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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.	)	
	)	Judgment delivered:
	)	October 21, 2021

JOYAL, C.J.Q.B.

INTRODUCTION

[1] The applicants challenge the constitutionality of various Emergency Public Health Orders (PHOs) made under ss. 13 and 67 of ***The Public Health Act***, C.C.S.M. c. P210

(***PHA***). Those orders were made and issued for the purpose of addressing the ongoing public health threat posed by the COVID-19 pandemic.

[2] In one part of the applicants' challenge (separate from this present application), the applicants assert that aspects of the PHOs infringe the ***Canadian Charter of Rights and Freedoms*** ("***Charter***"). In another part of that challenge (the focus of this present application), the applicants seek a declaration that ss. 13 and 67 of the ***PHA*** are violative of what they say is an unwritten constitutional principle that only the Legislative Assembly can make laws of general application and that such laws cannot be delegated to the chief public health officer (CPHO) or to individual ministers. The applicants say that insofar as s. 13 and s. 67 of the act enable such delegation, they are unconstitutional.

[3] This judgment and its reasons address only the challenge to the constitutionality of ss. 13 and 67 and the connected statutory delegation issue. Issues relating to whether any PHO made by the CPHO (and approved by the minister) violates the ***Charter***, are issues that are the subject of a separate and parallel application that involved voluminous affidavit evidence and cross-examinations. That application took place over several days. My decision (see ***Gateway Bible Baptist Church et al. v. Manitoba et al.***, 2021 MBQB 219) and the accompanying 153 pages of reasons in respect of that separate and parallel application are being released concurrently with these reasons, which to repeat, address only the applicants' arguments concerning ss. 13 and 67 of the ***PHA***.

[4] For the reasons that follow, I have determined that the statutory delegation per se in s. 67 of the ***PHA*** (and by extension s. 13) is constitutional and that the applicants' challenge in that regard should be dismissed.

BACKGROUND AND CONTEXT

[5] The applicants are churches, church congregants, and Manitoba citizens. In making the arguments they make on the present application, they are insisting that their fundamental rights and freedoms have been violated by PHOs that have contravened their absolute right to be governed democratically in accordance with the Constitution, democracy, the rule of law and the separation of powers. The applicants suggest that with the enactment and implementation of the impugned PHOs, they are now being governed by the mere decree of individuals or by ministerial fiat.

[6] The applicants make those arguments in the context of the present global pandemic in respect of which the Manitoba government ("Manitoba") had declared a wide state of emergency under ***The Emergency Measures Act***, C.C.S.M. c. E80, on March 20, 2020. The state of emergency has been extended several times. Numerous orders have been made under ***The Emergency Measures Act***. In addition, since March 2020, a large number of PHOs have issued (pursuant to s. 67 of the act). These orders take urgent action to protect the health and safety of Manitobans and are frequently varied as the pandemic evolves.

[7] In addition to their challenge to the constitutionality of s. 67, the applicants also impugn the constitutionality of s. 13 of the act as being a similarly "unconstitutional and undemocratic delegation of legislative power to an unelected official". That challenge presumably flows from what are from time to time, sub delegations by the CPHO Dr. Brent Roussin to his Acting Deputy Chief Public Health Officer Dr. Jazz Atwal. For example, in December 2020, pursuant to his authority under s. 13 of the act, Dr. Roussin

sub delegated his authority to make public health orders to Dr. Atwal who temporarily became the acting chief public health officer. Dr. Atwal issued the December 22, 2020 orders. In respect of those orders and the accompanying restrictions, the applicants also say that they broadly infringed the constitutional rights and freedoms of Manitobans and that they were issued without legislative review and oversight.

LEGAL FRAMEWORK

A. *Relevant Legislation*

[8] The applicants challenge the impugned orders made pursuant to provisions of the ***PHA***. Those specific provisions are also being challenged as earlier described. The impugned sections 13(1), 67(1), 67(2), 67(3) of the ***PHA*** read as follows:

> **Delegation by chief public health officer**
>
> 13(1) Unless otherwise stated in this Act, the chief public health officer may delegate any of his or her powers or duties under this Act to any person.
>
> . . .
>
> **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 regional 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 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 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,

(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.

B. ***Legislative History***

[9] Bill 21 (***The Public Health Act***) was introduced in the House on December 8, 2005. It was enacted on June 13, 2006 (S.M. 2006, c. 14) after thorough debate. It did not come into force until April 1, 2009.

