179] Dr. Bhattacharya acknowledged that lockdowns could be used as a last resort and suggested that a jurisdiction could build more hospitals before considering a lockdown. In this regard, he did however acknowledge that hospital capacity is not just a question of space, but also staffing.

[180] Respecting PCR tests, Dr. Bhattacharya noted that the PCR test was never designed to measure infectiousness and that a single PCR test is but a snapshot in time.

[181] I have reviewed carefully the testimony and cross-examination of Dr. Bhattacharya given the importance of his evidence to the position being advanced by the applicants. In considering Dr. Bhattacharya's evidence, the Court must acknowledge without hesitation his undisputed and strong academic credentials as a professor at one of the world's leading universities. Despite those obvious credentials and general qualifications, questions can be and were raised respecting the weight that should attach to some of his opinions and views on the specific topics of immunology and virus spread. On these topics — in the absence of a more consistent and more specialized long-term academic focus and a more obviously rooted practical and clinical experience — some of Dr. Bhattacharya's opinions and views can be justifiably challenged.

[182] Leaving aside the precise nature and depth of Dr. Bhattacharya's practical experience and specific academic focus, it is nonetheless clear that notwithstanding the

support that was mobilized for the *Great Barrington Declaration*, many of Dr. Bhattacharya's opinions and prescriptions on the subject of the preferred and most effective public health responses to the pandemic, are opinions and prescriptions that fall outside the mainstream consensus that has congealed amongst most medical and scientific experts and governments the world over. I address more specifically the serious and relevant questions surrounding the *Great Barrington Declaration* later in this judgment at paragraphs 306-15.

[183] While Dr. Bhattacharya's contrary and in some cases contrarian views are decidedly not a disqualification from an important role in what has to be a continuing and rigorous scientific conversation and method, the views of Dr. Bhattacharya need be seen as views and opinions that are not supported by most of the scientific and medical community currently advising on and formulating the ongoing public health responses to a pandemic that continues to threaten too much of the world's population.

[184] So although Dr. Bhattacharya's opinions have obviously been carefully considered by the Court as part of the applicants' evidentiary foundation generally and as part of the applicants' challenge to the science relied upon by Manitoba more specifically, there was in the end, little in the evidence of Dr. Bhattacharya (or the cumulative evidence of all of the applicants' witnesses) that would cause me to seriously doubt the science upon which Manitoba is relying. Similarly, there is little in Dr. Bhattacharya's evidence that would cause me to doubt as to whether Manitoba has established what it must establish in order to discharge its onus on its s. 1 defence (of the impugned orders) on a balance of probabilities.

(ii) Dr. Thomas Warren

[185] Dr. Warren in an infectious diseases specialist and medical microbiologist, and a physician in Ontario. Amongst other things, he works in a lab that does PCR tests for COVID-19.

[186] Dr. Warren testified that he is seeing the strain on the hospital system such that his own hospital often takes patients from the bigger hospitals in surrounding areas.

[187] Dr. Warren acknowledges that while the research is clear that transmission by asymptomatic patients does occur, it is less likely. He acknowledged that it is difficult to differentiate asymptomatic from pre-symptomatic cases in studies and he further acknowledged that the issue of pre-symptomatic transmission is still an open question and that evidence regarding the impact of pre-symptomatic transmission is not conclusive.

[188] Dr. Warren testified that the PCR test is "a point in time test" that identifies virus by replicating genes, which may be whole virus or fragments. PCR test yields a semi-quantitative figure called Ct, which represents the number of doublings done through replications before a result is obtained. It was his evidence that if he had a patient with a positive test he would follow the government regulations and isolate a patient newly diagnosed with COVID-19, regardless of what the Ct value indicated.

[189] Dr. Warren also testified that when SARS-CoV-2 enters the body, it replicates in a portion of the population, but not in every person.

[190] Dr. Warren also observed that the SARS-CoV-2 virus can enter the nose and not actually infect the person due to prior existing immunity or because it was a small amount

that entered the nose. It is possible in that scenario that the virus could be picked up on a PCR test even though the person was not actually infected with SARS-CoV-2.

(iii) Dr. Joel Kettner

[191] Dr. Kettner is the former CPHO for Manitoba at which time he managed the flu pandemic every year and was also present during the H1N1 virus. Dr. Kettner noted that it was important to stay atop and keep track of trends in case positivity rates, and monitor hospital admissions and the number of people who are succumbing from a particular disease. From his perspective, Dr. Kettner observed that he would want to know much more about the deaths in question and whether COVID-19 played a role. In the context of the H1N1 epidemic, Dr. Kettner explained that he wanted to know how other factors may have resulted in persons coming to the ICU. He explained that this requires a complex surveillance system to look at the reported deaths. He did acknowledge however, that he himself did not get this sort of information when he managed the H1N1 epidemic as they did not have sufficient surveillance capacity at that time. In that connection, he suggested that there is currently more information and technology available, which would be helpful for the surveillance he identified.

[192] Dr. Kettner accepted that it would be unusual for public health officials to look into individual information in order to get the information they need on a population basis. He recognizes that there is indeed a lot of information available from a variety of locations, such as ER, death reports, hospitals, etc.

[193] Dr. Kettner accepted that pandemics are difficult on the public and agreed that COVID-19 is causing a lot of deaths and a lot of people are required to go to hospital. In

the case of his experience with SARS, he noted that it was a serious problem and involved a lot of work in public health notwithstanding that Manitoba never had a case.

(iv) Tobias Tissen

[194] As Manitoba has submitted, Mr. Tissen's testimony and cross-examination establishes that where government does no more than simply make a request for voluntary compliance with public health recommendations, such a simple request is usually not sufficient to ensure the necessary compliance in respect of what is an extraordinary global public health pandemic.

[195] Somewhat defiantly, Mr. Tissen testified in cross-examination that his church has done no more during the pandemic than what it has always done: ask congregants who feel sick to stay at home. A video was played during the course of his cross-examination, which demonstrated that during the pandemic, there has indeed been an overt and apparently defiant resistance to the government's public health messaging. During the video that was played in open court, it was possible to see the church service that was held. Despite the fact that the church service was taking place when the church premises were required to be closed, the images on the video revealed very high numbers (at least 100 or more people) where no physical distancing was taking place, no masks were being used and vocalization and singing dominated much of the service.

[196] As Manitoba has suggested, there are obvious limits to the effectiveness of voluntary requests for compliance.

IX. THE COURT'S ASSESSMENT OF ALL OF THE EVIDENCE FOLLOWING THE CROSS-EXAMINATIONS

[197] Given my findings and determinations clearly set out in the analysis section of this judgment (commencing at paragraph 203), in presenting the above highlights of the cross-examinations, I have commented upon the witnesses' evidence and the challenge to their evidence selectively and only where obviously necessary to understand and support the basis for my findings and determinations made in the context of my legal analysis. As has already been noted and will be further explained later in my analysis, in most instances, where differences in the expert evidence exists, those differences and the evidence underlying those differences do not sufficiently persuade me that the supporting evidence that Manitoba invokes for its position is, in the final analysis, lacking in reliability, credibility or cogency such so as to compromise its s. 1 defence. Indeed, on an "all things considered" assessment of the evidence, I have no difficulty concluding that even where Manitoba's response to the various waves of the pandemic could be properly criticized in hindsight as too slow and not sufficiently broad, the restrictions that were eventually imposed represent public health policy choices rooted in a comparatively well-accepted public health consensus. As Dr. Roussin noted, the impugned restrictions were generally consistent with measures seen across most of Canada and the rest of the world.

[198] I appreciate that specific aspects of Manitoba's evidentiary foundation can be parsed and challenged based on what in some cases may be alternative readings or interpretations of the evolving science. That said, 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.

[199] In different ways, depending upon their role, position or expertise, all of Manitoba's experts have persuasively conveyed and supported the essence of Manitoba's position in this case. It is a position that acknowledges that pandemics are indeed extremely difficult on a population. It is a position that also convincingly contends that COVID-19 has caused serious illness and death, particularly in older adults, but also, in vulnerable populations of all ages. Based on s. 67 of ***The Public Health Act***, the CPHO has been delegated the onerous and formidable task of implementing measures (with the approval of the minister) to prevent or lessen the danger to public health posed by COVID-19. By necessity, these measures will include that which will prevent exponential growth of the virus from overwhelming our limited health care resources, while trying to minimize the hardship and disruption that these restrictions impose on our day-to-day lives. As all the relevant witnesses have acknowledged, it is an awesome challenge to find the requisite

balance. Despite some of the contrary evidence and cross-examination, the search for and calibration of that balance is not necessarily amenable to a sterile quantitative metric.

[200] When I consider the cross-examination of Manitoba's experts as conducted by the applicants, I certainly note and accept those points where valid and reasonable disagreement can be stipulated as it relates to what might still be some of the evolving science. That said, in the absence of convincing evidence of any obvious or definitively faulty science being applied by Manitoba (and in this case, I have seen none), Manitoba's own evidence convinces me that it is on solid ground in its s. 1 defence of measures and restrictions, which I repeat, represent the public health consensus and approach followed across most of Canada and the world.

[201] As it relates to the specific measures taken and the public health choices made, my consideration and assessment of the cross-examination of the witnesses on both sides (but particularly the challenge to those Manitoba experts) has been conducted mindful of Manitoba's solid reliance on what I find is credible science and also, mindful of what Manitoba has consistently argued as part of its theory. 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".

[202] While I will provide my detailed legal analysis and explain my application of the governing law (and the related legal tests) in the next section of this judgment, 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.

X. ANALYSIS

[203] In the analysis that follows, I propose to address and explain my determinations with respect to the three categories of issues that present in this case: the ***Charter*** issues, the administrative law issue, and the division of powers issue.

A. *CHARTER* ISSUES

Issue #1: ***Did the restrictions on private gatherings, public gatherings or places of worship imposed in Orders 1(1), 2(1), 15(1) and 15(3) of the Public Health Order dated November 21, 2020, as subsequently amended on December 22, 2020 and January 8, 2021, limit rights under ss. 2(a), 2(b) or 2(c) of the Charter?***

Section 2(a) of the Charter

[204] Section 2(a) of the ***Charter*** reads as follows:

> **Fundamental Freedoms**
> Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion.

[205] Freedom of religion under the ***Charter*** contemplates the right to entertain religious beliefs, to declare those beliefs openly and without fear of hindrance or reprisal and to manifest religious belief by worship and practice or by teaching and dissemination. Section 2(a) is engaged when an impugned law or state conduct interferes with the ability to act in accordance with a sincerely-held religious belief or practice, in a manner that is more than trivial or insubstantial. Freedom of religion includes the ability of religious adherence to come together and create cohesive communities of belief and practice (see ***R. v. Big M Drug Mart Ltd.***, [1985] 1 S.C.R. 295, at 336 (paragraph 94); ***Law Society***

of British Columbia v. Trinity Western University, 2018 SCC 32, at paragraphs 62-64).

[206] Manitoba concedes and I find that the restriction on in-person religious gatherings as found in the impugned PHOs is a *prima facie* limit on freedom of religion that must be justified under s. 1 of the ***Charter***.

Section 2(b) of the Charter

[207] Section 2(b) of the ***Charter*** reads as follows:

> **Fundamental Freedoms**
> Everyone has the following fundamental freedoms:
> . . .
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[208] Freedom of expression protects all nonviolent activities that convey or attempt to communicate meaning. A law or government action that has the purpose or effect of interfering with such activity is a *prima facie* interference with freedom of expression. Section 2(b) protects listeners as well as speakers (see ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927, at 968-72; ***Beaudoin***, at paragraphs 169-70).

[209] Although Manitoba notes that the restrictions on religious gatherings that flow from the impugned PHOs do not have the purpose of restricting expression, Manitoba does concede that they have that effect. Manitoba similarly concedes that the restriction on the size of public gatherings could have the effect of limiting the applicant MacKay's freedom of expression. Manitoba notes that while MacKay was entirely free to protest

the COVID-19 measures and convey any message at a protest rally, the size of those groupings was limited (see ***Beaudoin***, at paragraph 169).

[210] To confirm, Manitoba concedes and I find that there is as argued a *prima facie* interference with freedom of expression that must be justified under s. 1 of the ***Charter***.

Section 2(c) of the Charter

[211] Section 2(c) of the ***Charter*** reads as follows:

> **Fundamental Freedoms**
> Everyone has the following fundamental freedoms:
>
> . . .
>
> (c) freedom of peaceful assembly.

[212] Section 2(c) of the ***Charter*** guarantees the freedom of peaceful assembly. As noted by counsel in the present case, there is relatively little jurisprudence interpreting this provision. The protection contemplates what is inherently a group activity (see ***Beaudoin***, at paragraph 173).

