File No. CI 20-01-29284

THE QUEEN'S BENCH
Winnipeg Centre

APPLICATION UNDER: *The Constitutional Questions Act*, C.C.S.M., c. 180

AND UNDER: The Court of Queen's Bench Rules, M.R. 553/88

IN THE MATTER OF: *The Public Health Act*, C.C.S.M. c. P210

BETWEEN:

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, ROSS MACKAY

Applicants,

– and –

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA, DR. BRENT ROUSSIN in his capacity as CHIEF PUBLIC HEALTH OFFICER OF MANITOBA, and DR. JAZZ ATWAL in his capacity as ACTING DEPUTY CHIEF OFFICER OF HEALTH OF MANITOBA

Respondents.

APPLICATION BRIEF OF THE APPLICANTS
HEARING DATES: April 19-30, 2021

JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS

D. Jared Brown / Allison Kindle Pejovic / Jay Cameron

[redacted]

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PART I – INTRODUCTION

> The biggest casualty of the lockdown will not be the closed pubs, restaurants and shops and the crippled airlines. It will not be our once-thriving musical, theatrical and sporting culture. It will not even be the wreckage of our economy. These are terrible things to behold. But the biggest casualty of all will be liberal democracy.
>
> ...
>
> Liberal democracy breaks down when frightened majorities demand mass coercion of their fellow citizens, and call for our personal spaces to be invaded. These demands are invariably based on what people conceive to be the public good. They all assert that despotism is in the public interest.
>
> ...
>
> A society in which oppressive control of every detail of our lives is unthinkable except when it is thought to be a good idea, is not free. It is not free while the controls are in place. And it is not free after they are lifted, because the new attitude will allow the same thing to happen again whenever there is enough public support.
>
> ...
>
> Liberty is not an absolute value but it is a critically important, foundational one. Of all freedoms, the freedom to interact with other human beings is perhaps the most valuable. It is a basic human need, the essential condition of human happiness and creativity.[1]

1. Statement of Facts

1. On or about March 20, 2020, the Province of Manitoba declared a province-wide 'state of emergency' under *The Emergency Measures Act* C.C.S.M. c. E80 due to the Covid-19 pandemic. Between March 2020-February 2021, pursuant to the authority delegated to him under section 67 of the *Public Health Act*, C.C.S.M. c. P210 (the "*Act*"), Manitoba's Chief Public Health Officer ("CPHO") Dr. Brent Roussin, and his sub-delegate Dr. Jazz Atwal, issued successive Public Health Orders which dramatically altered the lives of Manitobans, including broadly infringing their constitutional rights and

[1] Lord Jonathan Sumption (Retired Justice of the Supreme Court, UK), "Liberal democracy will be the biggest casualty of this pandemic" *The Telegraph*, February 15, 2021 (Applicants' Book of Authorities, **TAB 46**) ("Applicants' BOA")

freedoms to assemble and worship. The Minister of Health, Seniors and Active Living, Mr. Cameron Friesen (at that time), approved the Public Health Orders.

2. Dr. Roussin issued the most recent set of Orders dated April 8, 2021.[2]

3. Canadians have fundamental rights and freedoms which are constitutionally guaranteed absent demonstrable justification according to law in a free and democratic society. The Applicants, like all Manitobans, have been subjected to wide-ranging and long-term restrictions and prohibitions on their movements and activities in an unprecedented manner. Personal rights and freedoms have vanished almost overnight, with no end in sight. The Respondents have, for many months, imposed draconian measures upon the Applicants which have turned their lives upside down. The Respondents closed churches completely, asserting they were "non-essential" services, which caused the Applicants tremendous mental and spiritual hardship. The Respondents also forbade public outdoor gatherings of more than five people, effectively prohibiting peaceful protests, and indoor visits with anyone other than one's own household. The stress and loneliness that these measures have caused the Applicants, (and all Manitobans) is profound and devastating. How "flatten the curve" turned into more than a year of crushing public health measures which restrict everything that makes Manitobans happy and human is unfathomable.

4. The Applicants specifically challenge the constitutionality of Orders 1(1), 2(1), 15(1),(3) of the November 21, 2020 Public Health Orders, Orders 1(1), 2(1), 16(1),(3) of the December 22, 2020 Public Health Orders, Orders 1(1), 2(1), 16(1),(3) of the January 8, 2021 Public Health Orders, and subsequent orders of a substantially similar or identical nature, that prohibit or restrict gatherings at private residences, restrict public gatherings and public expression, and restrict and close places of worship (the "PHOs"). Due to the restrictive nature of all of the Orders since January 8, 2021 and including the current Orders dated April 8, 2021, the Applicants are challenging their constitutionality as well.

[2] Public Health Order, Province of Manitoba, April 8, 2021 (Applicants' BOA, **TAB 42**)

5. They argue the PHOs have infringed their sections 2(a)(b)(c), 7, and 15 rights under the *Canadian Charter of Rights and Freedoms*, in the manner described below. They further submit that those infringements cannot be reasonably justified in a free and democratic society under section 1 of the *Charter.* Similar arguments are made in respect of the alternative argument that the PHOs' failure to comply with section 3 of the *Act* renders them *ultra vires*. Finally, the Applicants argue that in the further alternative, the PHOs conflict with section 176 of the *Criminal Code* (the "*Code*"), rendering them inoperative by the doctrine of paramountcy.

2. The Science

6. This Application is a *Charter* challenge to public health orders which the Applicants argue are not justified under section 1 of the *Charter*. While the Applicants will argue below that there are multiple factors which ought to lead this court to the conclusion that the Respondents have not met their section 1 onus, one of the key factors is the scientific evidence which is inextricably connected to Dr. Roussin's decisions to issue the impugned PHOs. Therefore, it is necessary to outline the scientific evidence before the court, and which the Applicants expect will be confirmed on cross-examinations.

i. Mortality Danger of Covid-19

7. Dr. Jay Bhattacharya, a world-renowned epidemiologist, medical doctor, PhD in economics, and Full Professor at Stanford University, identified in his January 5, 2021 expert report that for a majority of the population, including the vast majority of children and young adults, Covid-19 poses *less* of a mortality risk than seasonal influenza. According to a meta-analysis by Dr. John Ioannidis, (one of the most cited scientists in the world), the median infection survival rate from Covid-19 is 99.77%. For Covid-19 patients under 70, the meta-analysis finds an infection survival rate of 99.95%.[3]

8. Dr. Bhattacharya wrote that a study of Covid-19 in Geneva published in the prestigious journal *The Lancet* provided a detailed breakdown of the infection survival rate: 99.9984% for patients 5 to 9 years old; 99.99968% for patients 10 to 19 years old;

[3] Affidavit of Jay Bhattacharya, sworn January 5, 2021, at Exhibit "C", p. 2 ("Bhattacharya Affidavit1")

99.991% for patients 20 to 49 years old; 99.86% for patients 50 to 64 years old; and 94.6% for patients above 65 years old.[4]

9. The Respondents' affiants do not dispute that Covid-19 poses the greatest risk of death to older people.

ii. Asymptomatic Transmission of Covid-19

10. In his January 5, 2021 affidavit, Dr. Bhattacharya identified two recent, significant peer-reviewed studies which found that asymptomatic spread of Covid-19 is significantly lower than symptomatic spread. Specifically, one of the studies, a meta-analysis of 54 studies in the *Journal of American Medical Association Network Open*, confirmed that within households, where none of the safeguards that restaurants are required to apply are typically applied, *symptomatic* patients passed on the disease to household members in 18% of instances, while *asymptomatic* patients passed on the disease to household members in 0.7% of instances.[5]

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

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

13. Dr. Jason Kindrachuk, an Infectious Disease specialist and Assistant Professor at the University of Manitoba, also discussed asymptomatic transmission. He concluded that while SARS-CoV-2 transmission is likely lower from individuals with asymptomatic

[4] Bhattacharya Affidavit1, Exhibit "C", p. 3
[5] Bhattacharya Affidavit1, Exhibit "C", at p. 8

infections as compared to symptomatic cases, those in the "pre-symptomatic" phase of disease appear to be able to transmit the virus similarly to symptomatic individuals.[6]

14. Dr. Bhattacharya had not previously addressed "pre-symptomatic transmission" of the disease in his January 5, 2021 expert report. In response, Dr. Bhattacharya explained that in his previously cited *JAMA Netw Open* meta-analysis study, the authors concluded that household transmission of the disease from asymptomatic *and* "pre-symptomatic" patients occurred 0.7% of the time. He also revealed that many of Dr. Kindrachuk's studies were taken into consideration in the larger meta-analysis from *JAMA Netw Open*, which ultimately determined the vanishingly low rate of asymptomatic and pre-symptomatic transmission.[7]

iii. RT-PCR Testing, Infectiousness, and Cycle Thresholds

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

16. He states that a higher cycle threshold increases the false positive rate of the PCR test because even if a non-infectious viral load is present in the sample obtained from the patient, a large number of permitted doublings could amplify whatever minute or fragmentary viral segment is present such that the test result is positive. A positive test result obtained in this fashion does not mean that such an individual is infectious or contagious. On the contrary, an individual who tests "positive" using a high cycle threshold is exceedingly unlikely, or even impossible, to be a transmission risk at all.