[10] Manitoba has helpfully reminded the Court, that the ***PHA*** was the culmination of a decade of work conducted under both the government of the day and the previous administration. On first reading, the legislative record reveals that the minister thanked

those who worked tirelessly over a long period of time throughout Manitoba and across Canada to put together a new *Public Health Act*. That act was intended to strengthen the public health system, clarify responsibilities, make it easier to deal with threats to public health and to increase the province's capacity to provide wellness for all.[1]

[11] On May 16, 2006, the then minister of health stated as follows in his second reading speech:

> This bill was introduced to enhance our capacity, in particular to deal with emergencies. Planning for a pandemic has received the highest priority. Our Chief Medical Officer of Health has worked with Health Canada over the last 18 months to establish a comprehensive plan for a pandemic in Manitoba. Over the last three years, regional health authorities have developed formal agreements, I underline formal, with every municipality in Manitoba spelling out how resources will be deployed in the case of an emergency.[2]

[12] Manitoba is right to emphasize that with the emergence of new threats such as SARS, West Nile virus, monkey pox and the avian flu, the modernization of the ***PHA*** was an important focus for government. In that context, a deliberate choice was made respecting what Manitoba describes as a centering of our public health system under a single official, the CPHO. In that regard, the act sets out the powers afforded to public health officials to address communicable diseases and importantly, it also constrains those powers so as to ensure an appropriate balance between individual rights and the protection of public health. In that regard, in his second reading speech, the minister noted:

> … Bill 21 will complete this process of modernization. It learns from review of the SARS outbreak in Ontario. <u>It will support the reorganization of our public health</u>

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[1] Manitoba, Legislative Assembly, *Debates and Proceedings* (Hansard), 38th Leg. 40th Sess, Vol. LVII, No. 27B, (8 December 2005) at 1033 (Hon. Tim Sale).

[2] Manitoba, Legislative Assembly, *Debates and Proceedings* (Hansard), 38th Leg. 40th Sess, Vol. LVII, No. 70B, (16 May 2016) at 2206 (Hon. Tim Sale).

> services under one single official, the Chief Provincial Public Health Officer, whose powers are clearly set out in the new act. The act sets out the ways in which the act and officials can deal with hazards and communicable diseases and importantly sets limits on those powers as well.
>
> In addition to ensuring appropriate judicial oversight, Bill 21 provides that any exercise of the dramatic powers that are provided for a pandemic or bioterrorism must be reported to this House. They cannot be simply left to officials. Bill 21 also sets out other emergency powers that will enable the management of a wider public health threat. These powers complement the powers included in *The Emergency Measures Act*.
>
> … Bill 21 brings the legal framework for our public health system into the 21st century where it needs to be, while striking an appropriate balance between the rights of the individual and the rights of all of us to be protected. Thank you.[3]
>
> [emphasis added]

[13] It is instructive that the Honorable Myrna Driedger (member of the opposition at the time) also spoke in support of the goal of reorganizing the provincial public health services under a chief public officer. She did so recognizing that the new act was part of an attempt all across Canada to modernize public health acts:

> What they are doing across Canada right now is looking at modernizing public health acts. Considering what did happen with SARS, with the possibilities of avian flu, certainly we do need to have a public health act that is modern, coherent and connected, comprehensive and flexible to be able to meet emerging needs. That is the other challenge in addressing a public health act is to have the opportunity within it so that it is not so rigid that we cannot actually use it to address emerging needs. So there are a lot of challenges in putting together a good piece of legislation around public health.
>
> . . .
>
> Mr. Speaker, I support the reorganization of our provincial public health services under a chief provincial public health officer, in keeping with what is happening federally. I think that will position Manitoba very, very well in the future in terms of addressing public health issues.[4]

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[3] *Ibid.*

[4] Manitoba, Legislative Assembly, *Debates and Proceedings* (Hansard), 38th Leg. 40th Sess, Vol. LVII, No. 70B, (16 May 2016) at 2207-08 (Hon. Myrna Driedger).

[14] It is clear that the Manitoba Legislature made a conscious decision to put as Manitoba submits, "our trust in a public official with appropriate knowledge and expertise to make public health decisions, subject to ministerial approval". It is apparent that the legislature was very much aware of the need to strike a difficult and delicate balance between protecting public health and individual rights.

