Citation: Gateway Bible Baptist Church et al v Manitoba et al, 2023 MBCA 56
Date: 20230619
Docket: AI22-30-09740

IN THE COURT OF APPEAL OF MANITOBA

2023 MBCA 56 (CanLII)

Coram: Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron
Madam Justice Karen I. Simonsen

B E T W E E N :

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	)	***E. M. Meehan, K.C.*** ***A. K. Pejovic*** *and* ***T. S. G. Slade*** *for the Appellants*
(Applicants) Appellants	)	***C. P. R. Murray*** *and* ***S. R. R. Thomson*** *for the Respondents*
- and -	)	
HIS MAJESTY THE KING 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	)	***A. M. Schutten*** *for the Intervener*
(Respondents) Respondents	)	*Appeal heard:* ***December 13, 2022***
- and -	)	
ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA	)	*Judgment delivered:* ***June 19, 2023***
Intervener	)	

On appeal from 2021 MBQB 218; 2021 MBQB 219

CAMERON JA

Introduction and Background

[1] Unquestionably, the COVID-19 pandemic challenged governments in Canada and around the world in their attempts to ensure the well-being, safety and lives of their citizens, including managing the capacity of their respective healthcare systems to provide services to the many people whose health was significantly impacted by the virus or to those who lost their lives to it.

[2] On March 20, 2020, the Manitoba Government (Manitoba) declared a state of emergency pursuant to *The Emergency Measures Act*, CCSM c E80 (the *EMA*). Various restrictions were put in place in order to address the ongoing public health threat caused by the COVID-19 pandemic. At issue in this case is the constitutionality of certain emergency public health orders (PHOs) made pursuant to sections 13 and 67 of *The Public Health Act*, CCSM c P210 (the *PHA*), between November 11, 2020 and January 8, 2021 (in force until January 22, 2021) (the impugned PHOs). The impugned PHOs imposed restrictions on gatherings at private residences, limited public gatherings to five people and restricted indoor gatherings at places of worship.

[3] The applicants include churches and individual applicants. The individual applicants include Thomas Rempel (a deacon at the Redeeming Grace Bible Church), Tobias Tissen (a minister at The Church of God) and Ross MacKay (a resident of Manitoba who attended a “Hugs Over Masks” rally in Manitoba). Mr. Tissen and Mr. MacKay each received tickets

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imposing fines under *The Provincial Offences Act*, CCSM c P160, for failing to comply with certain of the impugned PHOs.

[4] The applicants applied for a declaration that sections 13 and 67 of the *PHA* constituted an unconstitutional delegation of the powers of the Legislature to make laws of general application.

[5] The applicants also applied for a declaration that the impugned PHOs violated sections 2(a)–2(c), 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and could not be saved by section 1 and, therefore, were of no force and effect pursuant to section 52(1) of the *Charter*.

[6] In addition, the applicants applied for a declaration that the impugned PHOs were *ultra vires* as the restrictions that they imposed were greater than were "reasonably necessary" as required by section 3 of the *PHA*.

[7] The application judge issued two written judgments released concurrently. In the first decision (see 2021 MBQB 218) (decision 218), he dismissed the application for a declaration that sections 13 and 67 of the *PHA* violate the unwritten constitutional principle that only the Legislative Assembly can make laws of general application and that that authority cannot be delegated to the Chief Public Health Officer (CPHO) or to individual ministers.

[8] In his second decision (see 2021 MBQB 219) (decision 219), he held that the impugned PHOs did not violate sections 7 or 15 of the *Charter*. The applicants have not appealed those findings.

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[9] Next, he agreed with Manitoba's concession that, on a prima facie basis, the impugned PHOs infringed sections 2(a)–2(c) of the *Charter*. Nonetheless, he found the restrictions imposed by them to be constitutionally justifiable limits under section 1 of the *Charter*.

[10] Finally, he found that the impugned PHOs were not *ultra vires* (in the administrative law context) and that they met the requirements of section 3 of the *PHA* in that they restricted rights and freedoms no more than was reasonably necessary.

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The Grounds of Appeal

[11] The applicants advance three grounds of appeal, which I have slightly reordered to accord with the decisions of the application judge. First, the applicants assert that the application judge erred when he found sections 13 and 67 of the *PHA* to be constitutional (decision 218). Next, they argue that the application judge erred in finding that, having infringed sections 2(a)–2(c) of the *Charter*, the impugned PHOs constituted constitutionally justifiable limits on those rights under section 1 (decision 219) . Finally, they argue that the application judge erred in his determination that the impugned PHOs complied with section 3 of the *PHA* (*ibid*).

[12] The intervener, the Association for Reformed Political Action (ARPA) Canada, supports and augments the applicants' *Charter* arguments. ARPA submits that cumulative breaches of the *Charter* should be considered in the constitutional analysis and the principle of constitutional pluralism should form part of the section 1 *Charter* analysis.

The Statutory Framework and the Impugned PHOs

[13] As earlier indicated, on March 20, 2020, Manitoba declared a state of emergency pursuant to section 10 of the *EMA* as a result of the COVID-19 pandemic. Manitoba extended the declaration as required throughout the time that the impugned PHOs were in effect (see section 10(4) of the *EMA*).

[14] Section 67(1) of the *PHA* allows for the CPHO to take special measures described in section 67(2) if they believe that "(a) a serious and immediate threat to public health exists because of an epidemic or threatened epidemic of a communicable disease; and (b) the threat to public health cannot be prevented, reduced or eliminated without taking special measures."

[15] Section 67(2) provides for a number of orders that can be made in circumstances where section 67(1) applies (see sections 67(2)(a)–67(2)(d.1)). Among other things, section 67(2)(c) allows for the CPHO to order that a public place or premise be closed and section 67(2)(d) allows for an order for persons not to assemble in a public gathering in a specified area.

[16] Section 67(3) provides that no order can be made pursuant to sections 67(2)(a)–67(2)(d.1) without first obtaining the minister's approval.

[17] For ease of reference, sections 67(1), 67(2) and 67(3) of the *PHA* are attached as an appendix at the end of these reasons.

[18] The impugned PHOs at issue in this case are:

- Order 1(1) of the PHOs issued November 11, 2020, to the extent that it prohibited outdoor gatherings of more than five people;

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- Order 2(1), of the PHOs issued November 21, 2020, December 22, 2020 and January 8, 2021 that prohibited indoor and outdoor gatherings of more than five people.

- Order 15(1) of the November 21, 2020 PHOs and Order 16(1) of the PHOs issued December 22, 2020 and January 8, 2021 which ordered that all churches, mosques, synagogues, temples and other places of worship be closed except as permitted by certain listed exceptions.