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[6] Affidavit of Jason Kindrachuk, affirmed March 2, 2021, Ex. B, pp. 9-10 ("Kindrachuk Affidavit")
[7] Bhattacharya Affidavit2, Exhibit "A", at p.10

17. Dr. Bhattacharya asserts that the PCR test is not the gold standard for determining whether a patient is infectious. He says that from an epidemiological point of view, infectivity measurement is more important than a measurement of whether the virus is present, since it is possible for a patient to have non-viable viral fragments present, a positive PCR test, and yet not be infectious. He cites a study published in the *European Journal of Clinical Microbiology & Infectious Diseases* which determined that culture positivity of the virus decreased progressively by Ct values to reach 12% at a Ct of 33. That means only 12% of the samples spun at a Ct of 33 had a positive culture. *Further, no culture was able to be obtained from samples with a Ct of greater than 34.* Dr. Bhattacharya also cited a study published in top epidemiological journal *Eurosurveillance* which found that if 27 cycles are needed for a positive test, the false positive rate is 34%; if 32 cycles are needed for a positive test, the false positive rate is 92%; if more than 40 cycles are needed for a positive test, the false positive rate is nearly 100%.[8]

18. He revealed that the WHO published an Information Notice on December 8, 2020 warning users of PCR tests that it had received user feedback on an elevated risk for false SARS-CoV-2 results when testing specimens using PCR test.[9]

19. Dr. Jared Bullard, a Microbiologist employed by the Province of Manitoba who works in the Cadham Provincial Lab ("CPL") where all of the PCR tests are analyzed for Covid-19, provided an affidavit wherein he explained how PCR tests work and explained his practice with those tests in the lab. He admitted that the CPL uses a total of 40 cycles of amplification. He explained that specificity is the proportion of people who do not have Covid that the test will call negative, and that poor specificity results in false positives. He further explains that the specificity of the PCR test is greater than 99.9% - i.e. less than 1 in 1000 will have a false positive result.[10]

20. He stated that SARS-CoV-2 is detectable by RT-PCR for up to 3 months.[11]

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[8] Bhattacharya Affidavit1, Exhibit "C", at p. 37
[9] Bhattacharya Affidavit1, Exhibit "C", at p. 38
[10] Affidavit of Jared Manley Peter Bullard, Affirmed March 5, 2021, Exhibit "C", at lines 85-86, 131-136 ("Bullard Affidavit")
[11] Bullard Affidavit, Exhibit "C", at lines 148-149

21. Dr. Bullard referred to his own study which found that samples with a Ct value of 25 or greater did not grow SARS-CoV-2 in cell culture, and another study published in the *Clinical Infectious Diseases Journal* (also referred to in Dr. B's January 5, 2021 expert report) which found that for SARS-CoV-2 in cell culture, 70% had a positive culture at a Ct of 25, 20% had a positive culture at a Ct of 30, and less than 3% had a positive culture at a Ct of 35. Dr. Bullard asserted that if an individual tests positive, he has the SARS-CoV-2 pathogen and has been diagnosed with Covid-19.[12] He concluded, however, that no single SARS-CoV-2 PCR Ct value in isolation can be used to determine infectiousness of a case and must be interpreted in the overall clinical context.[13]

22. Dr. Bullard's expert report revealed that in December 2020, out of 5825 positive PCR results in Manitoba, 18% had a Ct of 25-30, 18% had a Ct of 30-36, and 7% had a Ct of 36-40.[14]

23. In response, Dr. Thomas Warren, an Infectious Disease specialist and Medical Microbiologist and Adjunct Professor at McMaster University, agreed with Dr. Bullard that a positive PCR test represents the identification of SARS-CoV-2 virus fragments. Dr. Warren clarified that a positive PCR test result did not necessarily indicate that the entire virus is present or that the patient has Covid-19. He responded to Dr. Bullard's assertion that a PCR has a specificity of greater than 99.9%, and stated that while a positive test means there is a 99.9% likelihood that the person has or recently had SARS-CoV-2 virus in their body, it does not mean that the person is infectious or that they have Covid-19 disease (symptoms). This is an important distinction. He concluded that the presence of SARS-Co-V-2 virus as detected by PCR is necessary but not sufficient to indicate either infectiousness or Covid-19 disease properly defined.[15]

24. In response to Dr. Bullard, Dr. Bhattacharya analyzed the December 2020 lab data and found that 25% (1456) of the 5825 people that Manitoba considered a

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[12] Bullard Affidavit, Exhibit "C", at line 217
[13] Bullard Affidavit, Exhibit "C", at lines 157-170
[14] Bullard Affidavit, Exhibit "C", at lines 193-195
[15] Affidavit of Thomas Warren, Exhibit "B", at pp. 3, 5-6 ("Warren Affidavit")

"positive" case in December 2020 had Ct values that strongly suggested they were *not* infectious.[16]

25. Both Dr. Bhattacharya and Dr. Warren in response referred to the second warning from the WHO on January 20, 2021 where it gave guidance on PCR testing which states: "health care providers must consider any result in combination with timing of sampling, specimen type, assay specifics, clinical observations, patient history, confirmed status of any contacts, and epidemiological information." Further, the WHO guidance advises: "...the probability that a person who has a positive result (SARS-CoV-2 detected) is truly infected with SARS-CoV-2 decreases as prevalence decreases, irrespective of the claimed specificity."[17]

iv. Herd Immunity

26. Dr. Bhattacharya writes that the science strongly suggests that recovery from SARS-CoV-2 infection will provide lasting protection against reinfection, either complete immunity or protection that makes a severe reinfection extremely unlikely. He writes that herd immunity, a scientifically proven phenomenon, occurs when enough people have immunity so that most infected people cannot find new uninfected people to infect, leading to the end of the pandemic.[18] He suggests a strategy of Focused Protection to better protect the elderly while allowing the rest of society to live their lives.[19]

27. Dr. Kindrachuk disagrees with Dr. Bhattacharya's approach and cites the example of Manaus, Brazil which he states was devastated by the first wave of the pandemic with 4.5-fold excess mortality. He cited a seroprevalence study which found that 76% of the Manaus population was infected with SARS-CoV-2 and had antibodies by October 2020, but virus transmission continued anyway with a devastating surge of SARS-CoV-2 infections by mid-January 2021. He concluded that the data from Brazil provides supportive evidence that a herd immunity approach through natural infections could have devastating impacts on public health.[20]

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[16] Bhattacharya Affidavit2, Exhibit "A", at p. 13
[17] Warren Affidavit, Exhibit "B", at p. 3; Bhattacharya Affidavit2, Exhibit "A", at p. 14
[18] Bhattacharya Affidavit1, Exhibit "C", at p. 33
[19] Bhattacharya Affidavit1, Exhibit "C", at p. 34
[20] Kindrachuk Affidavit, TAB B, at pp. 16-17

28. In reply, Dr. Bhattacharya points out that the Manaus, Brazil example is based on a single, flawed, seroprevalence study conducted in Manaus in mid-2020. He states that the 76% estimate was not based on a random survey, but on blood donors, who are a very select group of people in the developing world. He illustrates that the seroprevalence among the blood donors was 52%, which was adjusted upwards based on questionable mathematical modelling of waning anti-bodies. He also states that it is impossible to conclude that lockdowns in a single location are a good strategy to control the epidemic.[21]

v. Spread of Covid-19 Outdoors

29. The Respondents have not provided any scientific evidence that Covid-19 transmits easily outdoors or that being outdoors amongst other people is a risk to the Manitoba population.

vi. Covid-19 Spread in Religious Settings

30. Dr. Bhattacharya asserts that places of worship can safely hold indoor worship services, with minimal effect on the spread of Covid-19 disease, by following guidelines recommended by the CDC. Such guidelines include recommendations to protect staff who are at higher risk for severe illness, engaging in hand-washing, mask wearing when social distancing is difficult, social distancing, disinfecting the worship space before and after each service, minimizing food sharing, encouraging symptomatic congregants to stay home, and posted signs about Covid-19 disease.[22]

31. He referred to medical studies which revealed that church attendance provides psychological benefits for attendees, especially for adolescents. He also referred to medical studies which showed the psychological benefits provided by communal singing in the process of worship which is shown to foster a sense of belonging and connectedness that is crucially important with measurable effects on mental health.[23]

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[21] Bhattacharya Affidavit2, Exhibit "A", at p. 18
[22] Bhattacharya Affidavit1, Exhibit "C", at pp. 24-25
[23] Bhattacharya Affidavit1, Exhibit "C", at p. 25

32. Dr. Roussin's reasoning for closing places of worship in November 2020 is that activities at those places are comparable to theatres, concert halls, or indoor sporting events, and involve prolonged contact between persons which could include hugging, hand shaking, choirs, singing, and sharing items.[24]

33. In Dr. Carla Loeppky's affidavit, she refers to clusters associated with attendance at faith-based events between August 2020-February 2021. She also includes a chart which is called "Potential Acquisition Settings are Diverse" in which it is identified that in the one-month period of September 1, 2020-October 2, 2020, 3.2% of cases were *potentially* acquired at faith-based settings.[25]

vii. Variants of Concern

34. Dr. Kindrachuk and Dr. Roussin[26] first raised the issue of "Variants of Concern" (VOC) in their affidavits. Dr. Kindrachuk states in his affidavit that variant B.1.1.7 has increased transmissibility ranging from 30-70% over circulating non-VOCs and has been associated with increased risk of severe and fatal disease in hospitalized patients. He recommends decreased community transmission to reduce the potential for additional emergence of VOCs.[27]

35. In response, Dr. Bhattacharya explained that VOCs do not escape immunity provided by previous infections or by the Covid-19 vaccines. He states that the presence of VOCs pose little additional risk of hospital overcrowding or excess mortality, and that such predictions are based on faulty modelling. He cites Florida as an example of a jurisdiction where UK variant B.1.1.7 is wide-spread but cases have dropped sharply. He explains that vaccines have decoupled the growth in Covid-19 cases from Covid-19 mortality. While cases in Canada have gone up in March 2021, deaths have continued to fall.[28] Finally, Dr. Bhattacharya points out that if restrictive public health measures did

[24] Affidavit of Brent Roussin, Affirmed March 8, 2021, at paras. 155-156 ("Roussin Affidavit")
[25] Loeppky Affidavit, Exhibit "E", at p. 17
[26] Roussin Affidavit, at paras. 28-29
[27] Kindrachuk Affidavit, TAB B, at p. 16
[28] Bhattacharya Affidavit2, Exhibit "A", at pp. 8-9

not work to protect Canadians from the less infectious Covid-19, there is little reason to expect that they would work to suppress VOCs.[29]

[29] Bhattacharya Affidavit2, Exhibit "A", at p. 10

PART II – STATEMENT OF ISSUES

This case raises the following issues of public importance that warrant the consideration and guidance of this Court:

Issue 1: Do the PHOs Violate the Applicants' section 2(a), 2(b), and 2(c) *Charter* rights?