[15] I note that the ***PHA***, and specifically s. 67, was recently amended in response to the COVID-19 pandemic. Manitoba describes Bill 59, enacted on April 15, 2020, as providing enhanced enforcement measures and a strengthening of the powers of the CPHO. Those amendments provide greater flexibility to take special measures to prevent or reduce the spread of the pandemic. Those measures include such things as mandating isolation for travelers, business closures and social distancing. Such powers had already existed in other provinces, but not in Manitoba.

[16] In examining the legislative history of the ***PHA*** and its evolution in respect of the powers that have been delegated under the act, it important that s. 67 be understood in the context of the act as a whole. Manitoba is right to point out that s. 67 is but one of many provisions delegating powers to various public health officials to enable them to comprehensively address public health concerns, including emergencies.

C. ***Constraints on the Delegated Powers of the CPHO***

[17] As it relates to the specific delegation under s. 67 to the CPHO, I note that the powers are purposefully and carefully constrained by the ***PHA***. In that connection, I note the following:

- That under s. 67(1), special measures can only be taken if the CPHO reasonably believes: a) that a serious and immediate threat exists to public health due to an

epidemic of a communicable disease, and b) the threat cannot be prevented, reduced or eliminated without taking one or more of the special measures;

- That under s. 67(2), the types of orders that can be made are clearly delineated;
- That under s. 67(3), the special measures taken in the impugned PHOs require prior approval of the minister of health. As Manitoba underscores, this would seem to ensure political accountability and oversight;
- That pursuant to s. 3, the orders must not in the circumstances, restrict rights or freedoms any more than reasonably necessary to respond to the public health emergency;
- That s. 67(4) stipulates that an order requiring a person to be immunized cannot be enforced if the person objects;
- That the appointment of the CPHO by the minister under s. 10, must be a physician. The minister can remove or replace the delegate at any time; and
- That the ability to sub delegate powers under s. 13 is more limited under part 6. In that regard, the CPHO can only delegate his powers to a medical officer or director who is a physician (s. 68). This ensures that during a public health emergency, special measures will be ordered by someone with an appropriate medical expertise. Insofar as s. 13 provides for a sub delegate, that provision would appear to contemplate and recognize the significant strain on one person's ability to lead a response throughout a pandemic that may persist over many months or years.

[18] All of the above points constitute safeguarding constraints in respect of the powers delegated to the CPHO and they can be seen as providing both ongoing political oversight and accountability.

SUBMISSIONS OF THE PARTIES

Applicants

[19] The applicants on this application challenge the constitutionality of the orders as being an unconstitutional and an undemocratic delegation of legislative power to unelected and unaccountable government officials.

[20] The applicants submit that this application provides the Court with an opportunity and responsibility to reassess the permissible scope of the delegation of legislative power under the modern Constitution. It is the position of the applicants that in place of an ordered system of democratic governance under the rule of law, s. 67 of the ***PHA*** permits the broadest delegation of authority to a government official in Manitoba history. According to the applicants, this unrestrained and prolonged transfer of legislative power violates the text and the structure of the Constitution and must be struck down as being of no force and effect pursuant to the supremacy clause the ***Constitution Act, 1982***.

[21] The applicants concede that the Supreme Court of Canada has showed some tolerance for delegations of legislative power in various circumstances based on an early decision of the Privy Council and in various wartime decisions of the Supreme Court of Canada (see for example, ***Hodge v. The Queen*** (1883), 9 App. Cas. 117 (P.C.); ***In Re George Edwin Gray*** (1918), 57 S.C.R. 150; ***Shannon v. Lower Mainland Dairy Products Board***, [1938] A.C. 708 (P.C.); and ***Reference as to the Validity of the Regulations in Relation to Chemicals Enacted by Order in Council and of an Order of the Controller of Chemicals Made Pursuant Thereto***, [1943] S.C.R. 1). The applicants maintain however that these decisions pre-date the emergence of a modern understanding of the Canadian Constitution "heralded by the enactment of the ***Constitution Act, 1982***, including the ***Charter of Rights and Freedoms***, and the Supreme Court of Canada's subsequent charting of the architecture of the Constitution in a series of landmark rulings". See for example, ***Re Manitoba Language Rights***, [1985] 1 S.C.R. 721; ***Ontario (Attorney General) v OPSEU***, [1987] 2 S.C.R. 2; ***Reference***

re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R. 3; ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217; and ***Reference re Senate Reform***, 2014 SCC 32.