- Orders 15(3) of the November 21, 2020 PHOs and 16(3) of the PHOs issued December 22, 2020 and January 8, 2021 which permitted religious leaders to conduct religious services at the above listed places provided that no more than five persons, other than the officiant, attend the ceremony.

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Mootness

Positions of the Parties

[19] As a preliminary issue, Manitoba argues that the appeal is moot. Relying on *Manitoba Métis Federation Inc v Canada (Attorney General) et al*, 2010 MBCA 71 (*MMF*); and *Kennett Estate v Manitoba (Attorney General)*, 1998 CarswellMan 348 (CA), it argues that the impugned PHOs have long since expired. It maintains that, when the application was originally heard in May 2021, orders of a "substantially similar or identical nature" were in effect, but that is no longer the case. Manitoba submits that it is purely hypothetical to consider whether any new public health restrictions will be made in response to this or a future pandemic. It also argues that judicial

economy and judicial restraint militate against this Court considering the appeal. Finally, it points out that the factual record regarding any future constitutional challenge will be different and require a different constitutional analysis than the facts underlying this case. For example, it states that the impugned PHOs were made before the widespread availability of vaccines.

[20] The applicants maintain that the matter is not moot as this is a continuing constitutional wrong. They argue that there are periods of time when the restrictions have been lesser, but that they have reverted on at least two occasions, to the same severity level as the restrictions at issue in the impugned PHOs. They state that none of the impugned PHOs have been repealed. Regarding judicial economy, they argue that, because the restrictions imposed by the impugned PHOs vary in terms of severity, and the timeframes during which they are in force are relatively short, judicial consideration of the constitutionality of them only when they are in effect would result in "installment litigation". They argue that such a situation would effectively relieve Manitoba of the responsibility to design a program that is constitutionally proportional. They submit that any decision resulting from these proceedings will have an impact on measures taken by Manitoba in the future.

Analysis

[21] The leading case of *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, explains that mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises a merely hypothetical or abstract question. This general principle applies when the decision of the court will have no practical effect on the rights of the parties. The

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determination of mootness involves a two-step process. First, the court must determine whether there continues to be a live issue between the parties. If there is no live issue, the court must decide whether to exercise its discretion to hear the case (see p 353).

[22] Considerations in the determination of whether the court should exercise its discretion include whether there is an adversarial context, judicial economy, and consideration of the traditional role of the court and intrusion into the role of the legislative branch (see pp 358-62).

[23] This case is one of a number across the country where various provisions aimed at curbing the transmission of COVID-19 have been challenged and the issue of mootness has arisen. In *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427, the petitioners consisted of a number of churches as well as several individuals, including Mr. Beaudoin. The petitioners sought a declaration that certain orders made by the provincial health officer which imposed time-limited prohibitions on certain gatherings and events (the G&E orders) were unconstitutional. The chambers judge declared the G&E orders to be of no force and effect to the extent that they infringed the right to organize and participate in outdoor protests. Mr. Beaudoin sought to appeal the declaration on the basis that the decision of the chambers judge did not go far enough. The Court declined to hear Mr. Beaudoin's appeal, finding it moot. In that case, the G&E orders prohibiting outdoor protests under which he had been charged had been declared invalid (which was not appealed) and, despite Mr. Beaudoin's argument to the contrary, there were no such further restrictions. The charges against Mr. Beaudoin had been stayed and there was no evidence of collateral effects. On these facts, the Court found no live issue between the parties.

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[24] Regarding the second stage of the *Borowski* analysis, the Court largely adopted the arguments of the Attorney General of British Columbia that there existed an absence of adversarial context, concerns about judicial economy and that the decision would have no practical effect (see paras 165, 173). The Court also added that the "the nature and complexity of the pandemic continues to change and . . . it would be unwise to make broad constitutional pronouncements in a factual vacuum and in the face of an uncertain future" (at para 173).

[25] Despite the above, the Court did consider the appeals of the religious petitioners, who alleged that the chambers judge erred in dismissing their application for a declaration that the G&E orders amounted to an unreasonable (applying the test in *Doré v Barreau du Québec*, 2012 SCC 12), or, alternatively, constitutionally unjustifiable (applying the test in *R v Oakes*, [1986] 1 SCR 103) infringement of their freedoms of religion, expression, assembly, association and equality rights.

[26] In *Ben Naoum v Canada (Attorney General)*, 2022 FC 1463, the applicants challenged interim orders made by Transport Canada, requiring full vaccination against COVID-19 in order to board a plane or train to travel within or depart from Canada. At the time of the hearing before the Federal Court, the challenged orders had been repealed and replaced by orders not requiring vaccination or had been allowed to expire. Gagné ACJ granted Canada's motion to have the applicants' applications for judicial review struck as being moot. She held that there was no live controversy (see para 32). Regarding whether to exercise her discretion to determine the matter on its merits, she found that to do so, would have no practical effect on the

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rights of the applicants (see para 41), that there was no uncertain jurisprudence and the matter was not evasive of review (see paras 42-43).

[27] Also see *Gianoulias c Procureur général du Québec*, 2022 QCCS 3509; and *Lavergne-Poitras v Canada (Attorney General)*, 2022 FC 1391, as examples where courts have declined to determine applications for declarations of invalidity regarding vaccination requirements based on mootness.

[28] In the recent case of *Ontario (Attorney General) v Trinity Bible Chapel*, 2023 ONCA 134, the issue of mootness did not arise because, while the regulations regarding public gatherings at issue were no longer in effect, the charges against the applicants for contravening those regulations remained outstanding pending the outcome of the constitutional litigation before the Court.

[29] In the circumstances of this case, I agree with Manitoba that, having expired, the impugned PHOs no longer affect the rights of the applicants. There was no evidence led and no argument made that any offences were outstanding against any of the applicants or that they otherwise continued to be affected. The only argument advanced by the applicants is that similar orders could be made at any time. That argument does not satisfy me that there continues to be an issue between the parties. There no longer being a live issue between the parties, I now turn to the question of whether this Court should exercise its discretion and determine the matter on its merits.

[30] A consideration of the factors listed in *Borowski* leads me to conclude that an adversarial context continues to exist in this case. The parties fully argued the constitutional issues before this Court, as did ARPA.

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[31] Regarding judicial economy, I note that the parties fully litigated this matter before the application judge at a time when there were orders in effect similar to those that they challenged (see decision 219 at para 6). Furthermore, concerns regarding judicial economy can be answered if there exist special circumstances, which make it worthwhile to apply scarce judicial resources to determine the issue (see *Borowski* at p 360). In my view, such circumstances exist in this case.