Yes. The Respondents have conceded these *Charter* breaches.

Issue 2: Do the PHOs violate Tobias Tissen's and Ross MacKay's section 7 *Charter* rights in a manner that is not in accordance with fundamental justice?

Yes. They have received fines for *Charter* protected activities, threatened with incarceration for breaching the PHOs, experienced extreme stress and been prohibited from visiting most indoor public places, loved ones and friends. Their liberty and security of the person rights have been infringed by PHOs which are arbitrary, overbroad and grossly disproportionate violating the principles of fundamental justice.

Issue 3: Do the PHOs violate the Religious Applicants' section 15 *Charter* rights on the basis of religion?

Yes. The *Charter* applies to the PHOs, they make a distinction based on religion, and they perpetuate a disadvantage against a historically marginalized Canadian set of the population.

Issue 4: Are the *Charter* breaches demonstrably justified in a free and democratic society under section 1 of the *Charter*?

No. While they are pressing and substantial, they are not rationally connected to their objective, they do not impair *Charter* rights as minimally as possible, and their deleterious effects far outweigh their salutary effects.

Issue 5: Are Dr. Roussin's and Dr. Atwal's PHOs "Reasonably Necessary" as Required by Section 3 of *The Public Health Act*

No. The PHOs infringement of rights and freedoms is not reasonably necessary. (This argument is very similar to the section 1 argument and has not been duplicated.)

Issue 6: Are the Public Health Orders which prohibit and/or restrict religious gatherings *ultra vires* due to their conflict with section 176 of *The Criminal Code of Canada*?

Yes. Due to the doctrine of paramountcy, the conflict between the *Code* and the PHOs (if they are found to be otherwise valid) ought to be resolved by a finding that the PHOs are invalid.

PART III – ARGUMENT

1. The PHOs Violate the Applicants' Section 2(a), 2(b), and 2(c) *Charter* rights

1. Section 2 of the *Charter* states:

> 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; and
>
> (*d*) freedom of association.

a. Religious Applicants

i. Churches

2. Gateway Bible Baptist Church, Pembina Valley Baptist Church, Redeeming Grace Bible Church, Grace Covenant Church, Slavic Baptist Church, Christian Church of Morden, and Bible Baptist Church argue that due to these PHOs, they have been prohibited from engaging in: In-person church services including for the purposes of congressional singing and worship; and Bible studies, prayer meetings and Bible camps in violation of their sections 2(a), 2(b), and 2(c) *Charter* rights.

3. Specifically, Pastor Christopher Lowe of Gateway Bible Baptist Church and Pastor Riley Toews of Grace Covenant Church explain how God requires the Church to Gather. They reference that the Lord Jesus described His people as *ekklesia*, which literally means a "called out assembly." They explain that the gathering together for worship is not optional, and is commanded by God in the Holy Scriptures.[30]

[30] Affidavit of Riley Toews, sworn January 5, 2021, at paras. 9-13 ("Toews Affidavit1"); Affidavit of Christopher Lowe, sworn December 30, 2020, at paras. 7-12 ("Lowe Affidavit1")

4. Pastor Lowe explains:

> Lest we think that the physical gathering of Christians is optional or subject to cultural constraints, Hebrews 10:25 (King James Version) stipulates to "not forsaking the assembling of ourselves together, as the manner of some is; but exhorting one another: and so much the more, as ye see the day approaching." The very word assembling in the Greek texts necessitates the physical meeting of believers together...[31]

5. They believe that congregational singing of praises to God is an act of worship, praise, and expression, none of which cannot be replicated over the internet.[32]

6. Pastor Toews explains:

> This verse highlights the corporate nature of congregational singing: Colossians 3:16: "Let the Word of Christ dwell in you richly, teaching and admonishing one another in all wisdom, singing songs, hymns and spiritual songs, with thankfulness in your hearts to God."
>
> The congregational singing of praises to God is an act of worship and praise. The power and grandeur of corporate worship together cannot be replicated by the internet. The internet cannot replicate our presence together, the sound and power of voices raised in common praise. While the internet is an incredible tool, it cannot replicate congregational singing, which is an integral part of the worship service.[33]

7. As a result of the Orders which have forced them to close and/or severely restrict the number of congregants who may attend for worship services, these Applicants assert that their *Charter* section 2 rights of worship, expression and assembly have been infringed.

ii. Thomas Rempel and Tobias Tissen

8. Thomas Rempel is a Deacon at Redeeming Grace Bible Church. As an individual congregant, he outlines his belief that the Bible commands him and his fellow congregants to worship and sing together in person:

> In addition to the life-giving benefit of gathering with my fellow church members I also believe that The Bible commands us to do so. The common argument is that the church is not a building it's the people. The church is the

[31] Lowe Affidavit1, at para. 11
[32] Toews Affidavit1, at para. 16-18; Lowe Affidavit1, at paras. 13-17
[33] Toews Affidavit1, at paras. 16-17

> assembly of the people of God, in the original Greek the word translated as church is always referring to the assembly of the people of God. Hebrews 10:24-25 says "And let us consider how to stir up one another to love and good works, 25 not neglecting to meet together, as is the habit of some, but encouraging one another, and all the more as you see the Day drawing near." Here the word of God is instructing us to stir each other up in love and good works, and it goes on to tell us not to neglect in meeting.[34]

9. Mr. Rempel also asserts that not only do the Orders make the faithful practice of the worship of God impossible due to a prohibition on in person worship, but also when in-person worship is restricted in numbers. He expresses how being able to freely exercise his religious convictions, without any restrictions, is critical to his identity and his well-being.[35]

10. Tobias Tissen is a minister at the Church of God. He states that the Scriptures establish an imperative to have regular corporate worship, and that Christians draw strength in assembly for worship from God and His Word to get through difficult times together. He asserts:

> These Orders have been devastating to our congregation. Scriptures mandate that believers congregate together for worship. For example, in Hebrews 10:24, 25: "And let us consider one another to provoke unto love and to good works, Not forsaking the assembling of ourselves together as the manner of some is; but exhorting one another: and so much the more as ye see the day approaching." Also see Ephesians 4:16: "From whom the whole body (church) fitly joined together and compacted by that which every joint (member) supplieth, according to the effectual working in the measure of every part, maketh increase of the body (church) unto the edifying of itself in love." In Acts 4:19, 20: "But Peter and John answered and said unto them, whether it be right in sight of God to hearken unto you more than unto God judge ye. For we cannot but speak the things which we have seen and heard." Also Acts 5:42 "And daily in the temple, and in every house, they ceased not to teach and to preach Jesus Christ." The Scriptures establish an imperative to have regular corporate worship.[36]

11. He writes that he is not able to express his belief in unity and community to a computer screen when he cannot see the reactions of the congregation to his words. While he has conducted drive-in church services when there was no other option, he

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[34] Affidavit of Thomas Rempel, affirmed January 7, 2021, at para. 13 ("Rempel Affidavit1")
[35] Rempel Affidavit1, at paras. 13-16, 20
[36] Affidavit of Tobias Tissen, affirmed January 5, 2021, at para. 6 ("Tissen Affidavit1")

explains that participating in that kind of service goes against the Biblical mandate to greet and help each other, and sing and pray together.[37]

12. Mr. Rempel and Mr. Tissen assert that the Orders have infringed their section 2 *Charter* freedoms of conscience, expression, religion and assembly.[38]

b. Ross MacKay

13. Ross MacKay is a Manitoba resident. He attended a Hugs Over Masks rally in Steinbach on November 14, 2020 in order to voice his concerns about what he views as violations of Manitobans' human rights imposed by the Covid-19 lockdowns. He spoke to the crowd and was approached afterward by public health officials who accused him of violating a public health order. He departed the rally and drove home without receiving a ticket. On November 20, 2020, provincial officials attended at his home and gave him a fine in relation to his attendance at the Hugs Over Masks rally in the amount of $1296.[39]

14. Mr. MacKay explains:

> I feel that the public health orders imposed by the Respondents as a result of the Covid-19 pandemic are stripping me and all Manitobans of dignity. I am told where I can and cannot go, how many people I can have visiting my home, and that I am not permitted to gather in public to voice my concerns about government restrictions. I feel that my freedom to gather and express myself with and amongst family and friends has been violated…
>
> I feel that my rights and freedoms were and are violated when I was told I cannot protest my government in a free and democratic society. If I can't peacefully protest I feel that we are not free and certainly not democratic. The Province of Manitoba violates my dignity as a human being when Dr. Brent Roussin tells me what I can and can't buy, where I can go and spend my money, what to wear on my face, and where and how I can worship. These are not the edicts of a free and democratic society.[40]

15. Mr. MacKay was distraught that he was unable to have his daughter visit him for Christmas because of the prohibition in the Orders on having any visitors to his own

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[37] Tissen Affidavit1, at paras. 6, 7, 9-11
[38] Rempel Affidavit1, at paras. 17-18; Tissen Affidavit1, at paras. 10, 12, 20
[39] Affidavit of Ross MacKay, Affirmed January 4, 2021, at paras. 4-9 ("MacKay Affidavit1")
[40] MacKay Affidavit1, at paras. 6, 10

home. He also desired to visit friends and family at their homes over the Christmas season but the Orders similarly prohibited him from visiting others as well. He writes:

> Like many Manitobans I know, I cope with the cold winter in part by socializing with family and friends. I wanted to visit my friends at their homes as I do every Christmas season and have my daughter home for the Christmas holidays. But Dr. Roussin and Premier Pallister have told Manitobans that we are not allowed to visit family and friends or have any outside visitors to our homes. This is devastating to me.[41]

16. Mr. MacKay argues that his *Charter* protected freedoms of expression and assembly have been infringed by the Orders.

c. Respondents' Concession

17. The Respondents have conceded that the Orders breached the Applicants' section 2(a), 2(b), and 2(c) *Charter* rights. As a result, the Applicants will make no further written submissions on the legal tests in order to prove these infringements.