[22] It is the position of the applicants that it is unconstitutional for a legislature to delegate broad lawmaking power of general application (which is used to override the constitutional rights and freedoms) to an unelected public health official. The applicants argue that the institutional architecture of the Constitution is defined by the three well-known branches of government established by the foundational text and integrated through what are the informing unwritten principles of democracy, separation of powers, and the rule of law. Under this structure say the applicants, the processes of lawmaking and law application must be clearly articulated, with legitimizing democratic decision making by citizens proceeding and shaping executive lawmaking. The applicants assert that overly-broad delegations of legislative power to the executive branch deprive citizens of their right to participate in the formation of law and policy, deprive courts of their ability to meaningfully review executive action, and violate the "legitimate sphere of activity" of each branch of government.

[23] The applicants also argue that the public health orders are unconstitutional *ab initio* by virtue of the fact that the Lieutenant Governor has not provided Her Majesty's royal assent to the issuance of laws which broadly override fundamental rights and freedoms under the ***Charter***. The applicants argue that ss. 55 and 90 of the ***Constitution Act, 1867***, provide that provincial laws require royal assent through the Lieutenant Governor of the Province of Manitoba. The applicants insist that this

requirement is not optional particularly in light of the fact that the orders in question are not typical regulations. They are in fact say the applicants, laws of broad and general application that have not received the assent of Her Majesty's representative, the Lieutenant Governor. It is the applicants' position that insofar as s. 67 of the act allows for lawmaking by a public health official of the Crown without the required royal assent, s. 67 violates the Constitution. The applicants submit that the impugned section and any orders flowing from it are unconstitutional and of no force and effect.

[24] The applicants also argue that the Constitution mandates democratic governance for the good of society, for the prevention of arbitrary and tyrannical rule, and for the preservation and upholding of fundamental rights and freedoms of citizens. They maintain that since March 2020, the checks and balances represented by legislative study, debate, amendment and public consultation have been absent from the issuance of Dr. Roussin's orders. The applicants provide the Court with the somewhat rhetorical and conclusory assertion that: "the Constitution does not authorize Dr. Roussin's autocracy. It prohibits it."

Manitoba

[25] Manitoba submits that the constitutional challenge brought by the applicants is without merit. They argue that for almost 130 years, since the well-known ***Hodge*** case, an unbroken chain of binding authority from the Privy Council and the Supreme Court of Canada has stood for the proposition that legislatures may delegate broad and general lawmaking authority to subordinate bodies of its choosing over any subject within its jurisdiction. Manitoba insists that there is no constitutional principle, written or unwritten,

that precludes such delegation. The foundational and binding cases of ***Hodge***, ***In Re George Edwin Gray***, ***Shannon***, and the ***Chemicals References*** have been frequently affirmed by the Supreme Court of Canada and various provincial appellate courts. The constitutionality of delegated powers has recently been confirmed by the Supreme Court of Canada in ***References re Greenhouse Gas Pollution Pricing Act***, 2021 SCC 11, at paragraphs 83-88).

[26] Manitoba responds to the applicants' argument by asserting that the democratic principle invoked by the applicants, is assured by another important constitutional principle: parliamentary sovereignty. In that regard, Manitoba suggests that it was the will of the elected assembly to enact the delegation contemplated by the act and s. 67 more specifically. At the same time, the legislature retains at any time, plenary powers to limit, alter or revoke the delegated power it has conferred. So too can the legislature override a particular PHO.

[27] Manitoba also notes that democratic accountability is guaranteed by the system of responsible government. In other words, the minister of health, who appoints the CPHO and approves the impugned orders, is accountable both to the executive and to the legislature. Cabinet must retain the confidence of the House. In short, Manitoba argues that "our robust legislative institutions and procedures provide ample means to preserve democratic accountability".

[28] In addition to the other aspects of its position, Manitoba argues in any event, that delegated power is never unbounded or unrestrained. The CPHO cannot exceed the limits of the statutory power in s. 67, nor can he or she make orders that violate the

Charter. In that sense, constitutional imperatives, statutory limits and rule of law are preserved by judicial review.