[32] In addition, I am persuaded by the applicants' argument that the impugned PHOs were of brief duration, have varied in the degree of restrictions placed, and are evasive of review.

[33] Finally, I consider the admonition that unnecessary constitutional pronouncements should be avoided (see *MMF* at para 364). However, I note that the Courts of Appeal of British Columbia and Ontario have issued rulings regarding similar orders made in their respective provinces, evidencing the import of the issues in question.

[34] In conclusion, the applicants have satisfied me that this Court should exercise its discretion and determine the appeal.

Ground 1—Did the Application Judge Err When He Found Sections 13 and 67 of the *PHA* to Be Constitutional (decision 218)?

[35] I have earlier discussed section 67 of the *PHA*, the authority pursuant to which the impugned PHOs were made. Section 13 of the *PHA* provides that, unless otherwise stated, the CPHO may delegate any of his or her powers under the *PHA* to another person. Of note, section 68 of the *PHA* provides that the CPHO may not delegate a power or authority "under this

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Part" (which includes section 67) except to a medical officer or a director who is a physician.

[36] The main argument made by the applicants concerns section 67 of the *PHA*. As noted by the application judge, the challenge to section 13 presumably flows from sub-delegations made by the CPHO, Dr. Brent Roussin, to the Acting Deputy Chief Public Health Officer, Dr. Jazz Atwal, from time to time during the relevant time frame.

[37] The applicants submit that section 67 constitutes an unconstitutional and undemocratic delegation of legislative authority. They contend that it is an unwritten constitutional principle that only the Legislative Assembly can make laws of general application with such broad powers as those conveyed by section 67 of the *PHA* to the CPHO who is an unelected public health official. They argue that the "unrestrained and prolonged transfer of legislative power" violates the text and structure of Canada's Constitution and must be struck down pursuant to the supremacy clause in section 52(1) of the *Constitution Act, 1982*.

[38] The applicants argue that there is insufficient political oversight over the powers conferred pursuant to section 67. They argue that, if the CPHO makes an order, the minister must sign it and that there is nothing governing what type of information the CPHO must provide to the minister.

[39] The law regarding legislative delegation of administrative and regulatory powers was succinctly explained in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (at paras 84):

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> First, it is necessary to review the concept of delegation. As this Court explained in *2018 Securities Reference* [*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48], the principle of parliamentary sovereignty "means that the legislature has the authority to enact laws on its own *and* the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations": para. 73 (emphasis in original). Delegation is common in the administrative state: *ibid*. As this Court further explained, "a delegated power is rooted in and limited by the governing statute . . . . (T)he sovereign legislature always ultimately retains the complete authority to revoke any such delegated power": para. 74.

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[40] In his reasons, the application judge conducted a comprehensive analysis of the history of the *PHA*, noting that it was "the culmination of a decade of work" (at para 10). After reviewing Hansard and the context in which the legislation was enacted, including the emergence of new viral threats, he noted that a deliberate choice was made to center Manitoba's public health system under a single official, the CPHO (see para 12). He also underscored that section 67 was amended on April 15, 2020 to provide "enhanced enforcement measures and a strengthening of the powers of the CPHO" (at para 15). The new measures included things such as mandating isolation for travellers, business closures and social distancing (*ibid*).

[41] The application judge also pointed out a number of constraints specific to the delegation of power to the CPHO pursuant to section 67. These included that, pursuant to section 67(3), the special measures taken in the impugned PHOs required prior approval of the minister of health and that pursuant to section 3, the PHOs must not "restrict rights or freedoms any more than reasonably necessary to respond to the public health emergency" (at para 17).

[42] After reviewing the positions of the parties, the application judge agreed with Manitoba that section 67 was the result of the will of democratically elected representatives subject to democratic accountability. He noted that the Legislature could, at any time, expand, constrain or eliminate the legislation. Therefore, he found it did not undermine Manitoba's political institutions or right of discussion or debate (see paras 32-33).

[43] After reviewing Supreme Court of Canada jurisprudence, he emphasized that delegated powers are an essential and normalized part of the modern Canadian state. He found that the legislative history of the *PHA* suggested that the rationales behind the delegation of emergency powers to the CPHO are similar to those invoked when delegating powers to administrative decision makers–in this case, "medical expertise and prompt, flexible responses during a public health emergency" (at para 37).

[44] In rejecting the applicants' argument that section 67 offended unwritten constitutional rules of democracy and the rule of law, he noted the "unbroken chain" (at para 38) of authority confirming the Legislature's authority to delegate broad and general legislative powers. In that sense, he found that section 67 was consistent with the Constitution, including unwritten constitutional principles (*ibid*).

[45] He stated that the concerns raised by the applicants that the CPHO might act arbitrarily or in excess of the enabling act or in a manner that violates *Charter* rights can be addressed by judicial review and that those concerns should not be conflated with the constitutional validity of the underlying statute itself (see para 44).

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[46] The application judge found that the safeguarding constraints on the CPHO's powers earlier discussed provided an "additional level of political oversight and accountability" (at para 46) in relation to the powers delegated to the CPHO.

[47] Finally, of relevance to this ground of appeal, the application judge addressed the applicants' argument regarding the potential to invalidate an impugned law on the basis of unwritten constitutional principles. He found that, while such principles may be used as interpretive tools, they do not provide an independent basis to strike down legislation. In this regard, he accepted Manitoba's argument that, in *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, the Court held that, "invalidating legislation based on the unwritten constitutional principle of the rule of law would seriously undermine the legitimacy of judicial review of legislation for constitutionality" (at para 48). He explained (*ibid*):

> . . . In connection to that determination, the [SCC] offered two reasons for its resistance. First, if unwritten principles were wider than the written constitution, it could as Manitoba has argued, render the written text irrelevant or redundant. The second reason for the court's resistance in ***Imperial Tobacco Canada Ltd.***, related to the fact that unwritten constitutional principles often point in opposite directions. For example, the principles of democracy and constitutionalism often favour upholding legislation that conforms with the express written terms of our Constitution (see ***Imperial Tobacco Canada Ltd.***, at paragraphs 65 to 67).

[48] In the result, the application judge dismissed the argument that the statutory delegation in section 67 of the *PHA* is unconstitutional (see para 57).

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[49] The applicants make the same arguments as were made before the application judge. After carefully reviewing his reasons, I am not convinced that the application judge erred in law or in his application of the law to section 67 of the *PHA* and would therefore dismiss this ground of appeal.

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Ground 2–Did the Application Judge Err in Finding that the Impugned PHOs were Constitutionally Justifiable Limits on the Rights Infringed Pursuant to Section 1 of the *Charter*? (decision 219)

Sections 2(a)–2(c) of the Charter were Infringed

[50] Sections 2(a)–2(c) of the *Charter* state:

> **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 . . ..