2. The PHOs Violate Tobias Tissen's and Ross MacKay's Section 7 *Charter* rights

18. Section 7 of the *Charter* states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

a. Right to Life, Liberty, and Security of the Person

i. Liberty

19. Ross MacKay argues that the Orders which prohibit him from having visitors to his home, prohibit him from visiting anyone else at their homes, or protesting, while closing all churches and stores (except a limited few which sold "essential" items) infringed his section 7 right of liberty. His movements have been severely curtailed, and

[41] MacKay Affidavit1, at paras. 11-13

he argues that these severe restrictions have treated him and all Manitobans as though they are under house arrest.[42]

20. The Supreme Court of Canada in *R. v. Heywood* held that state prohibitions affecting one's ability to move freely violate liberty and security interests, especially when non-compliance with those prohibitions could result in a jail sentence[43]. In this case, the Respondents' PHOs have completely prohibited the Applicants' abilities to move freely, and the consequences of violating those PHOs include a fine, imprisonment, or both.[44] The Respondents clearly intend to follow through on enforcement of these PHOs as not only have Mr. Tissen and Mr. MacKay received fines for violating them, but Mr. Tissen was actually threatened with imprisonment for continuing to hold church services in violation of the PHOs.[45]

21. The Supreme Court of Canada has also held that the section 7 right to liberty also protects a sphere of personal autonomy involving "the right to make fundamental personal choices free from state interference" and "inherently private choices" that go to the "core of what it means to enjoy individual dignity and independence".[46] The prohibitions on gathering at private homes, to protest, or for in-person worship restrict the right of participants to make personal choices free from state interference.[47]

22. The risk of severe illness or death from the virus for persons under 70 years of age is less than influenza. In a free society, the PHO's oppressive overturning of fundamental rights and freedoms in such circumstances, in light of such scientific evidence, cannot be justified. Covid-19 is simply not a sufficient threat to most of the populace for the state to prevent a free people from the exercise of their fundamental right to gather and worship if they choose. It is the position of the Applicants that the

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[42] MacKay Affidavit1, at paras. 10-14
[43] *R v Heywood*, [1994] 3 SCR 761 at 789 (para 45) (Applicants' BOA, **TAB 1**)["*Heywood*"]
[44] *The Act*, at s. 90(4) (Applicant's BOA, **TAB 43**)
[45] MacKay Affidavit1, at Exhibit "B"; Tissen Affidavit1, at Exhibit "E"
[46] *Carter v. Canada (Attorney General)*, 2015 SCC 5, at paras. 62, 64 (Applicants' BOA, **TAB 2**) ["*Carter*"]; *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55 at para 49 (Applicants' BOA, **TAB 3**)
[47] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC **44**, at para. 54 (Applicants' BOA, **TAB 4**) ["*Blencoe*"]

PHO's restrictions on gathering outdoors, for corporate worship, and home worship are nothing short of tyrannical.

ii. Right to security of the person

23. Security of the person is generally given a broad interpretation and has both a physical and psychological aspect. The Supreme Court of Canada held that it encompasses "a notion of personal autonomy involving...control over one's bodily integrity free from state interference".[48] It further held that security of the person is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.[49]

24. Mr. MacKay's and Mr. Tissen's evidence details how they have suffered psychologically throughout these lockdowns. Mr. MacKay has been "devastated" by the PHOs and has suffered "stress" that is "beyond comprehension" as a result of being denied his basic freedoms.[50] He feels that the PHOs have stripped him of his dignity.[51]

25. Mr. Tissen has similarly endured serious mental suffering due to the PHOs. He states,

> My conscience suffers when I am not able to attend in-person worship and practice my beliefs amongst the congregation together. In person services are the expression of my belief in unity and living as part of a loving community of Christians. I am not able to express my belief in unity and community to a computer screen when I cannot see the reactions of the congregation to my words.
>
> ...We live in fear of punishment for holding Bible studies and church services.
>
> ...

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[48] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, at pp. 587-88 (para 136) per Sopinka J. (Applicants' BOA, **TAB 5**)

[49] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para 58 (Applicants' BOA, **TAB 6**); *Blencoe*, *supra*, at paras 55-57 at **TAB 4**; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, at paras. 43, 191 and 200 (Applicants' BOA, **TAB 7**) ["*Chaoulli*"]; *Carter*, *supra*, at para 65 at **TAB 7**

[50] MacKay Affidavit1, at paras. 13-14

[51] *Ibid.* at paras. 6, 10

> It is absolutely devastating to me to have all of these restrictions on our congregation. We want to worship together, unencumbered by restrictions on our numbers or manner of worship…
>
> These Orders have affected my own well-being in that a minister cannot properly look after the mental and spiritual health of his congregation from a distance. These restrictions cause me personal distress as I care for the flock of God. Stress has been on the rise in our communities, as our people have suffered mentally through all of the isolation. These lockdowns and church restrictions have taken a mental toll on me. Seeing my friends and neighbors suffering under heavy-handed restrictions is hard to bear, knowing that I cannot do much to physically provide aid.[52]

26. That these PHOs have caused "serious psychological suffering" is an understatement, not only for the Applicants', but also for many in Manitoban society who have turned to substance abuse or worse to cope with all of the restrictions imposed by the overbearing state.

b. Fundamental justice

27. National security concerns—and by analogy, pandemics—cannot be used to excuse procedures that do not conform to fundamental justice at the section 7 stage of the analysis.[53] The principles of fundamental justice include the principles against arbitrariness, overbreadth and gross disproportionality. There is considerable overlap between them as indicated below.

i. Arbitrariness

28. A law is arbitrary if it lacks a real connection on the facts to the purpose the law is said to serve.[54]

29. The Supreme Court of Canada applied the arbitrariness doctrine in *Chaoulli v. Quebec*.[55] In that case, the appellant brought a constitutional challenge to Quebec's

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[52] Tissen Affidavit1, at paras. 7, 10-12, 18-19

[53] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, at paras 23, 27 (Applicants' BOA, **TAB 8**)["*Charkaoui*"]

[54] *Canada v. Bedford* [2013] 3 SCR 1101, at para. 111 (Applicants' BOA, **TAB 9**)["*Bedford*"] ; *Rodriguez*, *supra*, at para. 147 (pp. 594-95) at **TAB 5**; *Chaoulli*, *supra*, at paras. 129-30, 232 at **TAB 7**

[55] *Chaoulli*, *supra*, at **TAB 7**

prohibition on the purchase of private health care insurance. The prohibition's purpose was to make the universal public health care plan exclusive. The evidence was that delays in the public health care system increased the risk of death and prolonged pain and stress in breach of the right to life and security of the person.

30. Although the court was unanimous in its finding of the breaches, it was evenly divided on the issue of fundamental justice. The Applicants submit that in the absence of some justification in the medical evidence, the closure of gatherings for worship, restrictions on outdoor and private indoor gatherings, when gathering indoors at big box stores, grocery stores, liquor stores and cannabis stores is permitted, is clearly arbitrary. No strong evidence has been provided to connect the ban/restrictions on worship, outdoor and indoor gatherings to the purpose of preventing the overwhelming of hospitals, reducing Covid-19 spread and reducing mortality. There is no precedent in Canadian history for the state's prevention of corporate worship, even during an oubreak of illnesses with a far higher mortality rate than Covid-19.

31. The Applicants submit that the Respondents are unable to prove that there is something inherently unsafe about worshiping that, unlike so many secular activities, presents such an unacceptable public health risk that such worshiping must be banned. The same argument applies to at-home and outdoor gatherings. Therefore the PHOs are arbitrary.

ii. Overbreadth

32. "Overbreadth" is a breach of the principles of fundamental justice, and therefore a basis for a finding of unconstitutionality in a law that affects life, liberty or security of the person. In 1994, the Supreme Court of Canada established the doctrine of overbreadth in its decision in *R. v. Heywood*. It applies to a law that is broader than necessary to accomplish its purpose.

33. In *Heywood*, the accused challenged a provision of the *Code* that made it an offence of "vagrancy" for a person found guilty of the offence of sexual assault to be "found loitering in or near a schoolground, playground, public park or bathing area". He had been found guilty of sexual assault. The Supreme Court of Canada agreed with the

accused that the law restricted the liberty of those convicted sex offenders to whom the prohibition applied. It held that the purpose of the law was to protect the safety of children, and that a restriction on liberty to protect childrens' safety would not be a breach of fundamental justice. But, he held, a law that restricted liberty more than was necessary to accomplish its purpose would be a breach of fundamental justice by reason of "overbreadth".

34. Writing for the majority, Justice Cory wrote:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? **If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.**
>
> ...
>
> However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.
>
> ...In determining whether s. 179(1)(*b*) is overly broad and not in accordance with the principles of fundamental justice, it must be determined whether the means chosen to accomplish this objective are reasonably tailored to effect this purpose. **In those situations where legislation limits the liberty of an individual in order to protect the public, that limitation should not go beyond what is necessary to accomplish that goal**...[56]

35. The Supreme Court found that the law was overbroad in three ways: (1) its geographic scope was too wide, because parks and bathing areas included places where children were not likely to be found; (2) its duration was too long, because it applied for life without any possibility of review; and (3) the class of persons to whom it applied was too wide, because some of the offenders to whom it applied would not be a continuing danger to children. The overbroad law offended the principles of fundamental justice. It could not be upheld under s. 1, because its overbreadth would cause it to fail

[56] *Heywood* at pp. 792-794 (emphasis added) [Applicants' BOA, **TAB 1**]

the minimum impairment branch of the s. 1 analysis. The law was therefore struck down in its entirety.