[213] The jurisprudence confirms that the freedom of assembly and association are by definition, collective and public in nature. Section 2(c) guarantees access to and the use of public spaces, including parks, squares, sidewalks and buildings subject to reasonable regulations governing the use of those places and having regard to public health and safety (see ***Hussain v. Toronto (City)***, 2016 ONSC 3504, at paragraphs 38 and 44). As the freedom of assembly can often be integral to freedom of expression, issues surrounding peaceful assembly are often subsumed under the freedom of expression and the infringement can be often resolved under s. 2(b) (see ***British Columbia Teachers' Federation v. British Columbia Public School Employees' Assn.***, 2009 BCCA 39,

at paragraph 39). Again, to the extent that the impugned PHOs place limits on expression by prohibiting public gatherings to protest or comment on important matters of public interest, Manitoba concedes that there is a *prima facie* limit on free assembly. Manitoba is less willing to concede the applicants' claim that restricting gatherings in places of worship violates freedom of assembly by preventing church services, bible studies and prayer meetings. It is Manitoba's position that this is arguably better addressed directly under the freedom of religion. I agree.

[214] Despite the above qualification, Manitoba does concede and I so find that the *prima facie* limits the PHOs place on the freedom of religion, expression and assembly, require justification under s. 1 of the ***Charter***.

[215] With Manitoba's concessions and my findings that the impugned PHOs *prima facie* limit aspects of the freedom of religion under s. 2(a), freedom of expression under s. 2(b), and freedom of peaceful assembly under s. 2(c) of the ***Charter***, further analysis will have to be conducted with respect to these breaches pursuant to the ***Oakes*** test and the justificatory framework found under s. 1 of the ***Charter***. Prior to proceeding with that analysis, I will now address what the applicants contend are the two other alleged ***Charter*** breaches respecting ss. 7 and 15.

[216] As noted, the applicants raised two other alleged ***Charter*** breaches. Those issues were reduced to the following questions:

- Did the restriction on religious services at places of worship or the restriction on gatherings at private homes in the impugned PHOs interfere with the right to liberty or security of the person contrary to the principles of fundamental justice pursuant to s. 7 of the ***Charter***?

- Did the closure of places of worship in the impugned PHOs discriminate on the basis of religion contrary to s. 15 of the ***Charter***?

Preliminary Matter Raised by Manitoba Concerning the Alleged ss. 7 and 15 Breaches

Given Manitoba's concession respecting the violation of s. 2 and given the necessity of its s. 1 defence, should this Court consider and adjudicate the alleged ss. 7 and 15 breaches or as Manitoba suggests, is it unnecessary to do so?

[217] As a preliminary matter, before addressing the applicants' substantive arguments respecting the alleged breaches of ss. 7 and 15 of the ***Charter*** as identified above, the Court is required to determine whether to cede to Manitoba's position that in the circumstances of this application, the Court ought not to consider the alleged s. 7 and s. 15 breaches because "it is unnecessary to do so".

[218] It is the position of Manitoba that the impugned PHOs did not violate ss. 7 or 15 of the ***Charter***. However, Manitoba goes further and insists that it is unnecessary for the Court to address or decide the s. 7 and s. 15 issues (and it submits that this Court ought not to do so) because Manitoba has conceded the violations of s. 2 under the ***Charter*** and it says that the factual matrix underpinning those other ***Charter*** claims (i.e., ss. 7 and 15) is largely indistinguishable from the primary argument centered on the freedoms protected in s. 2. Manitoba contends that "the justification under s. 1 will be identical regardless of the ***Charter*** breach alleged".

[219] In addition to the above, Manitoba takes the position that the fact that a case was fully argued is insufficient to warrant deciding difficult ***Charter*** issues and laying down guidelines with respect to future cases simply because it might be "helpful" to do so (see ***Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)***,

[1995] 2 S.C.R. 97, at paragraph 13). Manitoba emphasises that there are many examples of cases in which the Supreme Court of Canada has declined to determine whether a specific ***Charter*** provision was breached, having already found a violation of a different ***Charter*** provision. As Manitoba points out, this includes cases where the court declined to address s. 7 or s. 15 because s. 2 or another ***Charter*** provision had been violated (see ***Carter v. Canada (A.G.)***, 2015 SCC 5, at paragraph 93); ***Devine v. Quebec (A.G.)***, [1988] 2 S.C.R. 790, at paragraph 31; ***R. v. Ladouceur***, [1990] 1 S.C.R. 1257, at 1278; and, ***R. v. Taylor***, 2014 SCC 50, at paragraph 36).

[220] Manitoba draws an analogy to the judgment in ***Law Society of British Columbia v. Trinity Western University***. In that case, the Law Society of British Columbia refused to accredit the law school because of its religious covenant prohibiting same-sex intimacy. While the case obviously touched freedom of religion, it also had implications for ss. 2(b), 2(d) and 15 of the ***Charter***. In that case, the court determined that the factual matrix underpinning the other ***Charter*** claims was largely indistinguishable and the primary argument centered on freedom of religion. In other words, whether the claim was articulated in terms of freedom of religion, expression, association or protection from discrimination, the limit was subject to the same proportionality analysis. Manitoba is insistent that the same analysis applies in the present case.

[221] In urging the Court not to consider or decide ss. 7 or 15 issues, Manitoba points to the fact that the applicants assert that the impugned PHOs interfere with liberty and security of the person by restricting the liberty of religious officials to hold religious services by regulating access to private homes. Manitoba also emphasizes that the

applicant Tissen asserts that restricting his ability to worship at church while permitting liquor and grocery stores to remain open, arbitrarily limits his security of the person. Manitoba's submission is that these allegations essentially duplicate the claims under ss. 2(a) and 2(c). Further, Manitoba maintains that as the applicants' claim that limiting home gatherings arbitrarily interferes with liberty and security of a person, the government's justification under s. 1 will be identical. Manitoba says that whether a law limits one or more ***Charter*** rights does not change the proportionality analysis under s. 1.

[222] In considering Manitoba's position, I have taken note that in ***Beaudoin***, a case similar to the present case, the government also conceded a violation of s. 2 ***Charter*** rights. In ***Beaudoin***, Hinkson C.J. declined to address s. 7.

[223] In summary, as it relates to the applicants' arguments concerning ss. 7 and 15, Manitoba urges this Court to conclude that this case is best analyzed under the rubric of s. 2 of the ***Charter*** and more specifically (given Manitoba's concession that s. 2 was breached), the framework of s. 1 which will determine whether the acknowledged limitations are reasonable and justified.

[224] On this preliminary question as to whether or not the Court should address and decide the applicants' ss. 7 and 15 arguments, I have given the position of Manitoba full consideration. I have also noted the applicants' strenuous objection to the position of Manitoba and to the prospect of the Court sidestepping what the applicants submit is still an essential part of its constitutional challenge.

[225] This Court certainly accepts and has affirmed the general proposition that courts should not make unnecessary constitutional pronouncements or "decide issues of constitutional law that are not necessary to the resolution of the matter that is before the court in a given case" (see ***R. v. Assi***, 2021 MBQB 44, at paragraph 13). That said, in the unique circumstances of this case, given the distinct protections that fall within ss. 7 and 15, given the distinct legal tests applicable to each section and given the specifically adduced evidentiary foundation produced through some of the individual applicants, it is not obvious that on this constitutional challenge and in the context of the impugned and unprecedented emergency restrictions attaching to fundamental freedoms, that the Court's proper response is to avoid what are not obviously "unnecessary constitutional pronouncements".

[226] Manitoba in no way concedes any infringements as having taken place respecting ss. 7 and 15. While Manitoba's defiant position following a more full analysis may very well be justifiable on the facts and the applicable law, in a case like the present one however, where the legal analysis — despite the similarities — may still be somewhat different (with possible implications for the s. 1 defence), Manitoba's submission does not convincingly or inexorably lead to the conclusion that the Court's consideration of the alleged ss. 7 and 15 breaches is superfluous or unnecessary for the resolution of the matters before me.

[227] Given the similarities between aspects of some of the factual and legal determinations that would have to be made in a s. 7 analysis with those that have to be made under s. 1, it is not clear that any unfavourable (to Manitoba) factual findings and

legal determinations that could be made in a s. 7 analysis might not have a negative impact on Manitoba's s. 1 defence. In that connection, to preempt that possibility, given the specific foundational evidence that has been adduced by the applicants, seems neither fair nor just.

[228] I express as well, my discomfort at preempting the ss. 7 and 15 arguments and determinations simply because Manitoba has necessarily conceded the identified infringements under s. 2. In my view, analytically, it does not follow from such a concession in the unique and particular circumstances of this case that the applicants will get all of the determinations their position deserves in the context of what Manitoba proposes as a sole analysis under the s. 1 justificatory framework.

[229] Having rejected Manitoba's position on this preliminary matter, the Court will accordingly consider and adjudicate the applicants' challenge pursuant to ss. 7 and 15. It should be clear that the Court's reasons for doing so are not only because (as Manitoba has warned against) those issues were fully argued by the applicants or simply because it might be "helpful" to lay down guidelines respecting difficult future ***Charter*** issues. Rather, the Court's decision to fully consider the ss. 7 and 15 arguments in this unprecedented constitutional challenge is grounded in the reality that these challenges represent in the present case, distinct questions that have to be properly adjudicated to fully and fairly resolve this case in a manner that best legitimizes the result.

[230] Manitoba has not persuaded me that in the present case, it is inappropriate to consider ss. 7 and 15 of the ***Charter*** because "it is unnecessary to do so". Accordingly, I set out below my analysis respecting the issues relating to those alleged breaches.

Issue #2: ***Did the restriction on religious services at places of worship or the restriction on gatherings at private homes in the impugned PHOs interfere with the right to liberty or security of the person contrary to the principles of fundamental justice pursuant to s. 7 of the Charter?***

[231] Section 7 of the ***Charter*** reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[232] To establish a violation of s. 7 of the ***Charter***, the onus is on the claimant to prove that: 1) the law interferes with or deprives them of their right to life, liberty or security of the person; and 2) such deprivation is not in accordance with the principles of fundamental justice.

[233] As it relates to the liberty interest in s. 7, the applicant Ross MacKay argues that the orders which not only closed all churches and stores (except the limited few that sold "essential" items), but also, prohibited him from having visitors to his home, visiting anyone else at their homes or protesting, were orders whose relevant provisions all infringed his s. 7 right of liberty. Mr. MacKay submits that his movements have been severely curtailed and that these restrictions have had the effect of treating him and all Manitobans as though they were "under house arrest".

[234] In connection with the above restrictions identified by Mr. MacKay, the applicants invoke the Supreme Court of Canada judgment of ***R. v. Heywood***, [1994] 3 S.C.R. 761, at 789 (paragraph 45), where the court held that state prohibitions affecting one's ability to move freely violate liberty and security interests, especially when non-compliance with those prohibitions could result in a jail sentence. In the present case, the applicants

contend that the PHOs have completely prohibited the applicants' ability to move freely, and the consequences of violating those PHOs include a fine, imprisonment, or both.

[235] The applicants also rely upon the Supreme Court of Canada's judgment in ***Carter,*** at paragraph 62, wherein it was held that the s. 7 right to liberty also protects a sphere of personal autonomy involving "the right to make fundamental personal choices free from state interference" and "inherently private choices" that go to the "core of what it means to enjoy individual dignity and independence". It is the position of the applicants that the prohibitions on gathering at private homes, to protest, or for in-person worship, restrict the right of participants to make personal choices free from state interference.

[236] In making the arguments they make concerning the infringements on the liberty right under s. 7, the applicants forcefully assert that the risk of severe illness or death from the virus for persons under 70 years of age is less than influenza. They insist that in a free society, the PHOs' "oppressive overturning of fundamental rights and freedoms" in such circumstances, particularly in light of the scientific evidence Manitoba relies upon, cannot be justified. Put simply, it is the applicants' position that COVID-19 is not a sufficient threat to most of the populace such that the state can prevent a free people from the exercise of their fundamental right to gather and worship if they choose. The applicants go further and say that the PHOs' restrictions on gathering outdoors, for corporate worship and home worship are nothing short of "tyrannical".

[237] Respecting the alleged breaches to the right to security of the person, the applicants have argued that "security of the person" is generally given a broad interpretation and has both a physical and psychological aspect. In that regard, the

applicants submit that the right to security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" (see ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 S.C.R. 519, at paragraph 136). The applicants also emphasize that security of the person is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering (see ***New Brunswick (Minister of Health and Community Services) v. G. (J.)***, [1999] 3 S.C.R. 46, at paragraph 56).