[51] At the hearing of the application, Manitoba conceded, as it has in the proceedings before this Court, that the impugned PHOs infringed each of the above fundamental freedoms.

[52] In agreeing with the concession that freedom of religion was infringed, the application judge cited *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336; and *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 62-64 for the authority that, "[f]reedom of religion

includes the ability of religious [adherants] to come together and create cohesive communities of belief and practice" (at para 205).

[53] Relying on *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 968-72, he stated that freedom of expression "protects all nonviolent activities that convey or attempt to communicate meaning" (at para 208). He further stated that, while the impugned PHOs did not have the purpose of restricting expression, they did have that effect (see para 209).

[54] Finally, regarding freedom of peaceful assembly, he noted that there was little jurisprudence interpreting this provision. Nonetheless, he found that the jurisprudence confirmed that freedom of peaceful assembly is inherently a group activity. He agreed with Manitoba that, "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, . . . there is a *prima facie* limit on free assembly" (at para 213).

[55] The above findings of the application judge are not at issue. The issue is whether the infringements are justifiable under section 1 of the *Charter*.

<u>The *Charter* Infringements were Justified Under Section 1 of the *Charter*</u>

The Section 1 Analytical Framework

[56] Section 1 of the *Charter* provides:

> **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

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> limits prescribed by law as can be demonstrably justified in a free and democratic society.

[57] As noted by the application judge, the framework for constitutional justification found in *Oakes* applies in this case. He chose this framework as opposed to the analysis to be applied pursuant to judicial review of administrative decisions made pursuant to delegated authority found in *Doré* and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, on the basis that, under the *PHA*, Manitoba's CPHO requires the approval of the minister to issue PHOs. When he examined the impugned PHOs he found them to be akin to "legislative instruments of general application rather than an administrative decision" (at para 36).

[58] Pursuant to the *Oakes* framework, the party defending the infringement must demonstrate, on a balance of probabilities, that (a) the objective giving rise to the restriction is pressing and substantial, and (b) the means employed were proportionate to the objective (see pp 138-39).

[59] The proportionality requirement requires a consideration of (i) whether the limit is rationally connected to the purpose, (ii) whether the limit minimally impairs the right, and (iii) whether the law is proportionate in its effect. That is, whether there is proportionality between the salutary and deleterious effects of the measure (see *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 186).

The Application Judge's Section 1 Ruling

[60] Regarding section 1 of the *Charter*, both Manitoba and the applicants proffered a considerable amount of affidavit evidence and

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accompanying reports, much of which was the subject of in-court cross-examination. The application judge listed the evidence provided by the parties (see paras 41-45). He then set out the submissions of the parties in relation to the evidence wherein he provided his own assessments and evaluations of the affidavit evidence and cross-examinations (see paras 51-195). These evaluations included determinations of the credibility and reliability of the evidence. He noted that his evaluations should be considered as a product of a complete review of the available and sometimes differing scientific evidence (see para 49).

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[61] In assessing all of the evidence, he stated (at para 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.

[62] In his review of the law regarding justification pursuant to section 1 of the *Charter*, the application judge referred to Supreme Court of Canada jurisprudence stating that the proportionality inquiry requires the court to look at the broader picture in balancing the interests of society with those of individuals in groups. He noted that, in cases where individual rights compete with the public good and societal rights that are also protected by the *Charter*, it is more likely that a restriction of rights may be found proportionate to its

objective (see para 279, referring to *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 94-96; and *R v KRJ*, 2016 SCC 31 at para 58).

[63] Referring to *Hutterian Brethren*, he stated (at para 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. . . .
>
> . . .

[64] In conducting his analysis of the *Oakes* factors, the application judge observed that the applicants did not contest that the objectives of the impugned PHOs were pressing and substantial and that they were "meant to protect public health and . . . to save lives, prevent serious illness and stop the exponential growth of the virus from overwhelming Manitoba's hospitals and acute healthcare system" (at para 293).

[65] The application judge found that the measures taken to limit gatherings, including at places of worship, were rationally connected to the objective of preventing the spread of COVID-19 (see para 297).

[66] Regarding minimal impairment, the application judge examined the dire health conditions that Manitoba was facing as a result of COVID-19 at

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the time the impugned PHOs were made (see para 303). He considered the measures taken, leading up to the impugned PHOs and the real-time considerations faced by public health officials balancing a plethora of competing interests. He stated (at para 304):

> . . . 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".

[67] He considered the evidence and the theory of the applicants based on Dr. Martin Kulldorff, Dr. Sunetra Gupta & Dr. Jay Bhattacharya, "Great Barrington Declaration", (4 October 2020) online: *Great Barrington Declaration* <www.gbdeclaration.org> (date accessed 9 June 2023), which advocated for a more relaxed approach to the control of the spread of COVID-19 on "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" (at para 288). The application judge noted that this approach had not been adopted by most governments or health officials in Canada or elsewhere in the world (see para 307); had to be considered in relation to the potential long term effects of COVID-19 on those left to be infected (see para 312); raised practical concerns, as well as significant ethical and moral questions (see para 313); and focussed on mortality, as opposed to the impact of widespread community transmission on the healthcare system (see para 314). The application judge also noted that Manitoba had, in fact, focussed its efforts on protecting vulnerable populations, and he accepted Manitoba's position that protection of

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vulnerable populations cannot occur without also reducing overall community transmission (see paras 314-15). Ultimately, the application judge found that the decisions made by the CPHO fell within a range of reasonable alternatives and that the measures in the impugned PHOs minimally impaired the rights in issue (see para 317).

[68] In considering the beneficial and deleterious effects of the impugned PHOs, the application judge noted that much of the applicants' argument that the impugned PHOs were not beneficial was based on their argument that the evidence that Manitoba relied on was flawed—an argument that he rejected (see para 323). He acknowledged the hardships that flowed from the limitation on rights imposed by the impugned PHOs (see paras 324, 335). However, he concluded that they achieved the important societal benefit of protecting the health and safety of others, especially the vulnerable (see para 327). He considered that they were only in effect for as long as necessary to "regain control over community transmission and alleviate the intense strain on the hospitals" and intensive care units (ICUs) (at para 328). He underscored that Manitoba's modelling projections were proven to be correct (see para 329). He noted that the PHOs were constantly re-evaluated as the pandemic progressed (see para 331).

[69] All of the above led the application judge to conclude that the salutary effects far outweighed the deleterious effects.