36. There are parallels in the facts and analysis of *Heywood* and this case. In *Heywood* the purpose of the law was to protect children from predators. The stated purpose of the PHOs is to preserve hospital capacity, prevent morbidity and prevent community spread. By prohibiting in-person worship, outdoor gatherings of more than five people, and visitors to private homes, the scope of the PHOs is too wide. There is no compelling scientific evidence about the spread of Covid-19 outdoors, or evidence that Covid-19 is more transmissible at a place of worship as opposed to a grocery, big box, liquor or cannabis store. To say that the class of persons to whom these PHOs apply is too wide is a gross understatement. They apply to every Manitoban - yet the science is clear that for people under the age of 65, they have a 99.97% chance of recovery.

37. If anything, the PHOs should be targeted to immunocompromised populations and elderly people who are at greatest risk of the disease. Further, the science does not support the notion that Covid-19 is transmissible through asymptomatic people. Therefore, there is no valid medical or scientific reason to prevent healthy, asymptomatic people from gathering at churches, outdoors or in their homes. These non-infectious people do not present a risk of spreading Covid-19 to anyone. The PHOs are overbroad.

iii. Gross Disproportionality

38. Where a law has some connection to its objective, but impairs section 7 of the *Charter* so severely that it is out of proportion to its objective, that impairment is "grossly disproportionate." Gross disproportionality applies only in extreme cases where "the seriousness of the deprivation is totally out of sync with the objective of the measure".[57]

[57] *Bedford*, *supra*, at para. 120 (Applicant's BOA, **TAB 9)**

39. In *Canada v. PHS Community Services Society*[58], the Supreme Court of Canada found that the Minister of Health's refusal to extend an exemption to the criminal prohibition of possession of proscribed drugs to Insite, a safe-injection clinic in Vancouver, was a denial of the principles of fundamental justice. It disregarded the evidence that Insite had saved lives and prevented injury and disease without any adverse effects on public safety. The court found that the closure of Insite was "grossly disproportionate" to any government interest in maintaining an absolute prohibition on drug possession at Insite.[59]

40. Similarly, in *Canada v. Bedford*, the Supreme Court of Canada found that laws criminalizing prostitution-related provisions in the *Code* actually increased the risks faced by prostitutes to an extent that was grossly disproportionate to the provisions' objectives. The offence of communicating with any person in a public place for the purpose of prostitution, whose object was to prevent a street nuisance, criminalized prostitutes' attempts to screen customers in public which heightened their safety risk. Further, the offence of keeping or being found in a "bawdy house", whose object was to prevent neighborhood disorder, criminalized prostitution indoors which risked having the prostitutes engage with their customers on the streets which was more dangerous.[60]

41. In this case, the objective of the PHOs is to reduce spread of Covid-19, preserve hospital capacity and reduce morbidity. In doing so, the physical and psychological damage done to Manitobans is grossly disproportionate to the potential benefits of the PHOs. A UBC study highlighted the self-reported increase in suicidal thoughts and increased substance abuse among residents of Manitoba and Saskatchewan in 2020.[61] Further, there has been an explosion in overdoses in Canada and overall damage to mental health. A Swiss study showed that for vulnerable populations in Canada, they would experience 7.79 years of life lost, and the mental trauma of forced isolation from friends and family would be irreversible.[62] (More will be said about harms of the PHOs in the section on *Charter* section 1 below.)

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[58] *Canada v. PHS Community Services Society*, [2011] 3 S.C.R. 134 [Applicants' BOA, **TAB 10**][*"PHS"*]
[59] *Ibid.*, at para. 136
[60] *Bedford*, *supra*, at paras. 133-136, 147, 158-159, (Applicant's BOA, **TAB 9**)
[61] Bhattacharya Affidavit1, Exhibit "C", at p. 23
[62] Bhattacharya Affidavit1, Exhibit "C", at p. 15

42. What is perhaps most troubling is that the very act of keeping families isolated to their own homes actually *increases* the risk of death to elderly family members who have to spend more time with adolescents and younger adults who might be carrying Covid-19 into the house.[63]

3. The PHOs Violate the Religious Applicants' section 15 *Charter* rights on the basis of religion

43. Section 15 of the *Charter* states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

44. The "Religious Applicants" all assert that the PHOs in both purpose and effect have discriminated against them on the basis of religion under section 15 of the *Charter*.[64] Churches were closed from November 11, 2020 to February 13, 2021, while liquor, cannabis, and big box stores were permitted to stay open, and while universities could still hold some in person learning, Manitobans could ride on buses, and movie productions could continue. The February 13, 2021 Order only allowed them to open at 10% capacity, while liquor stores remained permitted to fill to 25% capacity. The March 25, 2021 Order increased their allowable capacity to 25%, while allowing liquor stores and other retail stores to be open at 50% capacity. The Respondents have consistently marginalized worship services and ignored its multitude of benefits. Dr. Roussin would not allow people to attend church but he has encouraged excessive drinking by having liquor stores open for access by a population increasingly on edge and distraught over the harmful impacts of the lockdowns. The marginalization of religious individuals such as the Applicants is not only discriminatory, it is irresponsible governance.

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[63] Bhattacharya Affidavit1, Exhibit "C", p. 24
[64] Toews Affidavit1, at para. 25; Tissen Affidavit1, at para. 18; Rempel Affidavit1, at para. 19; Lowe Affidavit1, at paras. 20-21

45. The Religious Applicants must demonstrate three things before they can prove a violation of section 15(1) of the *Charter*.

a. Does the Charter apply?

46. The Religious Applicants must first prove that the *Charter* applies. It is uncontested that the Respondents are state actors and the Religious Applicants submit that the PHOs constitute "law" within the meaning of section 15(1).

47. Once the Religious Applicants demonstrate that the *Charter* applies, then they must pass the two-stage section 15(1) analysis:

> (1) Does the impugned law, on its face or in its impact, create a distinction on the basis of an enumerated or analogous ground?
>
> (2) Does the impugned law fail to respond to the actual capacities and needs of the members of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage?[65] [66]

b. Does the impugned law create a distinction on the basis of a listed ground?

48. The PHOs make a distinction between Manitobans who wish to attend liquor, cannabis, big box, grocery, and other retail establishments, and Manitobans who wish to attend in-person worship. The distinction is on the basis of religion, a listed ground in section 15 of the *Charter*, as Manitobans can gather for secular purposes in similar-sized buildings in similar numbers as Manitobans who wish to gather for religious purposes. This distinction creates differential treatment between Manitobans who seek to buy alcohol, certain consumer items and cannabis, film movies, ride buses, travel from the airport, and those who wish to gather to worship.[67]

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[65] *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548 at para. 19-20 (Applicants' BOA, **TAB** 11)
[66] See also: *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 40 (Applicants' BOA, **TAB 12**); *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 27 (Applicants' BOA, **TAB 13**); *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, at para. 25 (Applicants' BOA, **TAB 14**)
[67] See November 21, 2020 Public Health Order, Lowe Affidavit1, at Exhibit "B", Schedule "A"

49. Dr. Roussin asserts in his affidavit that church settings present a higher risk of spreading Covid-19 due to the fact that the services are long, people may hug each other, and may share food and utensils. He provides no evidence for these assertions, including no evidence as to how long worship services last. The assertion that he is justified preventing worship services because people *may hug each other is speculative, hypothetical, and at its core, irrational. There is no reason to suspect that persons are more likely to hug when encountering each other at a church than when encountering each other at an airport, on a movie set, on campus, or some other secular gathering where people are liable to meet.

50. Dr. Roussin states that retail stores present less of a risk because people move through them more quickly. The Applicants dispute that assertion. As Dr. Joel Kettner, Former Chief Medical Health Officer of Manitoba and Associate Professor at the University of Manitoba, illustrates, Dr. Loeppky's affidavit about clusters of cases linked to churches is weak on the evidence that these outbreaks originated that the cited religious gatherings and not at some other location where the congregants attended in the majority of their waking hours outside of the church setting.[68]

51. If the court finds that the Covid-19 transmission risk is the same for these "essential" activities, or in activities that are not essential but have more favorable capacity limits than places of worship (under the more recent PHOs which allow churches to open)[69], then the people who attend these activities are an appropriate comparator group to the people whose right to worship has been prohibited or restricted. Assembling for in-person worship is singled out on the basis of its religious nature. But unlike gatherings to buy food, alcohol, cannabis, or items at retail stores, assemblies for religious purposes benefit from constitutional protection as a *fundamental* right and freedom.

c. Does the distinction create a disadvantage?

52. Once it is established that the PHOs create a distinction, the Court must decide "whether the law worsens substantive inequality by perpetuating disadvantage or

[68] Loeppky Affidavit, at para. 17
[69] Manitoba Public Health Order, April 8, 2021, *supra* (Applicant's BOA, **TAB 42**)

prejudice, **or** by stereotyping in a way that does not correspond to actual characteristics or circumstances."[70]

53. The first way substantive inequality may be established is "by showing that the impugned law, in purpose *or effect*, perpetuates prejudice and disadvantage to members of a group based on personal characteristics within s. 15(1) of the *Charter*."[71]

54. The Religious Applicants submit that the PHOs which close churches and/or restrict church attendance, in purpose *and* effect, perpetuate prejudice and disadvantage against religious persons. Historically, religious persons were persecuted for their beliefs and for practicing their faith.[72] It would be a gross understatement to say that closing churches or restricting their attendance for months at a time perpetuates prejudice against religious persons. It severely disadvantages them by taking away their opportunity to worship in the manner that they believe that God commands them to, which is fundamental to their very identity. Such disadvantage and prejudice against them is severe, and has resulted in significant mental anguish.