[238] In the present case, the applicants, Mr. MacKay and Mr. Tissen, provided evidence describing how they have suffered psychologically throughout these lockdowns. For his part, Mr. MacKay described how he has been "devastated" by the resulting stress from the restrictions. Mr. Tissen described a similarly painful mental suffering exacerbated by the fact that as pastor, the restrictions have prevented him from carrying on his biblical duties and from caring for the mental and spiritual health of his congregation who have been prevented from gathering to worship.

[239] The applicants also argue that the above s. 7 rights and the alleged breaches of them involved an interference or deprivation not in accordance with the principles of fundamental justice. In that regard, they submit that the restrictions were arbitrary, overbroad and grossly disproportionate in connection to their objective.

[240] Concerning arbitrariness, the applicants argue that in the absence of some justification in the medical evidence, the closure of gatherings for worship and the restrictions on outdoor and private indoor gatherings (when gatherings indoors at big box

stores, grocery stores, liquor stores, and cannabis stores is permitted) is clearly arbitrary. The applicants insist that no compelling evidence has been provided so as to connect the ban/restrictions to the purpose of preventing the overwhelming of hospitals, reducing COVID-19 spread and reducing mortality. It is the position of the applicants that Manitoba is unable to prove that unlike so many secular activities, religious worshipping presents an unacceptable public health risk such that it must be restricted as it has. The applicants submit that the same argument applies to at-home and outdoor gatherings. Therefore say the applicants, the PHOs are arbitrary.

[241] As it relates to overbreadth, the applicants submit that the stated purpose of the PHOs is to preserve hospital capacity, prevent morbidity and prevent community spread. However say the applicants, by prohibiting in-person worship, outdoor gatherings of more than five people and visitors to private homes, the scope of the PHOs is too wide. The applicants repeat that there is no compelling scientific evidence about the spread of COVID-19 outdoors, or evidence that COVID-19 is more transmissible at a place of worship as opposed to a grocery, big box, liquor, or cannabis store. The applicants maintain that the class of persons to whom these PHOs apply is too wide and that they apply to every Manitoban notwithstanding the fact that the applicants say, the science is clear that for people under the age of 65, there is a 99.97 per cent chance of recovery if and when COVID-19 was to strike.

[242] In arguing overbreadth, the applicants have submitted that the PHOs should be targeted to immunocompromised populations and elderly people who are at the greatest risk of the disease. They say that the science does not support the notion that COVID-19

is transmissible through asymptomatic people. Therefore say the applicants, there is no valid medical or scientific reason to prevent healthy, asymptomatic people from gathering at churches, outdoors or in their homes. According to the applicants, these non-infectious people do not present a risk of spreading COVID-19 to anyone and therefore the PHOs as implemented, are overbroad.

[243] Respecting gross proportionality, the applicants use as the requisite and appropriate reference point, what are in the present case, the objectives of the PHOs, which are to reduce the spread of COVID-19, preserve hospital capacity and reduce morbidity. Given the restrictions on freedoms as contained in the PHOs, the applicants say that the physical and psychological damage done to Manitobans is grossly disproportionate to the potential benefits of the PHOs. While the applicants emphasize their position on the potential "harms" of the PHOs in their s. 1 argument, they also at this stage (in respect of gross disproportionality) cite a University of British Columbia study that highlighted the self-reported increase in suicidal thoughts and increased substance abuse among residents of Manitoba and Saskatchewan in 2020. The applicants reference what they describe as an "explosion in overdoses" in Canada and the overall damage to mental health flowing from forced isolation from family and friends.

[244] It is part of the applicants' theory generally and their position more specifically on gross proportionality that one of the troubling aspects of the PHOs is that the very act of keeping families isolated to their own houses, actually increases the risk of death to elderly family members who have to spend more time with adolescents and younger adults who the applicants suggest might be carrying COVID-19 into the house.

[245] I have considered carefully the applicants' position and arguments respecting s. 7 of the ***Charter***. For the reasons that follow, I have determined that the impugned PHOs do not breach s. 7 of the ***Charter*** as alleged by the applicants.

Did the Impugned PHOs Limit Liberty or Security of the Person?

[246] The s. 7 rights to liberty and security of the person were discussed in ***Carter*** (at paragraph 64):

> Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" (*Rodriguez*, at pp. 587-88, per Sopinka J., referring to *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 58; *Blencoe*, at paras. 55-57; *Chaoulli*, at para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.). While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together.

[247] It is clear that the right to liberty protects the freedom from physical restraint and the autonomy to make fundamental personal choices. I am in agreement with Manitoba's submission that this does not mean however that a limit on a fundamental freedom protected by s. 2 is sufficient to establish a violation of liberty under s. 7. Manitoba is on solid ground when it argues that these are distinct ***Charter*** rights. In this regard, Manitoba relies upon ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, at paragraph 80, wherein the Supreme Court of Canada cautioned that courts must be careful to not conflate liberty or security of the person with dignity, self-worth and emotional well-being. The risk being that s. 7 would then become as Manitoba

suggests, all inclusive and that there would be "serious reason to question the independent existence in the ***Charter*** of other rights and freedoms such as freedom of religion and conscience or freedom of expression."

[248] Accordingly, if the right to liberty protects the freedom from physical restraint and the autonomy to make fundamental choices, and as explained above, it is necessary to remain mindful of the need to not conflate liberty or security with dignity, self-worth and emotional well-being, it is also instructive to note what must be demonstrated to establish a breach of security of the person. In that regard, in order to establish a breach of security of the person, the claimant must provide evidence of serious psychological harm caused by the state that goes beyond the ordinary stress and anxiety that a person might suffer as a result of state action (see ***Blencoe***, at paragraphs 81–86).

[249] At its core, the applicants in the present case argue that the impugned PHOs restrict the liberty and security of the person in two ways. First, they say that the measures restrict the liberty of religious officials to hold religious services. Second, the applicants say that the restrictions regulate "access to and from homes treating Manitobans as though they are criminals and under house arrest".

[250] Manitoba responds to the first point by readily conceding that religious officials were in fact prohibited from holding religious services in person at a place of worship for a period of 13 weeks. Nonetheless, it is Manitoba's position (a position that I accept) that the restriction on a freedom to engage in religious practice is properly addressed by s. 2(a) rather than s. 7 of the ***Charter***. On the second point, Manitoba correctly insists that at no time were Manitobans treated as criminals under house arrest. Manitoba points

out that there has never been an order requiring persons to remain in their homes or to refrain from seeing friends and family in small groups. Although the impugned PHOs did limit gatherings inside homes while these orders were in effect, it was still possible for persons to visit outside of a residence as long as they complied with gathering size limits. While Manitoba acknowledges that no one would question the emotional and psychological benefit of meeting in person compared to a more remote contact, Manitoba also submits (and I agree) that there is no evidence of the kind of serious psychological harm or suffering as set out in ***Blencoe***, at paragraph 80. This is particularly so where, as Manitoba has emphasized, the impugned restrictions were time limited to 13 weeks.

[251] I note as well that the PHOs did not preclude a person from entering another private residence for the purposes of providing health care (which Manitoba emphasizes was not limited to physical care), personal care, tutoring, or other educational instruction or to respond in cases of emergency. Accordingly, a minister from a religious institution was still able to attend to an adherent's home for any of those identified purposes — including one-on-one counselling for a mental health purpose or personal care purpose or, to provide religious education. I further note that there was an exception provided in Orders 15 and 16, which permitted a place of worship to continue to be used for the delivery of health care, child care or social services.

[252] For the reasons provided, the impugned provisions do not limit liberty or security of the person as those rights have been explained in the jurisprudence. To the extent that any of the PHOs interfere with the applicants' activity, that interference is best

understood and considered in the context of Manitoba's s. 1 defence resulting from its concession of the s. 2 breaches.

[253] Having made the determination I have that the impugned PHOs do not limit liberty or security of the person as defined in the jurisprudence, my analysis respecting s. 7 could conclude here as the applicants' challenges on this issue cannot now succeed. However, in the event that I am in error in respect of this first determination and in order to provide a complete analysis, I will proceed to consider what would have been the next relevant question in the s. 7 analysis.

Does any Deprivation of s. 7 Comport with the Principles of Fundamental Justice?

[254] It is well established that a law will be contrary to the principles of fundamental justice if the infringement of or interference with the s. 7 rights is arbitrary, overbroad or grossly disproportionate.

[255] For the reasons that follow, I am not persuaded that had any interference with the s. 7 rights occurred, that they were arbitrary, overbroad or grossly disproportionate. Instead, I am of the view that any restrictions with respect to those rights were and are in accord with the principles of fundamental justice.

Are the Impugned PHOs Arbitrary?

[256] A law is arbitrary when there is no rational connection between the limit on the right and the object of the law. An arbitrary law is one that limits rights but is not capable of fulfilling or in any way furthering the objectives of that law (see ***Carter***, at paragraph 85; ***Canada (A.G.) v. Bedford***, 2013 SCC 72, at paragraph 111).

[257] In the present case, it is clear from the evidence that the object of limiting gatherings (either in public places, private residences or places of worship) is to prevent, reduce or eliminate the likelihood of spreading COVID-19 in order to minimize death and serious illness. The evidence as I have accepted it, suggests persuasively that prolonged close contact, especially indoors, transmits SARS-CoV-2. As will be discussed later in the s. 1 analysis, the rational connection between the restrictions on in-person gatherings and their object of decreasing the likely spread of COVID-19 has been set out convincingly by Manitoba. It is not reasonable to suggest that individual rights in this case have been limited arbitrarily.

Are the Impugned PHOs Overbroad?

[258] Overbreadth can be seen as closely related to arbitrariness. A law is overbroad when it targets some conduct that appears to have no relation to its purpose. While an impugned order may not be arbitrary in all of its applications, it may nonetheless be arbitrary in part (see ***Carter***, at paragraph 85; ***Bedford***, at paragraph 12).

[259] In the present case, I find that the restrictions on gathering do not encompass conduct that poses no risk of transmission or has no relation to the object of the orders in question. I accept Manitoba's position that it is impossible to rule out the transmission at gatherings. Based on the evidence, this is so because asymptomatic and pre-symptomatic individuals may unknowingly transmit the virus to unsuspecting persons.

[260] Manitoba is correct when they point out that the applicants appear to have misconstrued the principles of arbitrariness and overbreadth when they compare the impugned PHOs to other orders (for example, those orders dealing with retail

businesses). In that regard, arbitrariness and overbreadth focus on the link between the impugned measures and the objective of those measures. For the purposes of s. 7, it is irrelevant to compare the impugned PHOs to other restrictions. The fact that some places of business are allowed to remain open (subject to various restrictions) does not in any way negate the rational connection that exists between the impugned PHOs and their object. Further, the PHOs in question restrict similar types of gatherings whether religious or secular in nature such as movie theatres, plays and/or concerts. Indeed, the secular activities are also protected by s. 2(b) of the ***Charter***. Insofar as retail locations are subject to different restrictions, it is as Manitoba persuasively has argued, owing to the fact that people are not gathering in those locations for a long period of time or in the same way (see also ***Beaudoin***, at paragraphs 228-30).

Are the Impugned Orders Grossly Disproportionate?

[261] No interference with a s. 7 right is permissible where it is grossly disproportionate to the object of the measure. This principle presents (for any party raising gross disproportionality), a very high bar and it applies only in extreme cases where the alleged interference or deprivation is totally out of sync with the objective. In ***Carter***, at paragraph 89 and ***Bedford***, at paragraph 120, it is confirmed that a determination of gross disproportionality requires a measure that is entirely outside the norms accepted in our free and democratic society. The Supreme Court of Canada provided by way of an example the situation where life imprisonment existed as a potential sanction for spitting on the sidewalk.

[262] In the present case, to determine whether any deprivation of a s. 7 right is grossly disproportionate to the object of the measure, the Court is required to consider the significance of the limitation on the s. 7 rights (the gathering at homes, public places and in-person religious services) and determine if the deprivation is so extreme that it is totally out of sync with the critical importance of the public health objective, which is to prevent death, serious illness and the overwhelming of the healthcare system. In my view, the applicants have not satisfied me that the interference with or the deprivation of any s. 7 rights in the present case represents an interference or deprivation that is grossly disproportionate and/or entirely outside the norms accepted in our free and democratic society. I make that determination, mindful of, amongst other things, the following convincing factors that Manitoba has invoked in support of its position:

- Manitoba has never denied, minimized or questioned the importance of gathering — including for faith-based communities for whom communal worship is central to their religious beliefs. Manitoba has also never questioned the importance of physical contact and socializing as part of the human experience in a community;

- In none of the impugned PHOs were religious services prohibited. They could continue to be offered remotely. Manitoba accepts however, that for some, a remote religious service is not an adequate substitute for in-person religious services, which is at the core of their beliefs;

- Since December 11, 2020, religious services could also take place in person, outside in motor vehicles, in accordance with Order 2(2);

- Funerals, weddings, baptisms or similar religious ceremonies could take place subject to a limit of five persons other than the officiant (Order 15(3) or 16(3));

- The impugned PHOs did not prevent a person, including a religious official, from entering a private residence for the purpose of providing mental health or spiritual care such as counselling (Order 1(2)(a)). Counselling and addiction support could also be delivered remotely to individuals or groups;

- Tutoring or other individualized educational instruction was also able to be provided. This was not restricted to secular education. The gathering limits did not prevent a person from entering a private residence to provide religious tutoring or other religious educational instruction (Order 1(2)(d)). Religious education could also be delivered to groups remotely;

- The impugned PHOs did not prevent places of worship from being used by a public or private school (including for religious education) or for the delivery of health care, child care or social services (Order 15 and 16);

- To the extent that one of the applicants raises concerns about summer bible camps, the impugned PHOs did not take effect until November 22. Throughout the summer months until November 12, 2020, the public health orders allowed summer camps as long as each group had up to a maximum of 50 children and that there were no joint activities between different groups. It was only the overnight camps that were prohibited; and

- Places of worship were treated in the same way as similar indoor gatherings involving prolonged close contact, such as movie theatres, plays, concerts, sporting events. As earlier indicated and as Manitoba has conceded, these activities are also protected under s. 2 of the ***Charter***.