[70] In the result, the application judge found that Manitoba had demonstrated that any restriction on the identified *Charter* rights flowing from the impugned PHOs was justified as a reasonable limit and constitutionally defensible under section 1 of the *Charter*.

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Analysis

[71] The applicants argue that the impugned PHOs were not reasonable or demonstrably justified. They argue that the application judge erred at each stage of his section 1 *Charter* analysis. That is, rational connection, minimal impairment and proportionality.

Standard of Review

[72] When reviewing the constitutionality of legislation, the standard of review is correctness. However, deference is owed to factual findings that underlie the constitutional analysis. Those findings are reviewed for palpable and overriding error (see *Manitoba Federation of Labour et al v The Government of Manitoba*, 2021 MBCA 85 at paras 40-46).

Rational Connection

[73] The applicants make a number of arguments relating to the rational connection factor. First, they argue that the application judge erred by failing to address whether Manitoba provided sufficient evidence that the restrictions on outdoor gatherings were rationally connected to the objective of reducing the spread of COVID-19.

[74] In his reasons regarding rational connection, the application judge stated (at para 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

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> 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.

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[75] The applicants interpret the application judge's reasons to be only applicable to indoor gatherings and point to the evidence given by one of Manitoba's experts, Dr. Jason Kindrachuk, that they had not seen broad transmission at events outdoors.

[76] I disagree with the applicants that the application judge intended his findings regarding the transmission of COVID-19 to relate only to indoor gatherings. He did not limit his findings in that regard.

[77] Furthermore, as is argued by Manitoba, the fact that there was no evidence of outbreaks from outdoor events does not undermine the rational connection. While the evidence adduced demonstrated that the risk of transmission was higher indoors, this does not negate the risk of outdoor transmission with prolonged close contact. Manitoba also reasonably points out that talking loudly or yelling increases the risk of transmission and that this is the type of behaviour one might expect to find at a crowded outdoor public event.

[78] Next, the applicants submit that there was insufficient evidence linking the spread of COVID-19 to religious gatherings. They argue that, while one of the experts called by Manitoba, Dr. Carla Loeppky, provided a list of clusters of cases that linked outbreaks of COVID-19 to gatherings at places of worship, their expert, Dr. Joel Kettner, stated (and Dr. Loeppky

acknowledged) that one could not assess the likelihood of those cases having been acquired at a religious service.

[79] The application judge was aware of the argument advanced by the applicants. In his review of the testimony given by Dr. Loeppky in cross-examination, he specifically referred to her evidence agreeing that they could not be certain that an infected individual picked up the virus at church. He also referred to her testimony that, in a cluster, there is an assumption that others became infected by an index case, although it was not certain (see para 148). Despite this, he found that Dr. Loeppky's evidence, along with the evidence of the other experts called by Manitoba, provided "credible and reliable assertive foundational evidence for Manitoba's position on its s. 1 defence" (at para 164). I am not convinced that he erred in this regard.

[80] Finally, the applicants point to Dr. Roussin's evidence that PCR test results were relied on in respect of the majority of the factors that were considered in deciding what measures to take to minimize the spread of COVID-19. They submit that their evidence demonstrated that PCR tests are unreliable. Furthermore, they argue that the application judge minimized their arguments in this regard.

[81] I disagree. The application judge acknowledged the applicants' argument that Manitoba had an "inadequate appreciation, misunderstanding and misuse" of the "RT-PCR testing, infectiousness and Cycle thresholds" (at para 87). He carefully reviewed the evidence called by both sides (see paras 97-107). He acknowledged the points made by the applicants resulting from their cross-examination of Dr. Roussin. These included that (a) a positive PCR test only indicated that a person would have been exposed to the

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virus within the previous 100 days, (b) public health does not know if a positive PCR test is infectious or infected with the virus, and (c) studies indicated only 28.9% and 31% of the positive PCR tests sampled were likely infectious (see para 121).

[82] However, the application judge also accepted Dr. Roussin's evidence that the use of total positive PCR tests per day was for surveillance purposes, gave a good picture of the "disease burden" in society (at para 126) and constituted an important tool (see paras 71(v), 126). I am not persuaded that he committed a palpable and overriding error in accepting Dr. Roussin's evidence.

[83] In the result, I am not satisfied that the applicants have demonstrated that the application judge erred in his evaluation of the evidence that led him to conclude that the restrictions imposed by the impugned PHOs were rationally connected to the objective of reducing the risk of transmission of COVID-19 to save lives, prevent serious illness and stop the growth of the virus from overwhelming Manitoba's hospitals and acute healthcare system.

Minimal Impairment

[84] The applicants do not dispute that the application judge correctly stated the minimal impairment test. Citing *KRJ* at para 70, he stated that "[i]f 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" (at para 298). Referring to *Trinity Western University* at para 81, he noted that the government's decision must be seen to fall within a

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reasonable range of outcomes and that, in that sense, the inquiries are highly contextual (*ibid*).

[85] He observed that, in *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, the Supreme Court suggested that, when considering minimal impairment, "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" (at para 299).

[86] In his consideration of context, the application judge commented on the dire situation facing Manitoba at the time of the restrictions. In describing the pressing and substantial concerns facing Manitoba during the time the impugned PHOs were in force and their underlying objectives, he found that community transmission was "raging", cases were "doubling every two weeks", "deaths were rising fast", "Manitoba's ICU and hospital capacity was being stretched to the maximum by those suffering from COVID-19" and that there was an "urgent need" to "flatten the curve" (at para 294); see also para 301). He agreed that by December 10, 2020, "a temporary circuit break was essential to significantly reduce the number of contacts and regain control of the pandemic" (at para 302).

[87] The minimal impairment argument was the focus of much of the applicants' oral presentation before this Court. They argue that:

a) the measures were not carefully tailored as there were alternative measures that could have been imposed, as was done in other provinces;

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b) certain businesses were permitted to operate with tailored restrictions;

c) Manitoba had not demonstrated that there were no other non-pharmaceutical interventions that could have mitigated the risks associated with religious activities other than the prohibition of in-person worship;

d) because the impugned PHOs did not limit the amount of time people stayed in a space, the distinction that the application judge drew between the risk of transmission of COVID-19 in situations of transient contact, such as in retail stores and prolonged contact at religious services, was wrong;

e) there was no evidence that in-home gatherings resulted in outbreaks of COVID-19; and

f) there was no evidence to substantiate the risk of transmission outdoors, therefore, the limits prohibiting outdoor gatherings at residences and limiting outdoor gatherings to five people in public places did not constitute minimal impairment.

a) Comparison with Other Jurisdictions

[88] Regarding the restrictions imposed in other provinces, I agree with Manitoba's argument that it is overly simplistic to compare restrictions at a single point in time. The application judge cited 13 areas of significant concern regarding the situation in Manitoba by November 10, 2020 (see para 71). Despite there already being restrictions in place, the number of cases

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was doubling every two weeks, Manitoba had the highest per capita rate of active COVID-19 cases in the country, the test positivity rate had soared to over 10.5% provincially, community spread was rampant in all regions of the province, cases in young adults were increasing, COVID-19-related deaths and hospitalizations were rapidly increasing and the healthcare system was under tremendous strain.