55. The Supreme Court of Canada emphasizes that is it important to demonstrate *impact* or *effect*: "There is no need to look for an attitude of prejudice motivating, or created by, the exclusion...What is relevant is not the *attitudinal* progress towards them, but ... their discriminatory *treatment*."[73]

56. Whereas the s. 15 claim in *Alberta v. Hutterian Brethren of Wilson Colony*[74] was based on a neutral policy choice concerning security measures and did not arise out of any demeaning stereotype, the same cannot be said of PHOs preventing corporate worship. The PHOs have denied the benefit of in-person worship on the basis of the purpose of the assembly which is religious, while permitting other non-religious assemblies to continue. This differential effect is imposed by the separate sections of

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[70] *Withler v. Canada (A.G.)*, [2011] 1 S.C.R. 396, at para. 65 (Applicants' BOA, **TAB 15**)(emphasis added)["*Withler*"]
[71] *Withler*, *supra*, at para. 35, (Application BOA, **TAB 15**)
[72] Tissen Affidavit1, at paras. 7-8
[73] *Quebec (Attorney General) v. A*, 2013 SCC 5, at para 357 [emphasis in original]. It is also necessary to heed the warning of Justice Wilson in *Andrews* where she wrote that "the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances." (Applicant's BOA, **TAB 16**) *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143, at p. 152 (Applicants' BOA, **TAB 17**)["*Andrews*"]
[74] Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37 (CanLII), [2009] 2 SCR 567 (Applicants' BOA, **TAB 18**) ["*Hutterian Brethren*"]

the PHOs, which designate certain activities as essential, or afforded greater capacity limits than places of worship. The important thing to demonstrate at this stage of the section 15(1) test is discriminatory **effect**. The discriminatory effect is that Manitobans can assemble for business meetings, at grocery, liquor, cannabis, airports, banks, and retail stores, and also to ride buses in close proximity to each other.

57. In *Andrews*, the Supreme Court of Canada defined discrimination as:

> [...] a distinction [...] based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group [...] or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. *Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination.* [75]

58. As set out above, the PHOs squarely fit this definition:

> (1) The group/personal characteristic: Manitobans who hold sincere religious beliefs that in-person assembly for religious worship is a requirement of their faith;
> (2) Distinction based on grounds related to the group characteristic: The PHOs specifically disadvantage those who choose to peacefully assemble with others of their religious community for a legitimate and constitutionally-protected religious practice, despite religious assemblies posing no greater Covid-19 transmission risk than other assemblies whose risks are regulated and tolerated;
> (3) Disadvantage: an absolute prohibition on assembling for a *religious* purpose, or a restriction on capacity that is harsher than the capacity restriction faced by similarly sized or smaller retail establishments; and,
> (4) Available to others: Manitobans were permitted to assemble for many purposes including travel, consumerism, economic, education, transport, cleaning, and more. But the PHOs singled out for exclusion those who wish to assemble for a *religious* purpose, despite the ability for churches to comply with the public health restrictions applicable in other contexts of equivalent Covid-19 transmission risk.

59. Importantly, this Honourable Court guides us to not only ask whether there is different treatment based on protected personal characteristics, "but also whether those characteristics are relevant considerations under the circumstances."[76] The PHOs respect the choices of some citizens to: gather in-person for a business meeting rather

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[75] *Andrews, supra*, at p. 174
[76] *Withler, supra*, at para. 49 at **TAB 15**

than meet over Zoom, act in or assist with film production, ride a bus, taxi or limousine, attend university in person in certain settings, shop for Vodka or marijuana, grocery shop, or to attend a church for "social services", daycare or health care delivery, to name a few.[77] This freedom for citizens to make responsible choices is appropriate. But the same PHOs do not extend the same respect and trust to the very same citizens when they seek to peacefully assemble for a religious purpose, despite express constitutional protection for that choice. A peaceful assembly's religious nature should grant it *additional* constitutional protection. Instead, the PHOs single out such assemblies for prohibition.

60. This statement from the Supreme Court of Canada regarding section 2(a) is relevant here:

> ...religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. [...] If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth.[78]

61. The Court has further determined that government actions that take into account the claimant's actual needs, merits, capacities or circumstances in a way that respects his or her value as a human being are less likely to limit section 15(1), whereas those that reflect stereotypical assumptions and decision-making will be suspect.[79]

62. As is evidenced in the Responding Affidavits of the Religious Applicants, the Respondents made no effort to reach out to them at any time before or during the church closures to discuss their needs and if or how they could attempt to be accommodated.[80] The Respondents have displayed a marked indifference to the religious needs of the Applicants as well as to the Respondent's general duty to

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[77] Sections of Nov 21 PHO, see Lowe Affidavit1, Exhibit "C"

[78] *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12, at para. 44 (Applicants' BOA, **TAB 19**)["*Loyola*"]

[79] *Lavoie v Canada*, 2002 SCC 23 at para. 44 (Applicants' BOA, **TAB 20**) *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12, **TAB 19**); *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para 88 (Applicants' BOA, **TAB 21**)

[80] Affidavit of Tobias Tissen, Affirmed March 26, 2021, at para. 6 ("Affidavit2"); Affidavit of Christopher Lowe, sworn March 25, 2021, at para. 4 ("Lowe Affidavit2"); Affidavit of Thomas Rempel Affirmed March 26, 2021, ("Rempel Affidavit2") at para. 6; Affidavit of Riley Toews Affirmed March 24, 2021, at para. 10 ("Toews Affidavit2")

safeguard section 2(a) rights and ensure that any measures are minimally impairing. The Religious Applicants were met with blanket closures of their churches, radio silence from the Respondents in terms of some acknowledgement of their needs, and tickets and threats of jail time in the case of Tobias Tissen.

d. U.S. Jurisprudence Re: Covid-19, In-Person Worship and Discrimination

63. In *Agudath Israel of American v. Andrew M. Cuomo*[81], the Supreme Court of the United States granted an injunction to a group of Orthodox Jews in New York City to bar enforcement of Governor Cuomo's Executive Order which restricted them from having more than 25% of their synagogue's capacity or more than 10 people at a religious service. In granting the injunction, the court found:

> In this case, the Governor's restrictions in each of the three zones single out "houses of worship" for **disparate treatment** by imposing stringent capacity limitations yet permitting comparable secular conduct, such as offices, retail stores, malls, and schools, as well as a host of other "essential" businesses and an undefined "essential" gatherings category, to operate under preferential capacity requirements.

64. In the companion decision of *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo*,[82] Justice Gorsuch of the Supreme Court of the United States found in his concurring judgment:

> **Government is not free to disregard the First Amendment in times of crisis.** At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least re-strictive means available...
>
> New York's Governor has asserted the power to assign different color codes to different parts of the State and govern each by executive decree. In "red zones," houses of worship are all but closed—limited to a maximum of 10 people.

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[81] *Agudath Israel of American v. Andrew M. Cuomo*, USSC, App. No. 20A, Nov. 20, 2020, pp. 28-29 (Applicants' BOA, **TAB 22**)

[82] *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo*, 592 U.S. ___(2020) (Applicants BOA, **TAB 23**)

> At the same time, the Governor has chosen to impose *no* capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?
>
> ...**People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues**...
>
> **The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces**...laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. ***That* is exactly the kind of discrimination the First Amendment forbids.**
>
> Nor is the problem an isolated one. In recent months, certain other Governors have issued similar edicts. At the flick of a pen, they have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples. See *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___, ___ (2020) (GORSUCH, J., dissenting). **In far too many places, for far too long, our first freedom has fallen on deaf ears.**[83]

65. As in the *Agudath* case, the requested injunction was granted.

66. In *Burfitt v. Newsom*[84], Father Trevor Burfitt brought an application for a preliminary injunction against California Governor Newsom's Covid-19 restrictions which prohibited all in-person worship. The court had to wrestle with the competing interests of public health and freedom of religion. In granting the injunction, Justice Pulskamp of the Superior Court of California found:

> In this case, the restrictions are not "neutral" and of "general applicability" because they assign entities into disparate classifications which results in religious activities being treated less favorably than comparable secular activities. For example, the "Purple Tier" of the "Blueprint for a Safer

[83] *Ibid.* at pp. 1-3

[84] *Father Trevor Burfitt v. Gavin Newsom,* Superior Court of California, County of Kern, BCV-20-102267, December 10, 2020 (Applicant's BOA, **TAB 24**)

> Economy," and the most recent "Regional Stay at Home Order," both impose a total ban on indoor religious services while simultaneously permitting a wide range of secular indoor activities to varying degrees. **Entities permitted to engage in indoor activities - also known as "essential businesses" or "critical infrastructure" - include big-box retail stores, grocery stores, home improvement stores, hotels, airports, train stations, bus stations, movie production houses, warehouses, factories, schools, and a lengthy list of additional businesses**. It is important to note that **almost all of the entities that are allowed to host indoor operations do not engage in activity that is constitutionally protected, whereas houses of worship do**. (Calvary Chapel Dayton Valley v. Sisolak (2020) 140 S.Ct. 2603, 2603-04 (diss. opn. of Alito, J.).) Therefore, strict scrutiny is the appropriate standard in this case.
>
> ...Stopping the spread of Covid-19 is undisputedly a "compelling state interest," so one element of the standard is satisfied. However, **Defendants' efforts to distinguish the permitted secular activity from the prohibited religious activity are not persuasive. For example, Defendants contend that the congregations of shoppers in big-box stores, grocery stores, etc., are not comparable to religious services in terms of crowd size, proximity, and length of stay. To the contrary, based on the evidence presented (or lack thereof) and common knowledge, it appears that shoppers at a Costco, Walmart, Home Depot, etc. may - and frequently do - congregate in numbers, proximity, and duration that is very comparable to worshippers in houses of worship.** Defendants have not convincingly established that the health risks associated with houses of worship would be any different than "essential businesses" or "critical infrastructure," assuming the same requirements of social distancing and the wearing of masks were applied across the board.[85]