[263] Manitoba readily concedes in its submissions that the impact on rights were surely difficult for the citizens of Manitoba — whether they be religious or secular. Nonetheless, they insist and I agree that the nature and significance of that impact is not such that it translates into a determination of gross disproportionality.

[264] Separate from the earlier noted factors that Manitoba submits are germane in assessing the significance of the deprivations in question, Manitoba also argued that the following considerations are relevant in establishing that the restrictions were not disproportionate or totally out of sync with the overwhelming importance of the public health objective animating the impugned orders:

- The CPHO did not impose the stricter restrictions on gatherings and in-person services at places of worship until Manitoba started to experience exponential growth of the virus that put lives at risk and the healthcare system in jeopardy;

- In the fall of 2020, the situation in Manitoba was serious. By November 2020, community spread of the virus was rampant. As of November 10, Manitoba had the highest per capita rate of active COVID-19 cases in Canada. The test positivity rate had soared to over 10.5 per cent provincially suggesting province-wide transmission. Newly reported cases were doubling every two weeks, which also translated into a large increase of severe cases. It was becoming an increasing challenge to conduct contact tracing (see the evidence of witnesses Dr. Brent Roussin and Dr. Carla Loeppky);

- COVID-19 related deaths and hospitalizations were rapidly escalating. Despite significant efforts to redeploy staff to maximize hospital and ICU capacity, acute care capacity was being overwhelmed (see the evidence of witness Lanette Siragusa). Epidemiological modelling projected that Manitoba was on the verge of exceeding its hospital and ICU capacity. Indeed, on November 10, 2020, there were only eight ICU beds left in Manitoba. It was projected that COVID-19 patients would require 100 per cent of Manitoba's ICU beds by November 23 and hospital capacity would be exceeded by mid-December unless action was taken;

- On December 10 - 11, Manitoba hit what was up until that point, its peak of hospitalizations with 129 patients in ICU and 388 hospitalizations due to COVID-19. This exceeded the province's ICU capacity, however, Manitoba did manage to address the situation with additional resources (see the evidence of witness Lanette Siragusa);

- Concerns remained that exceeding hospital and ICU capacity could lead to more preventable deaths and adverse health outcomes for both COVID-19 patients and other patients who may have been unable to access timely care, as was being experienced in other parts of the world where COVID-19 was hitting hard;

- Faith-based gatherings at places of worship involved prolonged contact in an indoor setting, which could be seen to heighten the risk of virus transmission. The gatherings often involved activities such as singing and ceremonial rituals that also heightened the risk of spread. There had already been clusters and outbreaks of COVID-19 at faith-based gatherings in Manitoba, which was consistent with the experience in other jurisdictions in Canada and elsewhere (see the evidence of witnesses Dr. Brent Roussin, Dr. Carla Loeppky and Dr. Jason Kindrachuk. See also ***Beaudoin***, at paragraphs 151-152, 226, 233, and 238 -39);

- Gatherings in homes was also deemed a significant source of transmission due to prolonged contact in close proximity;

- The measures implemented were intended to protect vulnerable groups who are seen as more prone to serious outcomes (death or hospitalization) when infected by COVID-19. This group of persons includes those over the age of 60 and people who may have a variety of underlying conditions — underlying conditions which are not limited to those over 60. It is noted that approximately one-third of the hospitalizations and 44 per cent of COVID-19 patients admitted into ICU have been under the age of 60 (see the evidence of witness Dr. Carla Loeppky). Manitoba notes that as of February 22, 2021, more than 37 per cent of all severe outcomes (hospitalizations, ICU cases and deaths combined) in Manitoba were among persons under the age of 60. Almost 17 per cent of severe cases were amongst persons under the age of 40 (see the evidence of witness Dr. Carla Loeppky);

- First Nations populations were also seeing escalating positivity rates and a disproportionate number of COVID-19 cases. The median age of hospitalizations for First Nations has been 51; and

- The "circuit break" was temporary. As Manitoba has noted, the impugned PHOs were in place for 13 weeks, but they were reassessed at regular, shorter intervals to ensure they remained necessary. Those measures were implemented to regain control over the rapid community spread of the virus and any consequent serious harm. Once the curve was flattened, there was gradual ease of restrictions.

[265] In considering the applicants' arguments with respect to gross disproportionality, I have no hesitation in concluding based on the evidence before me, that the pandemic's presence in Manitoba demanded decisive action in order to reduce the spread of the virus and in order to flatten the curve. Manitoba is not exaggerating when they state that lives were at stake. Indeed, at various points and with appropriate concern, many critics called for a quicker and more expansive response than actually occurred. Separate from whether they were sufficiently timely or adequate, I have no difficulty concluding that any of the restrictions on gatherings and in-person faith services that were eventually implemented, were as Manitoba has argued, temporary and necessary. While the impact of these restrictions on the rights in question should not be indifferently ignored or

minimized, such impact was certainly not disproportionate or totally out of sync with the critically important objectives which included preserving the healthcare system, protecting the general public health, and saving the lives of particularly vulnerable persons.

[266] Given my earlier determinations respecting arbitrariness and overbreadth, I have concluded that even had any interference occurred with respect to the s. 7 rights (which I have determined did not occur), such interference was in accord with the principles of fundamental justice.

[267] Accordingly, the applicants' challenge pursuant to s. 7 of the ***Charter*** is dismissed.

Issue #3: ***Did the closure of places of worship in the impugned PHOs discriminate on the basis of religion contrary to s. 15 of the Charter?***

[268] Section 15 of the ***Charter*** reads as follows:

> **Equality before and under law and equal protection and benefit of law**
>
> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[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.

[270] As I explain in the paragraphs that follow, the applicants have inaccurately described Manitoba's use of the adjective "essential" as it relates to churches and religious gatherings just as they have also failed to appreciate that the distinction in question (between what is permitted to remain open and what must remain closed) is not based on religion. Accordingly, I have determined that the impugned PHOs do not discriminate contrary to s. 15 of the ***Charter***.

[271] When a court considers a challenge on the basis of s. 15 of the ***Charter***, it must first ask whether the impugned law, on its face or in its impact, creates a distinction based on enumerated or analogous grounds. If it does, it must be determined whether the law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage (see ***Kahkewistahaw First Nation v. Taypotat***, 2015 SCC 30, paragraphs 18–19).

[272] In considering the position advanced by the applicants in respect of s. 15, I am struck by how the applicants suggest that the descriptions "essential" and "non-essential" are used. In this regard, I agree with Manitoba that the applicants have not accurately described the PHOs. The impugned PHOs do not characterize certain retailers as "essential" nor do they characterize churches or religious gatherings as "non-essential". Nowhere in the impugned PHOs does it imply that places of worship or religious practices are not essential or are of lesser importance than retail establishments. When one examines Order 4 for example, it can be seen that it provides that businesses listed in Schedule A, may open to provide goods and services to the public, subject to capacity limits and other public health measures like physical distancing. Order 5 states that a

retail business permitted to remain open may only sell "essential items" listed in Schedule B in person. Any "non-essential items" must be removed from public access inside the store. They go on to note that both "essential items" and "non-essential" items may be sold remotely, online or by phone and made available for delivery or pick up. Pursuant to Order 6, facilities or businesses not listed in Schedule A are required to close for in-store shopping, but may continue to sell those goods remotely. In other words, the adjectives essential and non-essential are not used as the applicants suggest and insofar as the distinction between essential and non-essential items is made, it is made for the purpose of determining which items may be bought in store rather than purchased only remotely.

[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 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. As Manitoba has argued, retail stores typically involve transient contact between individuals

who are only in close proximity for a relatively short duration. Such contact is accurately described as transactional in nature. Places of worship are often gatherings of individuals who are in close contact for prolonged periods of time. Moreover, 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.

[275] In summary, it is well to note that the basis of the distinction identified by the applicants for their s. 15 argument is one that is rooted in what the Supreme Court of Canada has said is not a demeaning stereotype, but rather, a neutral and rationally connected policy choice (see ***Alberta v. Hutterian Brethren of Wilson Colony***, 2009 SCC 37 (at paragraph 108):

> Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(a). There is no breach of s. 15(1).

[276] Given that the distinction(s) in question in this case do not involve distinctions based on religion (religious beliefs or the religious or non religious nature of the location),

the applicants' arguments under s. 15 cannot succeed. Accordingly, their s. 15 challenge is dismissed.

<u>Issue #4</u>: ***Are the violations in relation to ss. 2(a), 2(b) and 2(c) of the Charter, as caused by the impugned PHOs, justified as reasonable limits under s. 1 of the Charter?***

[277] For the reasons earlier explained, the Court will be reviewing Manitoba's argument (that the restrictions on the s. 2 rights are justified as reasonable limits under s. 1 of ***Charter***) on the basis of the well-known ***Oakes*** test. The ***Oakes*** test sets out an analytical and potentially justificatory framework that requires the court to determine whether the defending party has discharged its onus (on a balance of probabilities) to demonstrate the following:

1. That the objective of the measure giving rise to the restriction is pressing and substantial.
2. That the means employed was proportionate to the objective.

[278] The proportionality requirement will be satisfied where: 1) there is a rational connection between the means chosen and the objective; 2) the measure minimally impairs the rights at issue; and 3) there is proportionality between the salutary and deleterious effects of the measure (see ***Hutterian Brethren***, at paragraph 186).

[279] The proportionality inquiry is both normative and contextual. The inquiry requires a court to look at the broader picture in an effort to balance the interests of society with those of individuals in groups (see ***R. v. K.R.J.***, 2016 SCC 31, at paragraph 58). In a case like the present, where individual rights compete with the public good and societal interests that are themselves protected by the ***Charter*** (because the health and lives of

others are at stake), it is more likely that a restriction on rights may be found proportionate to its objective (see ***Carter***, at paragraphs 94-96). The case law has confirmed that the proportionality requirement does not require perfection, but rather, that the limits on the rights in question be reasonable (see ***R. v. K.R.J.***, at paragraph 67).

[280] Mindful of the above, where a broader contextual analysis is appropriate, some deference or "a margin of appreciation" may be afforded to governments when a court is determining whether a law is justified under s. 1 of the ***Charter***. This perspective and the resulting margin is particularly important where a case gives rise to complex issues that involve a multitude of overlapping and conflicting interests. In that regard, it was noted by McLachlin C.J. in ***Hutterian Brethren*** that the principal responsibility for the making of difficult choices and the drawing of necessary lines falls on the elected legislature and those it appoints to carry out its policies. In that context, she noted that the ***Charter*** "does not demand that the limit on the right be perfectly calibrated, judged in hindsight" but rather that it be reasonable and justified. She noted as follows (at paragraph 37):

> If the choice the legislature has made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives. 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. Courts recognize that the issue of identity theft is a social problem that has grown exponentially in terms of cost to the community since photo licences were introduced in Alberta in 1974, as reflected in the government's attempt to tighten the scheme when it discontinued the religious exemption in 2003. The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened.

> A degree of deference is therefore appropriate: *Edwards Books*, at pp. 781-82, *per* Dickson C.J., and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 43, per McLachlin C.J.
>
> [emphasis added]

[281] Manitoba reminds the Court in this case that public health officials have been required to respond to a novel and complex pandemic. They have been required to make decisions quickly and in real time, in rapidly changing circumstances and in a climate of scientific uncertainty and evolving knowledge. Given that reality, while courts cannot abdicate their responsibility as protectors of the Constitution, neither should they forgot that the factual underpinnings for managing a pandemic are essentially scientific and involve medical matters that fall outside the institutional expertise of courts. When determining whether any related restriction on rights is constitutionally defensible, the courts should be wary of second guessing those who are managing a pandemic on the basis of their democratic responsibility or their properly delegated authority, particularly when there may be divergent opinions or schools of scientific thought (see ***Beaudoin***, at paragraphs 120-21; ***Lapointe v. Hôpital Le Gardeur***, [1992] 1 S.C.R. 351, at paragraph 31; ***Taylor v. Newfoundland and Labrador***, at paragraphs 457-58; ***Trest v. British Columbia (Minister of Health)***, 2020 BCSC 1524, at paragraph 91).