[89] The situation varied in points of time, from province to province. While some provinces did not impose as restrictive measures, some did. Manitoba rightly points out that British Columbia, Quebec, Nova Scotia and New Brunswick also temporarily closed places of worship. Without listing all restrictions in other provinces, I would also note that British Columbia, Alberta, Saskatchewan, Newfoundland and Labrador, New Brunswick, Nova Scotia and Prince Edward Island prohibited persons from gathering inside or outside, with exceptions similar to Manitoba.[1]

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[1] See *Beaudoin*; British Columbia Office of the Provincial Health Officer, "COVID-19 Prevention Regional Measures" (13 November 2020), online (pdf): *gov.bc.ca* <www.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-vch-fh-november-13-2020.pdf> (date accessed 12 June 2023); British Columbia Office of the Provincial Health Officer, "Gatherings and Events" (8 January 2021), online (pdf): *gov.bc.ca* <https://alpha.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-gatherings-events-january-8-2021.pdf> (date accessed 12 June 2023); *Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation*, OC 1020-2020 (30 September 2020), GOQ vol 152, Part 2, No 40A at 2770A (*Public Health Act*); *Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation*, OC 2-2021 (8 January 2021) GOQ vol 153, Part 2, No 1B at 5B (*Public Health Act*); Nova Scotia, "News Release: New Restrictions For Entire Province" (27 April 2021), online: *novascotia.ca* <www.novascotia.ca/news/release/?id=20210427003> (date accessed 12 June 2023); New Brunswick, "News Release: New Brunswick moving to Level 3 of winter plan Friday at 11:59 p.m." (13 January 2022) online: *gnb.ca* <www2.gnb.ca/content/gnb/en/news/news_release.2022.01.0019.html> (date accessed 12 June 2023)—faith-based services restricted to outdoor only: Alberta Office of the Chief Medical Officer of Health, "CMOH Order 38-2020 which rescinds CMOH Order 36-2020 and Part 3 of CMOH Order 37-2020: 2020 COVID-19 Response" (24 November 2020) online (pdf): <https://open.alberta.ca/dataset/04afb7ea-dde7-4255-a16f-744f378fe0a0/resource/d9ee39d8-7446-4d61-9714-f3aa84202b3b/download/health-cmoh-record-of-decision-cmoh-order-38-2020.pdf> (date accessed 12 June 2023); Alberta Office of the Chief Medical Officer of Health, "CMOH Order 41-2020 which amends CMOH Order 38-2020: 2020 COVID-19 Response" online (pdf): <https://open.alberta.ca/dataset/f27976e7-9cf6-4d14-a9b3-b410fbc91baf/resource/465cb25b-da04-4d53-8834-c2ea7c2b151e/download/health-cmoh-record-of-decision-cmoh-order-41-2020.pdf> (date accessed 12 June 2023); Saskatchewan Ministry of Health "Public, Public Health Order: Provincial Order"

[90] In fact, Ontario and Quebec imposed measures arguably more restrictive than Manitoba. In January 2021, Ontario imposed a shelter-in-place order, which required everyone to remain in their homes except for an enumerated purpose.[2] Quebec ordered a curfew from 8:00 p.m. to 5:00 a.m.[3] Neither of those measures was imposed in Manitoba.

b) Comparison with Certain Businesses

[91] The applicants spent much time arguing that Manitoba imposed less restrictive measures, such as masking and physical distancing, for other businesses, such as retail stores, public transportation, taxis, airports and other workplaces, while it, wrongly, did not consider them acceptable for indoor places of worship.

[92] The application judge accepted that the risk of transmission was greater at places of worship than at certain businesses. He agreed that contact in retail environments is more transient and of shorter duration and that activities, such as singing, talking loudly or heavy breathing can also increase the risk of transmission. He noted that the prohibition on gathering in places of worship was restricted in a manner similar to movie theaters, sports facilities, plays, restaurants or other venues that involved prolonged periods of contact (see paras 56, 114, 274).

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(14 December 2020), online (pdf): *saskatchewan.ca* <https://publications.saskatchewan.ca/#/products/110743> (date accessed 12 June 2023); Newfoundland and Labrador Office of the Chief Medical Officer of Health, "Special Measures Order (General – Alert Level 5)" (12 February 2021), online (pdf): *gov.nl.ca* <www.gov.nl.ca/covid-19/files/Alert-5-feb-12.pdf> (date accessed 12 June 2023); *COVID-19 Prevention and Self-Isolation Order*, (8 December 2020) PEI Gaz vol 146, No 50 at 1379 at sections 22–23.

[2] See *Emergency Management and Civil Protection Act: Stay-at-Home Order*, O Reg 11/21 at sections 1(1), 24-25; and *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020: Rules for Areas in Shutdown Zone and at Step 1*, O Reg 82/20 at Schedules 4 and 9

[3] See OC 1020-2020 and OC 2-2021

[93] The application judge also referred to a video recording played in Court during Mr. Tissen's cross-examination of a church service that took place when church services were required to be closed. That recording 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" (at para 195).

[94] In my view, it was open to the application judge to accept the evidence of Dr. Roussin as to the reasons for the distinctions drawn when determining the measures to be taken for different activities based on risk.

[95] In addition, as was noted by the Ontario Court of Appeal when rejecting a similar argument in *Trinity Bible Chapel* where the motion judge was considering a limitation of 10 participants on both indoor and outdoor gatherings (at para 118):

> In my view, it was open to the motion judge to reject the analogy between retail settings and religious gatherings based on the public health rationale she cited. However, even if this differential treatment could not be justified purely on public health grounds, that would not determine whether the challenged regulations were sufficiently tailored to be minimally impairing. In other words, Ontario was entitled to balance the objective of reducing the risk of COVID-19 transmission in congregate settings with other objectives that did not arise in the context of regulating religious gatherings, such as preserving economic activity and preserving other social benefits which that activity made possible.

[96] In light of the above, I am not convinced that the application judge erred in the manner suggested by the applicants.