67. Similarly, in *South Bay United Pentecostal Church v. Newsom*[86], the applicants brought an injunction application to prevent enforcement of California's prohibition on in-person worship, in addition to requesting no capacity limits for in-person worship. The injunction was granted in part – the State was enjoined from enforcing the prohibition on

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[85] *Ibid*, at p. 2

[86] *South Bay United Pentecostal Church v. Newsom* 592 U.S. (2021) (Applicants' BOA, **TAB 25**); See also *Ritesh Tandon v. Gavin Newsom*, 593 U. S. ____ (2021), No. 20A151 (Applicant's BOA, **TAB 26**)

in-person worship pending a hearing on the merits, but could enforce a capacity limit on churches. In his concurring judgment, Judge Gorsuch wrote:

> **Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution.**
>
> Still, California says it can thread the needle. It insists that religious worship is so different that it demands especially onerous regulation. The State offers essentially four reasons why: It says that religious exercises involve (1) large numbers of people mixing from different households; (2) in close physical proximity; (3) for extended periods; (4) with singing.
>
> No one before us disputes that factors like these may increase the risk of transmitting COVID–19. And no one need doubt that the State has a compelling interest in reducing that risk. This Court certainly is not downplaying the suffering many have experienced in this pandemic. But **California errs to the extent it suggests its four factors are always present in worship, or always absent from the other secular activities its regulations allow.** Nor has California sought to explain why it cannot address its legitimate concerns with rules short of a total ban.
>
> Consider California's arguments in turn. The State presumes that worship inherently involves a large number of people. **Never mind that scores might pack into train stations or wait in long checkout lines in the businesses the State allows to remain open**. Never mind, too, that some worshippers may seek only to pray in solitude, go to confession, or study in small groups. See *Harvest Rock Church, Inc.* v. *Newsom,* App. to Emergency Application for Writ of Injunction, No. 20A137, Exh. A, No. 20–56357, p. 4, n. 1 (CA9, Jan. 25, 2021) (O'Scannlain, J., specially concurring). **Nor does California explain why the less restrictive option of limiting the number of people who may gather at one time is insufficient for houses of worship, even though it has found that answer adequate for so many stores and businesses.**
>
> Next, the State tells us that worshippers are sure to seek close physical interactions…And California allows people to sit in relatively close proximity inside buses too. Nor, again, does California explain why the narrower options it thinks adequate in many secular settings— such as social distancing requirements, masks, cleaning, plexiglass barriers, and the like—cannot suffice here…
>
> California worries that worship brings people together for too much time. Yet, **California does not limit its citizens to running in and out of other establishments; no one is barred from lingering in shopping malls, salons, or bus terminals.** Nor, yet again, has California explained why more narrowly tailored options, like a reasonable limit on the length of indoor religious gatherings, would fail to meet its concerns.

> When it comes to each of the first three factors, **California singles out religion for worse treatment than many secular activities**. At the same time, the State fails to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests.[87]

68. What these U.S. cases illustrate is that these superior courts recognize that singling out places of worship and treating them differently, whether by keeping them closed while "essential" businesses are open, or by having less favorable capacity limits compared to other businesses or public places, is discriminatory. The Respondents have made similar arguments to justify treating places of worship differently than retail stores. Dr. Roussin states that religious services involve prolonged contact among persons, comparable to theatres, concert halls, or indoor sporting venues, and are different than retail environments that involve transient contact between people.[88] But the PHOs do not limit the amount of time people spend at big box stores, grocery shopping, riding the bus in a smaller space than any church, riding in a taxi, and being on set while filming a movie, among other permitted activities.

69. As in the *Burfitt* decision, the Respondents have not convincingly established that the health risks associated with houses of worship would be any different than "essential businesses" or "critical infrastructure," assuming the same requirements of social distancing and the wearing of masks were applied across the board.

70. The Religious Applicants have fulfilled the test under section 15: the PHOs are laws that are subject to the *Charter*; the PHOs have made a distinction between the Religious Applicants and non-religious persons who are able to enjoy permitted activities; and this distinction has in its effect disadvantaged the Religious Applicants as they are not free to worship while non-religious persons are free to enter similar sized buildings that are similarly ventilated for unrestricted periods of time to partake in non-religious activities.

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[87] *South Bay United,* at pp. 2-4, (Applicants' BOA, **TAB 25**)
[88] Roussin Affidavit, at para. 155

4. The Violations of the Applicants' *Charter* rights are not demonstrably justified in a free and democratic society on the basis of section 1 of the *Charter*

a. Justification, Freedom and Democracy

71. The *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. This case will be determined on the basis of whether the Respondents prove that the PHOs are "demonstrably justified in a free and democratic society."

72. Section 1 of the *Charter* not only contains the constitutional "guarantee of rights and freedoms set forth in the *Charter*" and the narrow "power to restrict them within certain limitations", it also "includes a description of the character of our society."[89] Section 1 mandates that Canada be, and must always remain absent constitutional amendment, a "free and democratic society".

73. This mandate is not mere aspiration. "The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence."[90]

74. The principle of a free and democratic society did not originate with section 1 of the *Charter*. The constitutional analysis is shaped by the terms "demonstrably justified", "free" and "democratic society". This requires "cogent and persuasive" evidence which "makes clear to the Court the consequence of imposing or not imposing the limit."[91] The core issue in this matter is the necessity of restrictions imposed to prevent transmission of the SAR-CoV-2 virus, which must necessarily be determined by the evidence and the science provided to this Court, with regard to the Respondents' burden of proof.

75. As noted in an earlier hearing on the constitutionality of the broad delegation of authority, section 91 and 92 of the *Constitution Act, 1867* delegates law making power to

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[89] *Alliance des Professeurs de Montreal v. A.-G. Quebec,* 1985 CanLII 3058 (QC CA), para. 37, (Applicant's BOA, **TAB 27**)
[90] *Re Manitoba Language Rights*, [1985] 1 SCR 721, at para. 64 [Applicants' BOA, Delegation Hearing, **TAB 13**]
[91] *R. v. Oakes*, at para. 68 (Applicants' BOA, **TAB 28**); *R. v. Spratt*, 2008 BCCA 340, at para. 30 (Applicants' BOA, **TAB 29**)

the democratically elected Parliament and provincial legislatures. The Supreme Court of Canada noted that the *Constitution Act, 1867*,

> ...contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that **such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament**, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.[92]

76. The concept of "freedom" was perhaps most eloquently described by Chief Justice Dickson in *R. v. Big M Drug Mart*[93]:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

77. With regards to a "democratic society", the Court concluded its discussion of Canada's democratic principle in the *Secession Reference*[94] as follows:

> Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by

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[92] *Re Alberta Legislation,* [1938] S.C.R. 100 at p. 133, cited in "*Alliance*", at para. 43
[93] *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295, at para. 94 (Applicants' BOA, **TAB 31**)
[94] *Reference re Secession of Quebec* [1998] 2 SCR 217, at para. 68 (Applicants' BOA for Delegation Hearing, **TAB 16**)

> democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec*, *supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

78. The foregoing demonstrates that democratic governance is required by the Constitution. Section 1 stipulates that laws which override otherwise guaranteed fundamental rights and freedoms and which do not emanate from this democratic process are unconstitutional.

79. The Manitoba Legislature did not review, debate, amend, study or invite public consultation regarding the PHOs, other than the "Engage Manitoba" online surveys which do not reach the vast majority of Manitobans. There is no requirement legislatively for the Chief Public Health Officer to provide the legislature with an explanation or justification of the science supposedly underpinning the PHOs. Without scientific explanation, the legislature is incapable of commencing its democratic obligation to act in an informed fashion on behalf of the citizenry. Because the PHOs, which have overridden fundamental rights and freedoms, were not debated and are in force with no meaningful public input or legislative review or even legislative comprehension as to their basis, the paradigm within which the infringements take place is neither free nor democratic. According to section 1 of the *Charter*, infringements of fundamental rights and freedoms (here admitted by the Respondents) cannot be justified if they are undemocratic. As a result, the infringements cannot be justified. They fail the test in section 1 of the *Charter*.

b. The Oakes Test

i. The Onus of Proof Lies on the Respondents

80. Per section 1, the rights and freedoms set out in the *Charter* can only be "demonstrably justified in a free and democratic society."[95] This "clearly indicates that the onus of justification is on the party" who has limited the *Charter* rights engaged. Consequently, the onus in this case is on the Respondents to prove, on a balance of probabilities, that the *Charter* infringements resulting from the PHOs are justified in accordance with the *Oakes* test.

81. "[D]emonstrably justified" connotes a strong evidentiary foundation: the Respondents must demonstrate through cogent and persuasive evidence the "consequences of imposing or not imposing" the restrictions on gatherings that are the subject of this proceeding. Whether the impugned restrictions are necessary to achieve their objective must be determined by evidence.[96]

ii. The Two Branches of the Test

82. As per *Oakes*, the Respondents must show that:

1. The objective of the PHOs is pressing and substantial.

2. The PHOs are reasonable and demonstrably justified.

    i. The PHOs must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. They must be rationally connected to the objective.

    ii. The PHOs must impair the Applicants' *Charter* rights as little as possible.

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[95] *Oakes* at pp 136-37 (para 66) (Applicant's BOA, **TAB 28**)

[96] *Oakes* at page 138 (para 68) (Applicant's BOA, **TAB 28**); *R v Spratt*, 2008 BCCA 340 at para 30 (Applicant's BOA, **TAB 29**)

iii. There must be a proportionality between the effects of the PHOs on individuals and groups in society, and their objective. The more severe the deleterious effects, the more important the objective must be.

1. First Branch – Pressing and Substantial

83. The Applicants concede that the Respondents have met the first branch of the test. The objective of the PHOs, which is to reduce the spread of Covid-19, reduce morbidity and preserve hospital capacity, is pressing and substantial.