[282] In cases like the present, public decision makers are often called upon to balance the salutary effects of the public health measures against potential negative effects the severity of which, Manitoba has emphasized may be extremely difficult to predict or quantify. Manitoba is well to cite as they do, McLachlin J. (as she then was) in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199, where she held

that the civil standard of proof under s. 1 does not require "scientific demonstration" or the "standard required by science" (at paragraph 137).

[283] The often complicated and subtle task of a court when fulfilling its role as protector of fundamental freedoms while providing a margin of appreciation to governments attempting to balance complex issues that involve a multitude of overlapping and conflicting interests, was well described and addressed by Burrage J. in ***Taylor v. Newfoundland and Labrador*** (at paragraphs 456-64). Although Burrage J. correctly acknowledged that constitutional rights do not disappear in a pandemic, he also stressed the need for the necessary deference when examining COVID-19 public health measures within the justificatory framework of the s. 1 ***Charter*** analysis (at paragraphs 456-59, 463-64):

> It is at this point that I digress briefly to consider the role of deference to the CMOH and the institutional capacity of the Court.
>
> I am mindful of the fact that while travel restriction has legal force, it is in essence a medical decision directed towards protecting the health of those in this province. The qualifications of the CMOH to make this decision are not challenged. Furthermore, in the exercise of her authority the CMOH draws upon specialized resources at her disposal. This team approach is conducive to informed decision making based on the best medical evidence available.
>
> To this I would add that the courts do not have the specialized expertise to second guess the decisions of public health officials.
>
> In the context of the COVID-19 pandemic Chief Justice Roberts of the Supreme Court of the United States, for the majority, had the following to say regarding deference and the role of the judiciary (*South Bay United Pentecostal Church et al v. Gavin Newsom, Governor of California, et al.,* No. 19A1044 (USSC) at p. 2):
>
> > The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those official "undertake [ ] to act in area fraught with medical and

> scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).
>
> . . .
>
> I accept the Applicant's argument that the pandemic is not a magic wand which can be waved to make constitutional rights disappear and that the decision of the CMOH is not immunized from review.
>
> However, it is not an abdication of the court's responsibility to afford the CMOH an appropriate measure of deference in recognition of (1) the expertise of her office and (2) the sudden emergence of COVID-19 as a novel and deadly disease. It is also not an abdication of responsibility to give due recognition to the fact that the CMOH, and those in support of that office, face a formidable challenge under difficult circumstances.
>
> [emphasis added]

[284] Despite what is suggested in some of the jurisprudence as the need for deference in certain cases involving a s. 1 analysis, the applicants in this case correctly emphasize that the onus of justification rests with the government. They also emphasize the requirement that any restrictions on fundamental freedoms need be demonstrably justified with a strong and cogent evidentiary foundation. Put simply, in the present case, the applicants submit that strong evidentiary foundation does not exist and that the PHOs are not reasonable or demonstrably justified and that they fail all three parts of the proportionality inquiry. That is, the applicants insist that there is no rational connection between the PHOs' objectives and the PHOs, that the impugned restrictions do not minimally impair the ***Charter*** rights they infringe, and that the severely deleterious effect of the impugned restrictions far outweigh any salutary effect resulting from them.

[285] In arguing that there is no rational connection between the PHOs' objectives and PHOs, the applicants submit that Manitoba has not shown a rational connection between

the infringement and the benefits sought on the basis of reason or logic (see ***Hutterian Brethren***, at paragraph 48). In this connection, the applicants impugn Dr. Roussin's emphasis and reliance upon positive PCR test results, which the applicants argue are unreliable to determine infectiousness/contagiousness. The applicants also underscore the negligible risk of asymptomatic transmission, the use of unreliable models, the absence of scientific evidence to justify restrictions on outdoor gatherings, poor evidence to show that places of worship needed to be closed/restricted and what the applicants characterize as the failure on the part of Manitoba, to conduct a cost/benefit analysis. In addition to the foregoing, the applicants suggest that given that the PHOs do not bear any rational connection to their objectives — even on the basis of reason and logic — the restrictions in question are unjustifiably arbitrary.

[286] As it relates to their argument that the restrictions do not minimally impair the ***Charter*** rights they infringe, the applicants contend that there is insufficient evidence to justify the restrictions placed on religious settings, religious activities, private in-home gatherings, and outdoor gatherings. It is the position of the applicants that Manitoba has failed to explain through cogent and persuasive scientific evidence why a significantly less intrusive and equally effective measure or sets of measures were not chosen to address the pressing and substantial objectives that Manitoba has identified.

[287] The applicants argue that Manitoba has tendered no evidence to indicate that the risks that Dr. Roussin associates with religious activities cannot be mitigated by measures less extreme or drastic than outright prohibiting in-person worship. The applicants say that Manitoba has failed to provide specific evidence that in-home gatherings have

resulted in outbreaks of COVID-19 such so as to justify a complete prohibition on the home gatherings that were addressed by the PHOs. The applicants also argue that Manitoba has provided no evidence that restricting outdoor gatherings and protests advances the objective of preventing the transmission of COVID-19.

[288] In making their argument that Manitoba has failed to minimally impair ***Charter*** rights, the applicants point to the evidence and the work of their witness Dr. Bhattacharya, the co-author of the *Great Barrington Declaration*. The position advanced relies upon the premise that it is necessary to build herd immunity in a population by allowing people at low risk of death to live their lives normally while protecting those who are at a higher risk. This approach is called "focused protection" and as Dr. Bhattacharya and the applicants have emphasized, it is an approach which has been endorsed by more than 50,000 scientists, physicians and other medical professionals worldwide. It is the position of the applicants that the "focused protection" approach would have been significantly less intrusive and equally effective. It is an approach which as explained, would have involved the frequent testing of staff and visitors at long-term care homes, minimizing staff rotation, promoting grocery delivery to elderly people at home and having them meet family members outside. For those not vulnerable, it would involve promoting handwashing and staying home while sick, and otherwise encouraging citizens to continue living their lives.

[289] In addition to their contention that the impugned PHOs failed the rational connection and minimal impairment test, the applicants also submit that the PHOs have had egregiously severe and unprecedented deleterious effects without yielding any

discernable benefit supported in the evidence. The deleterious effects include, amongst other things, the emotional, psychological and practical impact of limiting and prohibiting what are for many, the sacred religious and spiritual practices of their faith (which the applicants emphasize are compelled by their most deeply held convictions). The negative impact also includes the immense stress, anxiety, despair and depression that comes from unprecedented social isolation. Juxtaposed with these deleterious effects say the applicants, is the reality that "lockdowns don't work". It is the position of the applicants that countries that had a population predisposed to worse COVID-19 infection had worse outcomes irrespective of whatever lockdown policies they implemented. Citing their expert Dr. Bhattacharya, the applicants insist that lockdowns push cases into the future, but they do not prevent them altogether. Further relying upon the research and study of Dr. Bhattacharya, the applicants insist that "in the vast majority of cases, there is no detectible effect of lockdowns on COVID-19 mortality.[74]

[290] Having closely examined all of the arguments raised by the applicants in response to the position of Manitoba and having reviewed the evidentiary foundation before me, I have determined as I explain below, that Manitoba has established that the restrictions placed on s. 2 rights as a result of the impugned PHOs are justified as reasonable limits under s. 1 of the ***Charter***.

[291] As will be apparent from the discussion below, I have undertaken the requisite legal analysis respecting the requirements for proportionality and I have determined, based on the evidence and the governing law, that Manitoba has discharged its onus. I

[74] Bhattacharya 2, pp. 1 & 2

have also determined that this constitutional challenge exemplifies those cases involving complex issues with a multitude of overlapping interests wherein it must be recognized that "the primary responsibility for making the difficult choices involved in public governance", falls on the elected legislatures and/or those to whom policy-making power has been properly delegated.

[292] In the context of this deadly and unprecedented pandemic, I have determined that this is most certainly a case where a margin of appreciation can be afforded to those making decisions quickly and in real time for the benefit of the public good and safety. I say that while recognizing and underscoring that fundamental freedoms do not and ought not to be seen to suddenly disappear in a pandemic and that courts have a specific responsibility to affirm that most obvious of propositions. But just as I recognize that special responsibility of the courts, given the evidence adduced by Manitoba (which I accept as credible and sound), so too must I recognize that the factual underpinnings for managing a pandemic are rooted in mostly scientific and medical matters. Those are matters that fall outside the expertise of courts. Although courts are frequently asked to adjudicate disputes involving aspects of medicine and science, humility and the reliance on credible experts are in such cases, usually required. In other words, where a sufficient evidentiary foundation has been provided in a case like the present, the determination of whether any limits on rights are constitutionally defensible is a determination that should be guided not only by the rigours of the existing legal tests, but as well, by a requisite judicial humility that comes from acknowledging that courts do not have the specialized

expertise to casually second guess the decisions of public health officials, which decisions are otherwise supported in the evidence.

(i) THE PRESSING AND SUBSTANTIAL OBJECTIVES OF THE IMPUGNED PHOS

[293] The applicants have not contested the pressing and substantial nature of the objectives of the impugned PHOs. The concession is wise as the objectives are clearly meant to protect public health and more specifically, they are meant to save lives, prevent serious illness and stop the exponential growth of the virus from overwhelming Manitoba's hospitals and acute healthcare system. By any estimation, such objectives in the context of a pandemic are pressing and substantial.

[294] In acknowledging the pressing and substantial objectives of the impugned PHOs, it is well to note the backdrop to those orders that were first implemented in the fall of 2020 when the community transmission of COVID-19 was raging. As was noted in the evidence, cases were doubling every two weeks and deaths were rising fast. Not surprisingly, Manitoba's ICU and hospital capacity was being stretched to the maximum by those suffering from COVID-19. There was indeed an urgent need to immediately address the COVID-19 infections and flatten the curve as Manitoba's hospitals and ICUs were in significant jeopardy of being overrun (see the affidavits of Dr. Brent Roussin, Dr. Carla Loeppky and Lanette Siragusa).

[295] The protection of public health has long been acknowledged as a pressing and substantial objective and currently, in the context of this COVID-19 pandemic, that objective has never been more obvious (see ***Springs of Living Water Centre Inc. v. The Government of Manitoba***; ***Taylor v. Newfoundland and Labrador***, at

paragraphs 426, 437; ***Beaudoin***, at paragraphs 224, 228; ***Toronto International Celebration Church v. Ontario (Attorney General)***, 2020 ONSC 8027; ***Ingram v. Alberta (Chief Medical Officer of Health)***, 2020 ABQB 806).

(ii) THE RATIONAL CONNECTION BETWEEN THE INFRINGING MEASURES AND THE OBJECTIVES

[296] In order to demonstrate a rational connection, a government must show a causal connection between the infringement and the benefit sought on the basis of reason or logic. A government need only show that it is reasonable to suppose that the measure in question may further the objective(s), not that it will absolutely do so. It is not a high threshold. There must however be a rational link between the infringing measure and its goal or object (see ***Hutterian Brethren***, at paragraphs 48, 51).

[297] In the present case, I have no difficulty in concluding, based on logic, reason and a common sensical understanding of the evidence (see amongst others, the evidence of Dr. Brent Roussin, Dr. Jason Kindrachuk, Dr. Carla Loeppky) that the measures taken to limit gatherings, including in places of worship, are rationally connected to the goal of reducing the spread of COVID-19. As the evidence has demonstrated, the virus is spread through respiratory droplets. It is reasonable and logical to conclude as has been suggested, that the risk of transmission is particularly high in gatherings involving close contact for prolonged periods. It is not surprising that outbreaks of COVID-19 have occurred in various gatherings, including in places of worship.

(iii) MINIMAL IMPAIRMENT: THE IMPUGNED PHOS LIMIT THE S. 2 RIGHTS IN A MANNER THAT IS REASONABLY TAILORED TO THE OBJECTIVE

[298] The minimal impairment requirement in a s. 1 analysis requires that the impugned PHOs limit rights in a manner that is reasonably tailored to the objective. If there are alternative, less harmful means of achieving the government's objective "in a real and substantial manner" as compared with the measure or means under challenge, then the law in question will fail the minimal impairment test (see ***R. v. K.R.J.***, at paragraph 70). In examining for minimal impairment, the government's decision must be seen to fall within a reasonable range of outcomes. In that sense, the inquiries are highly contextual (see ***Law Society of British Columbia v. Trinity Western University***, at paragraph 81).