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c) Non-pharmaceutical Interventions

[97] The applicants argue that Manitoba failed to demonstrate that non-pharmaceutical interventions, such as masking, social distancing, symptom screening and improved ventilation, were available to use in place of a full prohibition on indoor worship. In support of their argument, they refer to the evidence provided by their expert, Dr. Jay Bhattacharya, that places of worship can safely hold services if restrictions, such as those that were imposed on certain businesses were mandated, as well as measures including disinfecting the worship space, minimizing food sharing, encouraging symptomatic congregants to stay at home and posting signs about COVID-19 symptoms.

[98] They argue that the justification the application judge gave for rejecting their submissions in this regard was that it would not be possible to "monitor hundreds of private places of worship or residences" (at para 305). In their view, this reasoning applies regardless of whether there are lesser restrictions in place or a full prohibition is imposed.

[99] While some monitoring would have had to occur either way, I agree with Manitoba that this was not the only reason that the application judge rejected the applicants' argument about lesser measures. That argument ignores the fact that lesser restrictions had already been in place before the impugned PHOs. Unfortunately, they could not stem the dire situation that had developed by the time the impugned PHOs were put in place.

[100] Furthermore, while the measures were unarguably restrictive, there were activities that were permitted. For example, the application judge adopted Manitoba's assertions that (at para 303):

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> . . .
> 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 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).
> . . .

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[101] In my view, the argument made by the applicants is founded on a minor comment made by the application judge. Moreover, undoubtedly, it would be more difficult to monitor the conditions suggested by the applicants than those imposed.

d) Length of Time Indoors

[102] The applicants argue that the application judge erred in accepting Manitoba's position that contact in retail stores is typically transient, with individuals being in close contact for only short periods of time. They argue that the PHOs did not limit the time that a person may spend in any location. Therefore, they state that, pursuant to the PHOs, a person could spend the entire day singing hymns in any of the less restricted businesses, such as a shopping mall.

[103] I am not convinced that the application judge erred in accepting the CPHO's evidence in this regard. This was a question of determining, as best

as possible, ordinary human behaviour in certain situations to assist in the assessment of risk.

e) Private In-Home Gatherings

[104] The applicants argue that Manitoba did not provide specific evidence that in-home gatherings resulted in outbreaks of COVID-19. They point to Dr. Loeppky's evidence that the data on pre-symptomatic and asymptomatic spread of the virus showed that it occurred within households only 0.7% of the time. Thus, they argue that asking homeowners to do symptom and temperature checks of all guests and ask them not to visit if they were ill were viable alternative measures.

[105] As Manitoba points out, gatherings at private residences were identified by the applicants' expert, Dr. Bhattacharya, as a significant source of COVID-19 transmission.

[106] Furthermore, symptom checking, as suggested by the applicants, would not have prevented pre-symptomatic transmission. In this regard, Manitoba points out that the evidence of Dr. Roussin and Dr. Kindrachuk that scientific studies demonstrated that the virus can be transmitted before developing symptoms is persuasive. Again, I am not convinced that the application judge erred in accepting Manitoba's evaluation of the situation at the time.

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f) Outdoor Gatherings

[107] The applicants argue that Manitoba failed to meet its burden of proof regarding the measures limiting outdoor gatherings to five people in public places.

[108] First, they argue that the application judge erred when he said that fewer than five persons could gather outside of a residence. In fact, no outdoor gatherings were allowed at private residences.

[109] A review of the reasons as a whole leads me to agree with Manitoba that the applicants have misinterpreted the application judge's comments in decision 219 at para 250. The application judge merely stated that it was "still possible for persons to visit outside of a residence as long as they complied with gathering size limits" (*ibid*). His use of the phrase "gathering size limits" could only have meant the five-person gathering limit at public places.

[110] Even if I am wrong in the above interpretation, I am of the view that the application judge was fully aware of the provisions of the impugned PHOs and, at the most, misspoke.

[111] Next, the applicants rely on Dr. Kindrachuk's testimony that evidence of outdoor spread is elusive.

[112] Manitoba acknowledges that, while the evidence was that the risk of transmission was higher indoors, it could not be ruled out in outdoor situations, especially in crowds with prolonged close contact.

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

[114] Manitoba argues that it cannot be faulted for taking a precautionary approach of limiting gathering sizes given the difficulty of enforcing physical distancing and mask wearing while outdoor at public places. I agree.

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

[116] I am reinforced in my conclusion by noting that similar arguments were made in other jurisdictions with similar results. For example, in *Trinity Bible Chapel*, the Ontario Court of Appeal considered measures that limited indoor and outdoor religious gatherings to 10 people (see para 6). The Court held that the motion judge did not err in considering the precautionary principle in her analysis of minimal impairment, nor did she err in rejecting the analogy between religious gatherings and the retail sector. It upheld the motion judge's finding that the measures imposed minimally impaired the right in question.

[117] In *Beaudoin*, the British Columbia Court of Appeal considered the prohibition on religious gatherings under the *Doré/Loyola* test. However, it also conducted a section 1 *Oakes* analysis in the alternative finding that the measures met the minimal impairment test (see paras 301-303).

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Salutary and Deleterious Effects

[118] At the final stage of the *Oakes* test, the salutary effects are balanced against the deleterious ones. While the analysis of a pressing goal, rational connection and minimal impairment are "anchored in an assessment of the law's purpose" only this final consideration "takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'" (*Hutterian Brethren* at para 76).

[119] As was explained in *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 179; and *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 26, freedom of religion can be limited when the exercise of it can interfere with the rights of others.

[120] The applicants argue that the deleterious effects of the impugned PHOs included the prevention of in-person worship, which is a serious limitation on the right to freedom of religion, which denied their equal worth and that their practices or beliefs were treated as less important than those of others. They further argue that prohibiting the gathering of people for political protest is also a serious restriction on the freedom of expression and assembly.

[121] In addition, they argue that the impugned PHOs have caused significant mental health issues to the applicants and other Manitobans. In this regard, they rely on Dr. Bhattacharya's evidence that psychological harm and substance abuse increased as a result of the impugned PHOs. Finally, they rely on the affidavit of Dr. Loeppky which I would summarize as indicating that there were increased alcohol-related hospitalizations, suspected opioid overdoses, self-harming behaviour and violence-related calls to police in 2020.

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[122] Conversely, relying on the evidence of Dr. Bhattacharya, they argue that lockdowns do not work; thus, there were no salutary effects.

[123] ARPA argues that institutional pluralism should be addressed at this final stage of the *Oakes* analysis. It argues that the recognition of compound violations of the *Charter* (here, sections 2(a)–(c)) assists in the determination of the significance of the deleterious effects because a law, which affects multiple protected interests, will weigh differently in the balance. They argue that the impugned PHOs effectively banned the applicants' right to worship.