[29] It is Manitoba's position that rather than violating the separation of powers, the delegation of legislative powers is in fact the "lifeblood of our modern state". Manitoba emphasizes that the legislature exercises the democratic will to delegate. The executive through the minister must approve the exercise of that authority. It is the judiciary who then ensures that the exercise of authority remains within the balance of the law. In short, all three branches of government play their appropriate constitutional role.

DISCUSSION

[30] When I examine the impugned legislative provisions of the act, I am not in agreement with the applicants that the PHOs violate the democratic right of Manitobans "to be governed through laws debated, amended and passed by an elected legislature". Neither do I accept that the delegation under s. 67 represents an "unrestrained and prolonged transfer of legislative power". As I will explain below, I have determined that rather than being undermining of Canada's constitutional architecture or as the applicants suggest, compromising of the unwritten constitutional principles of democracy, the rule of law and/or the separation of powers, the broad delegation of powers as it takes place pursuant to s. 67 is consistent with Supreme Court of Canada jurisprudence validating such delegation. It is also consistent with the high court's jurisprudence which has affirmed such delegation as a necessary reality of Canada's modern regulatory state.

(i) ***Democratic Accountability Through Parliamentary Sovereignty***

[31] As noted in the earlier account of the legislative history of the act, the powers of the CPHO were fully debated and duly enacted by the legislature. As Manitoba has argued, it was the will of the democratically elected representatives to delegate the order-making power to the CPHO, on approval of its minister of health, so that he or she could address health emergencies like the pandemic.

[32] Manitoba is correct when it argues that democratic accountability is guaranteed by parliamentary sovereignty. Indeed, the democratic principle must be understood in light of such parliamentary sovereignty. Democratic accountability is clearly assured when the delegation in question was enacted by a sovereign legislature. In that regard, the legislature can at any time, amend, expand, constrain or altogether eliminate the delegation. It can also choose to override any subordinate regulation, rule, order or decision. It should also not be forgotten that the minister, who must approve the impugned PHOs, is directly accountable to legislature.

[33] In the end, the broad delegated lawmaking authority as exemplified by s. 67 of the act, does not undermine our political institutions or impinge upon the right of discussion or debate, rather, it is as Manitoba argues, a deliberate product of it. In the present case, the delegated authority in question is the product of the democratic will of the legislature as reflected by the legislative history of the ***PHA***. Such delegated authority is also validated by 130 years of binding jurisprudence.

(ii) ***Delegated Powers as an Essential and Normalized Part of the Modern Canadian State***

[34] Contrary to the tenor of the applicants' challenge, the delegation that takes place pursuant to the act is consistent with the realities of the modern regulatory state in Canada and elsewhere. As Manitoba has argued, delegated laws have been described as the lifeblood of the modern administrative state. Far from being incompatible with our constitutional architecture or endangering the rule of law as suggested by the applicants, contemporary Supreme Court of Canada jurisprudence contemplates and assumes a certain degree of delegated lawmaking (see for example, ***Alberta v. Hutterian Brethren of Wilson Colony***, 2009 SCC 37, at paragraph 40).

[35] The Supreme Court of Canada in a recent acknowledgment of the evolution and role of delegated decision making in modern Canadian society, stated as follows in ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65 (at paragraphs 4 and 29):

> … In parallel with the law, the role of administrative decision making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.
>
> . . .
>
> Of course, the fact that the specialized role of administrative decision makers lends itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority. Over the years, the Court has pointed to a number of other compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker. <u>These rationales have included the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.</u>
>
> [emphasis added]

[36] In that same spirit, Abella and Karakatsanis JJ. also noted the vast array of complex and important subjects that are now addressed by administrative decision makers (at paragraph 202):

> The modern Canadian state "could not function without the many and varied administrative tribunals that people the legal landscape" (The Rt. Hon. Beverley McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online)). Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, "government would be paralyzed, and so would the courts" (Guy Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 3).
>
> [emphasis added]

[37] In the "modern Canadian state", administrative decisions currently range from the routine to the life altering, from matters of "high policy" to the "pure law". The legislative history of the ***PHA*** suggests that the rationales that motivated the delegation of emergency powers to the CPHO, are similar to those typically invoked when delegating powers to administrative decision makers. In the case of the CPHO, there was an obvious need for medical expertise and prompt, flexible responses during a public health emergency.