[299] In ***RJR-MacDonald***, the Supreme Court of Canada suggested that when considering the minimal impairment aspect of the proportionality requirement, courts may often accord a measure of deference especially where issues are scientific or socially complex and where it may be said that government may be better positioned than courts to choose amongst a wide range of alternatives. The Supreme Court of Canada observed as follows (at paragraph 160):

> . . . The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement: . . . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

[300] In attempting to protect the population from the ravages of the pandemic, Manitoba acknowledges that the CPHO must attempt to balance a number of competing interests, including economic, social, mental health, limited acute care resources, and as well, the degree of public acceptance and compliance. These are all complex considerations, which Manitoba has argued and I accept, are not amenable to any easy calculous and they are indeed, the type of considerations that commend some deference to state action taken in response to COVID-19. As the Supreme Court of Canada noted in ***Irwin Toy Ltd.*** (at 993-94):

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources.

[301] If the inquiry into whether Manitoba's decisions respecting the impugned PHOs fell within a reasonable range of outcomes is indeed (as suggested by the jurisprudence) highly contextual, then it is both necessary and instructive to examine the situation facing the province in and around October to November 2020. The evidence in that regard supports Manitoba's assertion that the situation was dire and that the weeks following Thanksgiving 2020, saw in Manitoba a rapid escalation in cases including a significant spike of 480 new cases on October 30 alone. The Capital Region was put into Level Red indicating uncontained community spread and significant strain on Manitoba's healthcare system. Manitoba points out that 10 days later, on November 12, the entire province was in Level Red. To make the point even more clearly, Manitoba had the highest per capita rate of active cases in the country. COVID-19 infections were growing exponentially with cases doubling every two weeks. Manitoba's witnesses pointed out

that the positivity rate had by then soared to 10.5 per cent provincially. It had been noted that Indigenous people (who as was explained, were more vulnerable) were seen as disproportionately affected in terms of number of cases. On top of that, Manitoba was on the verge of losing its ability to contact trace effectively. Hospital and ICU resources according to Manitoba, were under extreme duress and the modelling information provided by Epidemiology and Surveillance projected that in the absence of significant action, within a very short time, the hospitals and ICUs would no longer be able to cope with the influx of new COVID-19 cases (see the affidavits of Dr. Roussin, at paragraphs 100-06; Dr. Carla Loeppky, at paragraphs 16-19, Exhibits E and F; Lanette Siragusa, at paragraphs 15-20).

[302] By December 10, 2020, after the Level Red restrictions were imposed, Manitoba peaked at 129 patients in ICU. Dr. Roussin concluded, based on all the data that was before him, that a temporary circuit break was essential to significantly reduce the number of contacts and regain control of the pandemic. Based on the evidence presented, Manitoba argues and I agree, that Dr. Roussin had a strong basis for determining that in his professional judgment, any lesser restriction would not have sufficed.

[303] In its written submissions to the Court, Manitoba provided a number of reasons in support of its position as to why the impugned PHOs were minimally impairing (see the application brief of the respondents, filed April 12, 2021, at paragraphs 152(a) through 152(j)). For the purpose of completeness and to fully understand and appreciate the context in which Manitoba drew the lines it did and made the decisions which I find fell

within a reasonable range of outcomes, I replicate below the entirety of the reasons provided by Manitoba at paragraph 152 to their brief:

> [152] Manitoba submits that the impugned PHOs are minimally impairing for a variety of reasons:
>
> a) Throughout the pandemic, public health officials have continually monitored and reassessed the situation in order to tailor orders to the prevailing circumstances. Orders have been regularly changed, either tightening or relaxing restrictions as warranted approximately every 2 - 4 weeks. For example, after the first wave, the public health restrictions were relaxed. Since July 24, 2020, businesses could generally re-open and gathering sizes were only limited to 50 persons indoors and 100 people outdoors. Places of worship could have up to 500 people or 30% of usual capacity. When the pandemic began to worsen in October 2020, the CPHO did not immediately close things down or eliminate gatherings. He took a focused and measured approach based on the epidemiological data and other indicators available to him. For example, from November 12 to 20, 2020, the limit on religious services was reduced from 500 to 250 people or 20% except in the Capital Regions where it was 100 people or 15%.[75] The history of orders demonstrates they were responsive and progressive. Tighter gathering restrictions were not put into place in the impugned PHOs until the pandemic became critical and more urgent intervention was necessary.
>
> b) The public health orders applied regionally when possible, so that restrictions could vary with the severity of community transmission. For example, on October 1, 2020 a more restrictive limit on gatherings including in private residences was imposed only in the Capital Region. The limit on religious gatherings also depended on the situation in particular locations.
>
> c) Unlike some other jurisdictions, there was no curfew imposed or a "shelter in place" order that would prevent people from leaving their home other than for limited reasons. It was still possible to gather with family and friends at indoor and outdoor public places, up to the gathering limit of 5 people. Children could also visit parents in a private residence. An exception was also made for people who live on their own to allow one person to visit.
>
> d) The PHOs did not close schools, maximizing learning and also permitting socializing among children.
>
> e) There was an attempt to accommodate religious services. Religious services could still be delivered remotely indoors, or outdoors in vehicles. As well, individual prayer and reflection was permitted. Places of worship could be used for the delivery of health care and social services (Order 15(4)). Religious

[75] Roussin, para. 98

officials could attend at one's private residence for counselling or educational instruction or tutoring (Order 1(2)). Bible studies could happen online.

f) Funerals, weddings, baptisms or similar religious ceremonies were permitted, subject to a gathering limit of 5 persons (in addition to the officiant).

g) The impugned PHOs were tailored to the nature of the risk. Places involving greater risk due to prolonged contact were subject to greater restrictions. Places of worship and gatherings in the home were treated much like restaurants, movie theatres, plays and concert halls, which had to remain closed during the circuit break. Some retail transactions were allowed in-store because this usually involved shorter, transitory contact between people. Even so, there was an attempt to minimize such transactions. People were only allowed to purchase "essential items" in-store. Otherwise, shopping had to be done remotely for pick up or delivery.

h) Despite the size limit on outdoor gatherings, this did not preclude many other means of expression to protest the PHOs or other important issues. This included petitions, emails, social media and letters to the media or politicians. In fact, the impugned PHOs did not preclude a protest involving many small groups as long as each group of five persons was discrete, sufficiently spread out and did not interact with other groups.

i) By the fall of 2020, it became clear that the previous measures in place up until then proved insufficient to stop the exponential spread of the virus. Despite earliercapacity limits and precautions, there was evidence of clusters associated with faith- based gatherings including one where several individuals carried on services despite being symptomatic.[76] Private home gatherings were another important source of transmission. Modelling suggested that more stringent limits on gatherings coupled with good public compliance were necessary to flatten the curve.

j) The Circuit Break was temporary. It was limited to a 13 week period when the pandemic was at its most dangerous point to date, cases were surging and our health care system was under enormous strain. Once the measures achieved the desired goal of flattening the curve, restrictions were gradually eased.[77] Currently, gatherings are limited to 5 people at indoor public places, 10 persons at an outdoor gathering on private property and 25 persons at outdoor public places. Religious services can holdup to 100 people or 25% of capacity. Weddings and funerals have increased to 25 persons. Private residences may allow up to 2 visitors or can create a "bubble" with another residence.

[76] Loeppky, para. 14
[77] Roussin, paras. 152-154

[304] The above reasons and the accompanying explanations represent "real time" considerations that implicitly or explicitly required the difficult balancing of a plethora of competing interests as the fast-moving pandemic continued to threaten lives and Manitoba's healthcare system. Needless to say, the menacing force and unpredictability of that pandemic did not provide public health officials with the "parlour-room luxury" of prolonged speculative debate nor the comfort of trial and error decision making, let alone the possibility of academic research projects that might confirm whether there existed "significantly less intrusive measures" that might be "equally effective".

[305] It is worth noting that as was hoped and as was predicted by the modelling, the circuit break implemented by Manitoba did indeed have its intended effect and it averted what the evidence suggests may have been a potential disaster. In the face of the applicants' suggestion that Manitoba could have imposed lesser restrictions on gatherings and places of worship (permitting for example, religious services of limited size as long as reasonable safety precautions were employed), Manitoba reminds the Court that such smaller gatherings had been allowed up until the point at which Manitoba was required to respond. As Manitoba realistically observes, it was not at that point possible to monitor hundreds of private places of worship or residences. There was no way to ensure that the precautions identified would always have been followed, properly or at all. As Manitoba consistently has argued, singing and communion are often integral parts of such services and those acts pose a higher risk, which in the dire context in which Manitoba was operating, constituted yet one more risk to the broader threat to public health.

[306] As part of its argument that the PHOs did not minimally impair the rights at issue, the applicants put forward a theory (through the evidence of Dr. Bhattacharya) that arises from the "*Great Barrington Declaration*". That theory suggests that Manitoba should have focussed its efforts only on protecting those who were vulnerable to death — the elderly and immunocompromised — rather than imposing broad restrictions aimed at slowing community spread. Based on this theory of "focused protection", young people (under 60) should be otherwise free to gather and circulate throughout society. The theory suggests that such an approach would more minimally impair fundamental freedoms and would cause less harm than that associated with "lockdowns" and at the same time, protect those who are truly at risk from COVID-19. The applicants submit that in addition to the other deficiencies in Manitoba's heavy-handed response, without a focused protection approach, Manitoba cannot argue for a favourable finding on minimal impairment.

[307] While I accept that the theory of focused protection emanating from the *Great Barrington Declaration* is part of what must be the rigorous ongoing and evolving "scientific conversation", it is not an approach that has been adopted or followed by most governments or their public health officials in Canada or elsewhere in the world. I will leave aside the international consensus to the contrary and the separate but very real question as to whether the specific theory arising from the *Great Barrington Declaration* could ever realistically be a valid and sustainable public health approach. I will nonetheless point out that based on the evidence before me, it is simply not accurate to suggest that Manitoba and Dr. Roussin do not themselves support a version of "focused

protection", however different it may be to the approach advocated by the applicants and Dr. Bhattacharya.

[308] As was explained, Manitoba did indeed focus its efforts on protecting vulnerable populations such as those living in personal care homes, congregate settings and First Nations. That said, it is Manitoba's position that such an effort at focused protection is not by itself sufficient.

[309] Manitoba argues that vulnerable people are integrated throughout society and that people over 60 are not confined to personal care homes. Further, severe outcomes (hospitalizations, ICU admissions, and deaths) can also occur in younger populations across a wide spectrum of ages. In other words, people of all ages are more susceptible to hospitalization and death if they have one of the many underlying medical conditions such heart disease, diabetes, kidney disease, high blood pressure, obesity or otherwise immunocompromised. I note from the evidence that in Manitoba, approximately 40 per cent of reported COVID-19 cases had an underlying condition. One-third or more of the serious cases of COVID-19 (resulting in death or hospitalization) occurred in people under the age of 60. Of those patients admitted to ICU, over 42 per cent were under the age of 60 (see the affidavits of Dr. Roussin, paragraphs 163-65; Dr. Carla Loeppky, Exhibit H).

[310] As it relates to Manitoba's Indigenous population, they too are more vulnerable to severe outcomes from COVID-19 owing to a variety of socioeconomic factors and underlying health conditions. As Dr. Roussin noted, First Nations have been disproportionately affected by COVID-19 and more than half of those cases are off reserve.

[311] It seems necessary to acknowledge that the reference point for identifying "the vulnerable" in the applicants' theory of focused protection, excludes many who in Manitoba, according to the evidence, have become infected and potentially infectious. The integration of these more vulnerable persons throughout society makes the applicants' theory based on the stark marker of age (60) seem insufficiently nuanced and unduly simplistic.

[312] When considering the efficacy of "focused protection" as envisioned by the *Great Barrington Declaration*, that decidedly more *laissez-faire* approach need be considered in relation to the potential long-term health effects of COVID-19 on those who are fatalistically left to become infected. In this regard, I note as Dr. Kindrachuk asserted in his evidence, that while much more research in this area is needed, there currently does exist troubling evidence of "long-haul symptoms" which persist, even in young people who become infected.

[313] The applicants' theory respecting focused protection (as a more minimally impairing approach) raises for the Court not only concerns about the practical effects flowing from the resigned acceptance of general community spread in the pursuit of an elusive herd immunity, it also raises significant ethical and moral questions connected to the risks of knowingly exposing any citizen, including some of those most vulnerable persons who are less identifiable because of their integration into the general population.