[124] On this latter point, I agree with Manitoba's position that, while independent *Charter* breaches may be relevant in the consideration of the seriousness of the violations, here, the same restriction simultaneously affected different section 2 freedoms. I also agree that this is often the case where public protest is limited (i.e., sections 2(b) and 2(c) limits), but that courts have not interpreted this to mean that the deleterious effects are greater.

[125] At this stage of the analysis, the application judge acknowledged the harmful effects suffered by the applicants. However, he rejected their argument that there were no salutary effects based on his acceptance of the scientific evidence produced by Manitoba and his rejection of their expert evidence (see paras 321-23).

[126] In determining that the salutary effects outweighed the deleterious effects, the application judge found:

- the impugned PHOs still made it possible to meet with family and friends in small groups (see para 326);

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- the measures taken in the impugned PHOs were of a limited duration and 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" (at para 328);

- the task of properly balancing collateral effects was difficult and he accepted Manitoba's evidence that collateral consequences were monitored, but that decisions had to be made quickly and the PHOs were constantly being monitored (see para 331);

- while there may be general evidence of mental health deterioration and economic suffering during the pandemic, and that suffering was not to be minimized, it was not possible to attribute increases in addiction or suicide cases directly to the restrictions imposed by the impugned PHOs (see para 332);

- the decisions, in part, were based on shared knowledge by provincial and federal counterparts and were based on the knowledge of many public health experts (see para 334);

- After the impugned PHOs were put in place, the COVID-19 numbers began to decline in accordance with what the modelling predicted (*ibid*).

[127] I have not been convinced that the application judge erred in his consideration of the evidence in reaching the above conclusions.

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[128] Considering all of the above, I would not interfere with the application judge's finding that, "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" (at para 335).

[129] Before concluding, I would note, that in his section 1 *Charter* analysis, the application judge did not explicitly refer to the arguments made by ARPA regarding institutional pluralism. However, those arguments were addressed by the British Columbia Court of Appeal in *Beaudoin* and the Ontario Court of Appeal in *Trinity Bible Chapel*, both cases in which ARPA intervened.

[130] In *Beaudoin*, the Court stated that it agreed with an understanding of institutional pluralism that means that the "state and other institutions . . . must accord one another a mutual respect and corresponding 'constitutional space'" (at para 287), but that it need not be addressed separately at the proportionality stage of analysis as it was already part of the section 1 *Charter* analysis as described in *Oakes*. In its view, to add institutional pluralism as an animating feature of the section 1 *Charter* analysis would not add clarity or value (see para 288).

[131] In *Trinity Bible Chapel*, the Court disagreed with ARPA's argument that the regulations in that case undermined institutional pluralism. It held that the case "engaged the limits of institutional pluralism, balancing the accommodation of religious freedom with achieving Ontario's objective of reducing the spread of COVID-19" (at para 133).

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[132] In my view, each of these conclusions are available in this case. Institutional pluralism need not be considered as a separate animating feature of the section 1 *Charter* analysis as it is already incorporated in that analysis. To the extent that it is applicable, it was engaged here and all rights were carefully balanced.

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Ground 3–Administrative Law Issue–Did the Application Judge Err in Finding that the Impugned PHOs Complied with Section 3 of the *PHA?*

[133] Section 3 of the *PHA* states:

> **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.

[134] In asserting that the PHOs are not reasonably necessary and therefore, *ultra vires*, the applicants adopt their section 1 *Charter* argument.

[135] In considering this ground of appeal, the application judge correctly applied the reasonableness standard of review. He, once again, briefly reviewed the urgency of the situation at the time the impugned PHOs were ordered. Relying on his section 1 *Charter* analysis, he found that the decisions made by Dr. Roussin were within the range of reasonable decisions supported by scientific and epidemiological evidence. Thus, the decisions were entitled to deference and the requirements of section 3 of the *PHA* were met.

[136] Given that I have found no error in the application judge's section 1 *Charter* analysis, I am similarly not convinced that he erred in his conclusion regarding section 3 of the *PHA*.

Disposition

[137] For the reasons set out above, I would dismiss the appeal.

[138] As was agreed by the parties, I would not make an order of costs.

_____ JA

I agree: _____ JA

I agree: _____ JA

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APPENDIX

Relevant provisions of *The Public Health Act*, CCSM c P210:

Public health emergency
67(1) The chief public health officer may take one or more of the special measures described in subsection (2) if he or she reasonably believes that

(a) a serious and immediate threat to public health exists because of an epidemic or threatened epidemic of a communicable disease; and

(b) the threat to public health cannot be prevented, reduced or eliminated without taking special measures.

Special measures
67(2) The chief public health officer may take the following special measures in the circumstances set out in subsection (1):

(a) issue directions, for the purpose of managing the threat, to a health authority, health corporation, health care organization, operator of a laboratory, operator of a licensed emergency medical response system, health professional or health care provider, including directions about

(i) identifying and managing cases,

(ii) controlling infection,

(iii) managing hospitals, personal care homes and other health care facilities and emergency medical response services, and

(iv) managing and distributing equipment and supplies;

(a.1) issue an order prohibiting or restricting

(i) a person or class of persons being employed by or working at more than one hospital, personal care home or

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other facility, or any combination of them, at the same time, or

(ii) a person assigning work at a hospital, personal care home or other facility to a person who — within the period immediately before beginning the assignment, as specified in the order — has

(A) been employed by or worked at a different hospital, personal care home or facility, or

(B) provided home care services;

(a.2) in the case of a person who, at the same time, is employed by or working at more than one hospital, personal care home or other facility, or any combination of them, issue an order directing the person to work at only one of them;

(a.3) issue an order prohibiting or restricting persons from travelling to, from or within a specified area, or requiring persons who are doing so to take specified actions;

(b) order the owner, occupant or person who appears to be in charge of any place or premises to deliver up possession of it to the minister for use as a temporary isolation or quarantine facility;

(c) order a public place or premises to be closed;

(d) order persons not to assemble in a public gathering in a specified area;

(d.1) order persons to take specified measures to prevent the spread of a communicable disease, including persons who arrive in Manitoba from another province, territory or country;

(e) order a person who the chief public health officer reasonably believes is not protected against a communicable disease to do one or both of the following:

(i) be immunized, or take any other preventive measures,

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(ii) refrain from any activity or employment that poses a significant risk of infection, until the chief public health officer considers the risk of infection no longer exists;

(f) order an employer to exclude from a place of employment any person subject to an order under subclause (e)(ii).

Minister's approval required
67(3) The chief public health officer must not issue a direction or order under clauses (2)(a) to (d.1) without first obtaining the minister's approval.

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