(iii) ***Delegation Under the Act Does Not Offend or Compromise the Unwritten Constitutional Principles of Democracy, Rule of Law and the Separation of Powers***

[38] The applicants' argument that the delegation of powers under s. 67 offends the unwritten constitutional principles of democracy, rule of law and separation of powers is without merit. Manitoba has strenuously argued that none of the cases relied upon by the applicants stand for the proposition that a broad delegation of subordinate lawmaking

power undermines our basic constitutional structure which includes the foundational principles of democracy, the rule of law and the separation of powers. As Manitoba not surprisingly points out, none of those cases invoked by the applicants address the topic of delegation at all. It need be acknowledged that since the Privy Council case in ***Hodge*** and now continuing through to the recent pronouncements of the Supreme Court of Canada (including ***References re Greenhouse Gas Pollution Pricing Act*** (see paragraphs 83-88)), there is indeed, as Manitoba submits, an "unbroken chain" of the highest binding authority that has repeatedly confirmed the legislature's authority to delegate broad and general legislative powers. In that sense, s. 67 of the ***PHA*** is indeed entirely consistent with the Constitution, including unwritten principles.

[39] Insofar as the applicants are not assisted by the jurisprudence and instead, must rely upon academic commentary to suggest that it is time to reassess the law of delegation in Canada, I note that even such commentary does not starkly preclude delegation. Instead, the commentary stipulates with more nuance, that such delegation need be accompanied by enabling legislation that contains an adequate level of content so it is recognizable and understandable to citizens and which contains sufficient information to enable a reviewing court to control the substance of the orders.[5]

[40] In respect of that academic commentary, Manitoba is quick to note that separate and apart from the fact that the author (Mr. (Alyn) James Johnson) does not present a position that is reflective of the current state of Canadian law, s. 67 of the ***PHA*** nonetheless meets the test stipulated by Mr. Johnson himself. In that regard, the

[5] See (Alyn) James Johnson, "The Case for a Canadian Nondelegation Doctrine" (2019) 52:3 UBC L Rev 817, 817-18.

legislature has provided through the ***PHA***, very clear criteria for invoking special measures and it has set out what measures may be taken. In that sense, there is indeed sufficient content in the enabling legislation so as to subject the PHOs to judicial review.

[41] I have also considered the applicants' arguments with respect to the impugned provisions and the threat to the rule of law. I am not persuaded. In my view, the rule of law is preserved by judicial review and judicial review is more than possible in relation to the PHOs in question.

[42] In ***British Columbia v. Imperial Tobacco Canada Ltd.***, 2005 SCC 49, at paragraphs 57 to 60, the Supreme Court of Canada held that the rule of law as a fundamental principle of our constitutional structure, encompasses three principles: 1) the law is supreme over government officials and private individuals alike; 2) there is an order of positive laws that preserves normative order; and 3) the relationship between the state and individual must be regulated by law. With such a definitional reference point in place, the court held that it would be difficult to conceive how legislation can be invalidated based on the rule of law as the rule of law does not speak to the terms of legislation.

[43] I agree with Manitoba that it would indeed be highly ironic were a court to strike down (on the basis of the unwritten principle of the rule of law) legislation which otherwise complies with the written text of the Constitution given that a statute duly enacted by the legislature is in fact one of the important manifestations of the rule of law. That is the reason why courts generally respect the legislature's choice to delegate

powers, including the choice of delegate and the scope of that delegate's authority (see ***Vavilov***, at paragraphs 12, 24 and 26).

[44] It is obvious that administrative bodies are required to act within the confines of their statutory authority in the Constitution. In that context, and in the context of any discussion about delegated power, the rule of law is assured and preserved by making available judicial review. To the extent that the applicants have concerns that the CPHO might act arbitrarily or in excess of his or her authority under the enabling act or indeed, exercise power in a manner that violates ***Charter*** rights, those concerns can be addressed by judicial review. Those concerns however, should not be conflated with or be seen to have a bearing on, the constitutional validity of the underlying statutory delegation itself (see ***Reference re Pan-Canadian Securities Regulation***, 2018 SCC 48, at paragraph 125).