[314] In the context of considering the minimal impairment aspect of the proportionality inquiry, it is necessary to acknowledge and consider Manitoba's own approach to focused protection, which is no less concerned with the protection of the vulnerable. Manitoba's

position however, and the position adopted by most other jurisdictions, is that the protection of vulnerable populations cannot occur without also reducing the extent of community transmission overall. It is only through the reduction of community transmission generally, that the rate of SARS-CoV-2 can be slowed in a community and in so doing, assist in the goal of preventing the overwhelming of the healthcare system and its limited resources. In this regard, Manitoba is right to point out that Dr. Bhattacharya's evidence focusses almost exclusively on mortality with virtually no mention of the impact that widespread community transmission has on hospitals and ICUs.

[315] Based on the evidence, I find that Manitoba's approach is appropriately described as multi-faceted in that it focusses on the vulnerable, but at the same time, it focusses on locations and activities that pose the greatest risk for outbreaks and community transmission. In this way, the restrictions imposed are meant to keep the growth of community transmission of the virus within manageable levels so as to enable Manitoba's healthcare system to cope and in order to "flatten the curve".

[316] I have examined carefully the PHOs in question in the context of the evidence adduced. Whether through an approach best described as multi-faceted focussed protection or otherwise, 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. The reality of Dr. Roussin's task in carrying out his duty as CPHO, is well reflected in the following excerpt from *Public Health Law and Policy in Canada*:[78]

> Clearly, in responding to novel public health threats, authorities will often lack scientific facts and must make judgement calls about restricting individual liberties for the sake of protecting the population as a whole. As Laskin C.J.C. observed in *Oakes*: "It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance".

[317] The impugned measures in the PHOs "minimally impair" the rights in issue as contemplated by the jurisprudence. Further, 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 emergency facing Manitoba and its healthcare system.

(iv) THERE IS AN APPROPRIATE PROPORTIONALITY BETWEEN THE BENEFICIAL AND DELETERIOUS EFFECTS OF THE IMPUGNED PHOS

[318] The last stage of the ***Oakes*** test as it is applied in the context of the s. 1 justificatory framework, considers the balance between the beneficial and deleterious effects of the limitation.

[319] At paragraph 289 of this judgment, I explained the range of what the applicants called the severely deleterious effects of the impugned restrictions which they say outweigh any salutary effect resulting from them. Apart from pointing to what they say

[78] Tracey Bailey, C. Tess Sheldon & Jacob J. Shelley, eds., *Public Health Law and Policy in Canada*, 4th ed. (Toronto: LexisNexis Canada Inc., 2019) at 25-26

is evidence establishing that lockdowns do not work (therefore there are no salutary effects) they also identify the significant deprivation occurring to those who are prevented from exercising in a communal and collective fashion, their religious rights and freedoms. They also point to the range of mental health problems flowing from unnecessary social isolation and the sharp rise in substance abuse issues. In short, the applicants insist that the deleterious effects of the PHOs far outweigh the salutary effects, which effects they say, have not prevented COVID-19 deaths or reduced stress on the healthcare system. As such, the applicants submit that the restrictions on gatherings are not "demonstrably justified in a free and democratic society" and are thus, unconstitutional.

[320] I have considered carefully the balance between the identifiable beneficial and deleterious effects of the limitation. I am persuaded that there exists the requisite proportionality as between the beneficial and deleterious effects such so as to conclude that Manitoba has discharged its onus on this prong of the ***Oakes*** test. The evidence in my view unquestionably demonstrates that the salutary effects of the limitation far outweigh those effects that may be characterized as deleterious.

[321] In considering and assessing the applicants' arguments at this third and final stage of the proportionality inquiry, it seems unavoidable but to conclude that much of what the applicants assert respecting the disproportionally negative impact of the limitations, is inextricably tied to their (the applicants) contention that the scientific evidence provides an insufficient justification for the unprecedented action taken by Manitoba. In other words, according to the applicants, the limitations and restrictions on rights based on

unconvincing science, do more harm than good given what the applicants say is Manitoba's misplaced and to some extent, unnecessary response.

[322] As earlier noted, amongst other objections, the applicants criticized the impugned PHOs on the basis of the following: that Manitoba had artificially inflated the number of deaths; that the PCR test was a flawed basis for decision making; that Manitoba's modelling was flawed; that Manitoba insufficiently assessed the collateral costs (economic effects and mental health) compared to the benefits; that there was no scientific evidence that the restrictions were necessary or that the virus spreads more easily at places of worship compared to retail outlets; and, that Manitoba ought to have focussed their protective measures only on the elderly and vulnerable and permitted everyone else to gather and circulate freely in society. The foregoing criticisms set up and constitute the basis for an argument whereby the applicants then proceed to insist that Manitoba's response, as exemplified by the restrictions in the PHOs, is based on misapprehension and misunderstanding all of which flows from generally questionable science. Not surprisingly, the applicants then say that the scope and nature of the accompanying measures are unnecessary and of a dubious utility and benefit, particularly given the disproportionate costs associated with the limiting of fundamental freedoms.

[323] The weakness in the applicants' position in making the arguments they do respecting the absence of salutary effects as compared to those they describe as egregiously deleterious, is that having carefully reviewed and assessed the evidentiary foundation in this case, I reject the applicants' criticisms of Manitoba's reliance upon the science Manitoba acknowledges it has in fact relied upon. As I have already suggested

and determined, Manitoba has persuaded me that there is nothing obviously flawed or deficient about the scientific evidence it has relied upon. As a consequence, for reasons already touched upon, I accept that Manitoba's response and the accompanying limitations on rights that they imposed, were both necessary and appropriate.

[324] Having determined as I have that the scientific evidence does support Manitoba's extraordinary response and the limitations and restrictions on rights they were required to implement, I can similarly say that the benefit from those limitations and restrictions in what was a dire and urgent situation, was neither disproportionately minimal nor insignificant. Notwithstanding what must be readily acknowledged are the hardships and inconvenience that flow from such limitations on rights, it was those very limitations found in the impugned PHOs, that — according to the evidence I accept — helped realize the pressing and substantial objectives of protecting public health, saving lives and stopping the expediential growth of the virus from overwhelming Manitoba hospitals and its acute healthcare system.

[325] Manitoba argues persuasively that it has long been recognized that the potential to harm one's neighbours provides a reasonable basis for limiting the freedom to manifest one's beliefs, opinions and conscience. In other words, freedom of religion for example, must be exercised with due respect for the rights of others and subject to such limitations as are necessary to protect public safety, order and health, and the fundamental rights and freedoms of others. As Manitoba has insisted, this approach does not repudiate religious freedom, but instead, it facilitates its exercise so as to take the general well-being of others into account (see ***Syndicat Northcrest v. Amselem***, 2004 SCC 47, at

paragraph 178). This proposition was also recognized in ***Multani v. Commission scolaire Marguerite-Bourgeoys***, 2006 SCC 6, wherein Charron J. noted as follows (at paragraph 26):

> This Court has clearly recognized that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others (see *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 337, and *Syndicat Northcrest v. Amselem,* [2004] 2 S.C.R. 551, 2004 SCC 47, at para. 62).

[326] Manitoba acknowledges that the impugned PHOs restrict the ability to worship in person, which Manitoba also acknowledges is of significance to the applicants. Although the orders also limit gatherings to small groups outside of one's private residence, they do not prevent gathering altogether. The PHOs still made it possible to meet with family and friends in small groups. In acknowledging the importance of gathering in person to worship and the deprivation that comes with the limits on gathering size, Manitoba nonetheless asserts persuasively, that in the context of the pandemic, while the identified deprivations are not easy, if they did not occur, the gatherings without limits could put the health and lives of others at risk. It is necessary for the Court when considering the limitations that have been imposed, to also consider the ***Charter*** rights of others (the right to life and security) which are also an important part of the consideration in balancing and weighing the effects of the limitation.

[327] Based on the evidence, it is not difficult to conclude that the PHOs do indeed achieve an important societal benefit: protecting the health and safety of others, especially the vulnerable. The present case is one of those cases where the obviously important freedom of religion and other ***Charter*** protections are, as Manitoba has

contended, outweighed by the greater good of protecting public health by preventing the spread of a highly-contagious virus in the context of an unprecedented global pandemic (see *Public Health Law and Policy in Canada*, at 27-29; ***Carter***, at paragraph 95).

[328] In addition to the broader societal benefits of the limitations, Manitoba submits that in assessing the proportionality of benefits and effects, it is also critical to remember that the impugned restrictions were of a limited duration. I agree that it is important to note that those restrictions were in effect for only as long as necessary so as to regain control over community transmission and alleviate the intense strain on the hospitals and ICUs.

[329] In underscoring the proportionality and significance of the benefits vis-à-vis the deleterious effects of the limitations, Manitoba maintains that despite the erroneous contentions of the applicants, the evidence suggests that the limitations were indeed required because: deaths from COVID-19 are real; positive PCR cases of COVID-19 are real; Manitoba's modelling projections were proven to be correct; and that in making the difficult and ultimately significant decisions required of them, public health officials properly balanced collateral effects. In my view, as I have already repeated, the evidence does indeed support all of those assertions.

[330] The task of properly balancing collateral effects is difficult because public health officials and government must balance a wide variety of competing rights and interests of all Manitobans. Manitoba concedes that the potential for negative collateral effects of public health restrictions and limitations, such as the impact on mental health or adverse economic consequences, must be taken seriously. That said, Manitoba resists any

suggestion that the CPHO failed to take into account the potential negative impacts of the impugned PHOs. In taking that position, Manitoba is on solid ground.

[331] At paragraphs 87 and 175 of his affidavit, Dr. Roussin affirms that collateral efforts were always part of the consideration and analysis for the public health officials. The potential harms were balanced against the benefits and the severity of the pandemic. Although there is no question that in the context of the considerable frustration, sickness, death, and fear, all of which have become to one extent or another, by-products of the pandemic, the restrictions flowing from the PHOs have caused further strain and hardship. Nonetheless, Dr. Roussin has noted that decisions were required to be made quickly and in real time and in the face of much uncertainty. Manitoba emphasizes that both the benefits and the burdens of the public health orders were constantly re-evaluated in a dynamic way as the pandemic progressed.

[332] The evaluation of precise harms caused by public health limitations and restrictions, is a complex subject that will be examined for many years. As Manitoba has argued, there may be general evidence that mental health has deteriorated during the pandemic and that there has been identifiable economic suffering. While that reality ought not to be minimized, it is not possible to attribute the cause of suicide or depression or increases in addiction or overdoses solely or directly to the public health restrictions — let alone the particular impugned PHOs. There is no convincing evidence that the 13-week closure of places of worship and the restrictions placed on public and private gatherings have caused suicides, or some version of irreparable economic harm such so as to require the Court to conclude that any real or potential harms outweigh the need

to address the urgency and the seriousness of the public health crisis as it was addressed during the period in question.

[333] In the final analysis, I am of the view that there is persuasive scientific evidence that justifies the restriction on gatherings and the temporary closure of religious services at places of worship. The evidence suggests that Manitoba's PHOs are indeed based on current scientific information and knowledge gathered from Canada and around the world, including from peer reviewed articles, recommendations from the WHO and the Pan-Canadian Public Health Network (PHN) advisory committees, and no less important, from the lessons learned from the experience in other jurisdictions.

[334] It should not be forgotten that decisions respecting the limitations on s. 2 rights were based in part on the shared knowledge, experience and best practices acquired from Manitoba working closely and collaboratively with the provincial and federal counterparts across Canada. This collaboration included public health experts who were epidemiologists, virologists, immunologists, and health care professionals from various other backgrounds. In the end, there is more than enough credible evidence before me to support the proposition that the restrictions on gatherings, including places of worship, were necessary. After those restrictions were put in place, the COVID-19 numbers began to decline, consistent with what the modelling predicted (see the affidavit of Dr. Roussin, at paragraph 87). The Level Red public health measures implemented during the fall of 2020, along with the public's cooperation and compliance with those PHOs, changed the trajectory of COVID-19 cases and improved the situation and burden on acute care resources. Manitobans had indeed flattened the curve and avoided a disastrous situation

(see the affidavits of Lanette Siragusa, at paragraph 21; Dr. Carla Loeppky, at paragraph 22).

[335] When examining the benefits of Manitoba's response in the face of the threat of such a deadly pandemic, it is reasonable and rational to conclude that despite the undeniable hardships caused by the limitations on fundamental freedoms, the salutary benefits far outweigh the deleterious effects. In making that statement, I am mindful that the Supreme Court of Canada has held that a s. 1 justification does not require scientific proof in an empirical sense. In this context, it is extremely difficult and perhaps impossible to empirically prove in advance that the potential economic and social costs of the impugned restrictions outweigh the benefits. Instead, as the Supreme Court of Canada has noted, "it is enough that the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has." In this sense, the Court looks for and Manitoba has provided, a "rational, reasoned defensibility" (see ***Sauvé v. Canada (Chief Electoral Officer)***, 2002 SCC 68, at paragraph 18; ***Harper v. Canada (Attorney General)***, 2004 SCC 33, at paragraphs 77-79). Even if and where the evolving scientific evidence and information is not definitive or completely determinative, I accept that Dr. Roussin relied on all of the available evidence, drew reasonable inferences and applied common sense to what was known. To repeat, the decision to temporarily close places of worship and otherwise limit the size of gatherings, was rational, reasoned and defensible in the circumstances of an undeniable public health crisis.

[336] Based on the above analysis, I have concluded that any restriction on the identified ***Charter*** rights flowing from the impugned PHOs, is justified as a reasonable limit and constitutionally defensible under s. 1 of the ***Charter***.

B. ADMINISTRATIVE LAW ISSUE

Issue #5: ***Were the impugned PHOs ultra vires because they failed to restrict rights or freedoms no greater than was reasonably necessary to respond to the COVID-19 public health emergency as required by s. 3 of The Public Health Act?***

[337] Section 3 of ***The Public Health Act*** states:

> **Limit on restricting rights and freedoms**
>
> If the exercise of a power under this Act restricts rights or freedoms, the restriction must be no greater than is reasonably necessary, in the circumstances, to respond to a health hazard, a communicable disease, a public health emergency or any other threat to public health.

[338] The applicants argue that the impugned PHOs restrict the identified rights and freedoms and that the restrictions are far greater than are reasonably necessary to respond to a public health emergency. As a result, they say the PHOs are *ultra vires* the act.

[339] The applicants submit that their argument on this administrative law issue is substantially similar to their s. 1 ***Charter*** argument and that they would rely on their analysis in respect of that section to argue the PHOs also do not comply with s. 3 of the act.

[340] Given that I have already made many of the relevant and connected determinations in my s. 1 analysis, my disposition of this issue need not be prolonged.

[341] This standard of review in respect of this question is one of reasonableness which need take into account, the due deference required respecting medical and scientific expertise.

[342] As my determinations made in the context of my s. 1 analysis would suggest, I have concluded that Dr. Roussin's assessment that the restrictions contained in the impugned PHOs represented restrictions that were no greater than reasonably necessary (to respond to the public health emergency) was a reasonable assessment. As already explained, the context for Dr. Roussin's decision and assessment was that the situation facing the province in November 2020 was grave and that the existing measures were insufficient to stem the tide of the growth of SARS-CoV-2. The resulting threat of hospitalizations and critical cases was undeniable. The spread of the virus was leading not only to increased deaths, but as well, an enormous pressure and burden on Manitoba's healthcare system.

[343] In that context, Manitoba was on the verge of exceeding its hospital and ICU capacity. In order to address the exponential growth of the virus and the potential disaster for the healthcare system, Dr. Roussin targeted those types of gatherings that posed a high risk of transmission. In acting as he did when he did, Dr. Roussin had little room for error and time was of the essence.

[344] Manitoba's explanation for Dr. Roussin's decisions were earlier explained in my s. 1 analysis, particularly in the context of my determinations with respect to minimal impairment. As will be noted, s. 3 of the act reflects much of the same analysis that need be conducted when considering the minimal impairment aspect of s. 1. Put simply, for

the reasons that I provided in determining that the restrictions in question were minimally impairing, I can similarly state that the CPHO acted reasonably in determining that the PHOs met the requirements of s. 3 of the act.

[345] As Manitoba has underscored, just as s. 1 of the ***Charter*** does not demand that a limit on rights be perfectly calibrated, neither can the CPHO's application of s. 3 of the act. In examining Dr. Roussin's decisions, I see them as decisions that were within the range of reasonable decisions supported by the scientific and epidemiological evidence. As such, the decisions are entitled to deference as those decisions are in my view, reasonable.

C. Division OF Powers Issue

Issue #6: *Were the impugned PHOs relating to places of worship inoperative under the doctrine of paramountcy because it conflicted with s. 176 of the Criminal Code?*

[346] Section 176 of the ***Criminal Code*** reads as follows:

> **Obstructing or violence to or arrest of officiating clergyman**
>
> 176(1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who
>
> (a) by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent an officiant from celebrating a religious or spiritual service or performing any other function in connection with their calling, or
>
> (b) knowing that an officiant is about to perform, is on their way to perform or is returning from the performance of any of the duties or functions mentioned in paragraph (a)
>
> (i) assaults or offers any violence to them, or
>
> (ii) arrests them on a civil process, or under the pretence of executing a civil process.

> **Disturbing religious worship or certain meetings**
>
> (2) Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.
>
> **Idem**
>
> (3) Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on a summary conviction.

[347] The applicants argue that the impugned PHOs, as they pertain to religious services, are in direct contravention of s. 176 of the ***Criminal Code***. Manitoba for its part, contends that the impugned PHOs are intended to protect the population from a serious communicable disease and do not violate or otherwise conflict in any manner with s. 176 of the ***Criminal Code***.

[348] The applicant Tobias Tissen's evidence states that the enforcement of the PHOs has obstructed and diverted persons from entering their place worship and attending religious services, frustrating the purpose of the protections afforded by s. 176. Mr. Tissen submits that while attempting to hold a drive-in church service in November 2020, a police barricade and tow truck were present, obstructing church goers from attending.

[349] It is the position of the applicants that regardless of any stated public health motive, the effect of the PHOs and the enforcement of them, disturbs a person's meeting for religious worship, and goes further still by precluding them from meeting for religious worship altogether, in violation of s. 176 and the fundamental freedoms it is intended to protect.

[350] The applicants submit that even in the event that the PHOs are determined to be validly enacted, the PHOs are incompatible with the federal legislative purpose of s. 176 and must be declared inoperative to the extent of the inconsistency and insofar as any meeting for religious worship is obstructed.

The Doctrine of Paramountcy

[351] The doctrine of paramountcy provides that "where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency" (see ***Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.***, 2015 SCC 53, at paragraph 15). When conducting a paramountcy analysis, the first step is to determine whether the federal and provincial laws are validly enacted. If both laws are validly enacted, the next step requires consideration of whether any overlap between the two laws constitutes a conflict sufficient to render the provincial law inoperative (see ***Lemare***, at paragraph 16).

[352] As the applicants have identified, there are two forms of conflict which the Supreme Court of Canada has described as follows (see ***Orphan Well Association v. Grant Thornton Ltd.***, 2019 SCC 5 (at paragraph 65)):

> . . . The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161, at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions".

[353] In order to establish that provincial legislation frustrates the purpose of a federal enactment, a party "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is compatible with this purpose" (see ***Orphan Well***, at paragraph 65; ***Lemare***, at paragraph 26).

[354] The purpose of s. 176 was addressed by the Supreme Court of Canada in ***Skoke-Graham v. The Queen***, [1985] 1 S.C.R. 106, at paragraphs 19-20. In that case, the Supreme Court of Canada was examining what was then s. 172, the identical section and precursor to what is now s. 176. The court noted as follows:

> 19. Subsection 172(3), much like subs. 172(2), is a prohibition which, by means of summary conviction penalty, protects people, who have gathered to pursue any kind of socially beneficial activity, from being purposefully disturbed or interrupted. The subsection is designed to safeguard the rights of groups of people to meet freely and to prevent the breaches of the peace which could result if these types of meetings were disrupted….
>
> 20. There is no difficulty in concluding that this prohibition, with its consequent penal sanctions, serves the needs of public morality by precluding conduct potentially injurious to the public interest.

[355] In its submissions, Manitoba directly explored the objects of s. 176. In that regard, it can be noted that s. 176 prohibits the criminal conduct of individuals who use threats or force or assault to willfully interfere with religious worship. Under s. 176(1)(a), it is a crime for a person to unlawfully obstruct or prevent officiants from celebrating a religious service by threats or force. Clearly, the impugned PHOs are legislative instruments. As Manitoba has argued, a legislative instrument or order made under a statute cannot be seen to (nor does it in the present case) use threats or force within the meaning of s. 176. Neither was it the intent of the impugned PHOs to obstruct or prevent officiants from performing religious services. Although public gatherings in a place of worship were

temporarily closed to limit the spread of COVID-19, Manitoba is well to remind the Court that officiants could continue to attend to perform services and offer them remotely. Even if the impugned PHOs had the effect of preventing officiants from performing in-person religious services at a place of worship, they did not unlawfully do so. Indeed, the PHOs were entirely lawful instruments made under ***The Public Health Act***.

[356] Section 176(1)(b) makes it a crime for a person to assault, be violent towards or arrest a religious officiant, knowing the officiant is about to perform or is returning from performing their religious duties. Clearly this is prescribed criminal conduct by individuals who knowingly interfere with an imminent religious function or one that has been performed. Nowhere in the impugned PHOs is it possible to see an authorization for anyone to assault or use violence against religious officiants. As Manitoba also clarifies, the PHOs did not authorize the arrest of a religious officiant on a civil process to prevent them from carrying out religious functions or because they just completed religious functions or duties. Instead, an officiant is allowed to carry on a religious service and deliver it remotely. In the event of any subsequent ticket that might be issued in relation to a violation of the order against gathering in a place of worship, such a ticket cannot be seen as an attempt to prevent a religious function by violence or assault.

[357] It must be noted that ss. 176(2) and (3) make it a crime for anyone to willfully disturb or interrupt an assembly of persons for religious worship. It is not however, a crime to issue a statutory order of general application intended to prevent prolonged gatherings indoors for a valid public health reason. In that sense, the impugned PHOs do not "wilfully disturb or interrupt" religious assemblies within the meaning of s. 176.

As Manitoba emphasizes, during the "circuit break", the impugned PHOs temporarily closed places of worship to prevent in-person gatherings in order to reduce the spread of a communicable disease. Nevertheless, religious assemblies were still permitted to continue by remote means.

[358] In ***Skoke-Graham v. The Queen***, the Supreme Court of Canada noted that ss. 172(2) and (3) protect people who have gathered from being purposefully disturbed or interrupted. They also noted that to be criminal, it is necessary for the conduct to be disorderly in itself or productive of disorder. As Manitoba as argued, these ***Criminal Code*** provisions are not intended to capture peaceful or orderly conduct. Given the above, I am not persuaded that issuing a public health order under ***The Public Health Act*** meets the *actus reus* of a s. 176 ***Criminal Code*** offence. With s. 176 of the ***Criminal Code***, it would appear that Parliament was contemplating and addressing a form of disorderly conduct or agitation which interferes with religious worship not the regulation that flows from a public health order.

[359] I am not in agreement with the applicants that the impugned PHOs conflict with the operation or frustrate the purpose of s. 176 of the ***Criminal Code***. As Manitoba has persuasively argued, if the applicants' argument were accepted, it would be impossible to restrict the number of people allowed in a place of worship or for that matter, to close a place of worship due to serious violations of building and fire codes. Such restriction or regulation would according to the logic of the applicants, be necessarily inoperative. Such a reading and application of s. 176, would be absurd.

[360] Accordingly, I have determined that those sections of the impugned PHOs relating to places of worship, are not inoperative under the doctrine of paramountcy.

XI. CONCLUSION

[361] My determinations can be summarized as follows:

a. Based on the position taken by Manitoba resulting in its appropriate concession, I have determined that the impugned PHOs do indeed limit and restrict the applicants' rights and freedoms as found in ss. 2(a), 2(b), and 2(c) of the ***Charter***.

b. In the circumstances of this case, it is necessary and just to address and decide the applicants' challenge respecting what they say were the alleged infringements to their ss. 7 and 15 rights under the ***Charter***. Having so considered the merits of the applicants' position in respect of those alleged breaches, I have nonetheless determined that the impugned PHOs did not infringe the applicants' ***Charter*** rights under ss. 7 and 15.

c. Insofar as Manitoba has conceded and I have found that the alleged limitations of ss. 2(a), 2(b), and 2(c) under the ***Charter***, I have also determined that the impugned restrictions in the PHOs are constitutionally justifiable as reasonable limits under s. 1 of the ***Charter***.

d. Respecting the applicants' administrative law ground of review, I have determined that the impugned PHOs were not *ultra vires* (in any administrative law sense) and they met the requirements of s. 3 of ***The Public Health Act*** insofar as they restricted rights and freedoms no

greater than was reasonably necessary in response to the COVID-19 public health emergency.

e. Respecting the applicants' division of powers ground, I have determined that the impugned PHOs do not conflict with the operation nor do they frustrate the purpose s. 176 of the ***Criminal Code*** and accordingly, they are not inoperative under the doctrine of paramountcy.

[362] In light of the determinations set out above, the application is dismissed.

"Original signed by Chief Justice Glenn D. Joyal"
_____C.J.Q.B.