[45] Insofar as the applicants have argued that broad delegation offends the separation of powers, such an argument is also unfounded. As already explained, the legislature has established the limits of delegated authority and it will always retain the sovereign ability to alter those limits and/or override particular orders at any given time. The minister in turn can refuse to approve an order or can in fact replace the CPHO. The courts in turn will control or constrain any arbitrary exercise of power through judicial review, thereby upholding the rule of law. As Manitoba has submitted, all three branches of government play their appropriate and unique role.

(iv) ***Democratic Accountability Through the Safeguarding Constraints of the CPHO***

[46] Just as s. 67 was democratically debated and enacted, so too must s. 67 be seen as having contemplated constraints on the CPHO's power. Those constraints were earlier discussed at paragraph 17 of this judgment. I accept that those safeguarding constraints do indeed provide an additional level of political oversight and accountability in relation to the delegated powers in question.

(v) ***The Use of Unwritten Constitutional Principles to Invalidate Legislation***

[47] The applicants' argument respecting the potential to invalidate an impugned law on the basis of unwritten constitutional principles is not persuasive. I accept that unwritten constitutional principles may in some instances assist in understanding the internal architecture of the Constitution and inform aspects of our interpretation, understanding and application of the text. In that sense, they may be used as interpretive tools (see ***Reference re Senate Reform***, at paragraph 26). However, unwritten constitutional principles do not and should not provide an independent basis to strike down legislation.

[48] Manitoba relies upon the Supreme Court of Canada judgment in ***Imperial Tobacco Canada Ltd.***, wherein 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. In connection to that determination, the court 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).

[49] In addition to the above, I note that the applicants' arguments with respect to the use of unwritten constitutional principles has not found favour in related recent Supreme Court of Canada judgments, the most recent of which was ***Toronto (City) v. Ontario (A.G.)***, 2021 SCC 34.

(vi) The Inapplicable Requirement for Royal Assent in the Present Case

[50] As it relates to the applicants' argument concerning the requirement for royal assent in respect of public health orders, Manitoba's submission provides a full and dispositive response.

[51] Sections 55 and 90 of the ***Constitution Act, 1867***, require that all bills passed by the legislature receive royal assent. This requirement however applies only to primary legislation. It does not apply to subordinate laws such as regulations, by-laws, orders, rules or other forms of delegated subordinate laws.

[52] Just as I have rejected the applicants' argument that the PHOs must be enacted by the legislature, I similarly reject the applicants' argument with respect to royal assent. Given that I have determined that the delegation under s. 67 is valid, PHOs do not require royal assent.

[53] The applicants' reliance on ***Re The Initiative and Referendum Act***, 1919 CanLII 246 (U.K. J.C.P.C.) at pages 20-21, 24-25, is misplaced. The constitutional problem identified in that case has no resemblance to the present case, just as the case has no application to the issue of delegated powers. Section of 67 of ***PHA*** does nothing similar to what was impugned in ***Re The Initiative and Referendum Act***. Under the ***PHA***, the applicants are wrong to suggest that the CPHO is acting as a *de facto* legislature with the minister of health usurping the role of the Lieutenant Governor.

CONCLUSION

[54] There is no constitutional or any legal basis for invalidating the impugned provisions of the PHOs as argued by the applicants. Section 67 of the ***PHA*** represents neither an unconstitutional nor an undemocratic delegation of power.

[55] Separate from the applicants' legal argument, which has no merit, it is impossible to ignore the highly persuasive, but obviously not determinative submissions of Manitoba with respect to the practical realities of overseeing a pandemic. In that regard, Manitoba submits that it would be untenable if the only permissible and constitutional manner by which to issue broad public health orders was through legislation. Such a requirement that public health orders only be enacted through statute would make it virtually impossible to respond to an emerging and evolving public health crisis. If every public health order and subsequent modification had to be enacted by the Legislative Assembly, it could potentially handcuff and immobilize government's ability to act in a timely manner. That would certainly not be in the public interest. No other jurisdiction in Canada so restrains its public health officials.

[56] In the final analysis, I see the delegation to the CPHO pursuant to the ***PHA*** as a constitutional and democratically legitimate means of ensuring that the public health measures that are stipulated are measures that are proposed by a qualified medical expert. Such delegation provides the flexibility and accountability essential for responding to an evolving and rapidly changing pandemic.

[57] For the foregoing reasons, any argument that the statutory delegation in s. 67 of the ***PHA*** is unconstitutional, is without legal foundation and is accordingly dismissed.

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