2. Second Branch – Not Reasonable or Demonstrably Justified

84. The Applicants submit, however, that the PHOs are not reasonable or demonstrably justified, and that they fail all three parts of the second branch of the *Oakes* test.

85. A very recent Scottish case from the Outer House, Court of Session (Scotland's Supreme Civil Court),[97] analyzed a petition challenging the enforced closure of places of worship in Scotland in January 2021. The case raised two issues: (1) the extent, if any, to which the respondents had the constitutional power, at common law, to restrict the right to worship in Scotland; and (2) whether the closure was an unjustified infringement of the human rights of the petitioners and others to manifest their religious beliefs, and to assemble with others in order to do so, in terms of articles 9(2) and 11 of the European Convention on Human Rights (ECHR). Lord Braid found that the respondents had the legal authority to restrict worship in Scotland, but found that the closures failed the proportionality test.

86. Interestingly, the legal test on judicial review for assessing the legality of the closures involved a test strikingly similar to the *Oakes* test.[98] Lord Braid found that the regulations were prescribed by law and had the legitimate aim of protection of public health and preservation of life.[99] He found that the regulations had a rational connection

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[97] *Reverend Dr. William J. U. Philip and Others*, [2021] CSOH 32, Outer House, Court of Session (Applicants' BOA, **TAB 32**)("*Reverend Dr. William*")

[98] *Reverend Dr. William*, at para. 100 (Applicant's BOA, **TAB 32**)

[99] *Reverend Dr. William*, *supra*, at paras. 98-99 (Applicant's BOA, **TAB 32**)

to their goal of preserving life (although he did not have the scientific evidence before him that is before this Honourable Court). He found that the regulations failed the "less intrusive means" test (ie. Minimal impairment test). On this issue, he wrote:

> they have not demonstrated why there was an unacceptable degree of risk by continuing to allow places of worship which employed effective mitigation measures and had good ventilation to admit a limited number of people for communal worship. They have not demonstrated why they could not proceed on the basis that those responsible for places of worship would continue to act responsibly in the manner in which services were conducted, and not open if it was not safe to do so; in other words, why the opening of churches could not have been left to guidance.[100]

87. When balancing the severity of the regulations against their benefits, Lord Braid accounted for the seriousness of Covid-19 and the variants. He still found that the regulations were disproportionate as their effect on religious people banned from attending worship was impossible to measure, a breach of the regulations could result in a hefty fine, and there was no indication that the respondents appreciated the importance of the right to worship in comparison to other activities.[101] The regulations were found to be unlawful.

a. There is No Rational Connection Between the PHO's Objectives and the PHOs

88. As confirmed by McLachlin CJ in *Hutterian Brethren*, section 1 requires the Respondents to "to show a rational connection between the infringement and the benefit sought on the basis of reason or logic."[102]

89. According to Dr. Roussin's affidavit, "the goal of all of the PHOs is and has been to reduce the risk of transmission by limiting close contacts, especially prolonged gatherings indoors, to prevent SARS-CoV-2 from spreading too rapidly and overwhelming Manitoba's health care system."[103] The Applicants submit that there is no rational connection between this goal and the PHOs for multiple reasons.

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[100] *Reverend Dr. William, supra*, at para. 115 (Applicant's BOA, **TAB 32**)
[101] *Reverend Dr. William, supra*, at para. 121, 122, 126 (Applicant's BOA, **TAB 32**)
[102] *Hutterian Brethren*, at para. 48 (Applicant's BOA, **TAB 18**)
[103] Roussin Affidavit, at para. 97

90. As per *Oakes*, the PHOs must not be unfair, arbitrary, or based on irrational considerations. Dr. Roussin lists the most important factors to the determination of the "special measures necessary to prevent, reduce or eliminate the threat to public health" in his affidavit:

> A. the total number of cases and the rate of growth
>
> B. the number of serious outcomes (hospitalizations, ICU admissions and deaths)
>
> C. the location of the cases and the extent of community transmission
>
> D. Outbreaks and clusters in highly vulnerable settings
>
> E. Test positivity rate and trend
>
> F. Capacity for testing
>
> G. Capacity for contact tracing
>
> H. Active v recovered cases
>
> I. Characteristics of virus transmission – asymptomatic or pre-symptomatic transmission.[104]

i. <u>Positive PCR Test Results – Unreliable to determine infectiousness / contagiousness</u>

91. The Applicants submit that six out of nine of these factors (A, B, C, D, E, H) rely on "cases of Covid-19" as they are diagnosed as a result of a PCR test or close contact with someone who has had a positive PCR test. As noted above by Dr. Bhattacharya, Dr. Warren, and the WHO with its **two** recent warnings: PCR tests are highly unreliable. After 25 cycles, a person's level of infectiousness decreases to the point where, as the cycles approach 40, the chances that that person will be contagious are close to zero. The Respondents admitted in response to the Applicants' request for further documents / information that **the lab does not communicate the Ct values to Dr. Roussin.**

92. Dr. Bullard asserts in relation to his admission about the percentages of positive PCR test by Ct value that it is good public health practice to ignore the errors of the PCR

[104] Roussin Affidavit, at para. 86

test because it is in the interest of Canadian public health to identify every single person virally infected and quarantine them, whether or not they pose any risk whatsoever in spreading the virus. Dr. Bhattacharya's response to that is that it is poor public health practice to quarantine 1456 people whose positive tests were as a result of high Ct values, (out of the 5825 people that Manitoba considered to be a case in December 2020) and violate their *Charter* rights with no discernable public health benefit whatsoever. Dr. Kettner also questions why Dr. Bullard recommends this course of action despite the high Ct values for a large number of these positive tests.[105]

93. Notably, the Portugese Court of Appeal is in agreement with Dr. Bhattacharya's and Dr. Warren's opinions on the reliability of PCR tests to determine infectiousness. In a November 2020 decision[106] it dismissed an appeal of a lower court's decision which found that the forced quarantine of the plaintiffs upon return from a trip to Germany based on positive PCR tests was illegal. The Court of Appeal cited a study in *The Lancet* which found, "Any diagnostic test must be interpreted in the context of the actual possibility of the disease, existing prior to its performance. For Covid-19, this decision to perform the test depends on the prior evaluation of the existence of symptoms, previous medical history of Covid-19 or presence of antibodies, any potential exposure to this disease, and no verisimilitude of another possible diagnosis."

94. The Portugese Court of Appeal held,

> "...false positive Covid-19 tests are becoming increasingly likely in the current epidemiological climate in the UK, with substantial personal, health system and societal consequences. Thus, as there are so many scientific doubts expressed by experts in the field, which are the ones that matter here, as to the reliability of such tests, ignoring the parameters of their performance and there being no diagnosis made by a doctor, in the sense of the existence of infection and risk, it would never be possible for this court to determine that C was a carrier of the SARS-CoV-2 virus..."[107]

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[105] Affidavit of Joel Kettner, sworn April 1, 2021, Exhibit. "B", at p. 10 ("Kettner Affidavit")

[106] *Tribunal da Relação de Lisboa, Proc. 1783/20.7T8PDL.L1* (see original and English translated versions)(Applicants' BOA, **TAB 33**)

[107] *Ibid.* at para. 16-18; See also: Administrative Court, WrN, *Freedom Party of Austria, Regional Group Vienna*, Vienna, 24.A3.2Q2L (See original and English translated versions)(Applicants' BOA, **TAB 34**)

95. So many factors that go into Dr. Roussin's decisions in making the PHOs relate to positive PCR tests without any requirement for a clinical diagnosis.

96. Further, the Respondents have provided information that approximately 27% of the positive cases diagnosed by a PCR test from March 2020-March 2021 were from a Ct value above 30, and approximately 46% of the positive cases in that same time period were from a Ct value above 25. The conclusion from this data is that it is very likely that 3,553 people (total positive tests→13,158 x 27%=3,553) plus all of their contacts were forced to quarantine when they were not likely to be infectious. That number increases to potentially 6052 people (plus all of their contacts) when the Ct values between 25-30 are counted as possibly resulting from a patient who is no longer infectious (13,158 x 46%=6052). These positive cases (that the Respondents cannot prove were actually infectious) were nonetheless included in the "case counts" and factored into Dr. Roussin's list.

97. Further, the number of categorized "probable cases" which were determined as a result of being a close contact of one of these false positive results is unknown. The Respondents ought also to have considered that a high number of death certificates of people with a positive test result would be classified as Covid-19 deaths when those results were from high Ct values.

98. Using unreliable PCR tests as the basis to impose restrictive and *Charter*-infringing PHOs is irrational. It is also profoundly unfair and arbitrary to quarantine people and remove their freedoms to live as they choose based on case counts of high numbers of people that pose no risk to anyone.

ii. <u>Negligible Risk of Asymptomatic Transmission</u>

99. Another factor on Dr. Roussin's list which is highly problematic for the Respondents is asymptomatic transmission. As discussed above, household transmission of Covid-19 in asymptomatic people where social distancing and mask protocols are not enforced is only 0.7%. There is no rational connection between the

objective of reducing the spread of Covid-19 and the PHOs when one of the main factors behind the PHOs is that Manitobans may be infectious without symptoms and could unknowingly transmit Covid-19 to other people. Basing PHOs on the risk of asymptomatic transmission when that transmission is negligible is an irrational consideration. It is also extremely arbitrary and manifestly unfair.

iii. Unreliable Models With Poor Performance are Tied to Unreliable Case Counts

100. It is clear from Dr. Loeppky's, Ms. Siragusa's and Dr. Roussin's affidavits that the November 2020 modelling played a major role in imposing the PHOs at that time. As Dr. Loeppky's affidavit points out, "as with models trying to predict the future, its results must be interpreted with caution."[108] Interestingly, Dr. Bhattacharya's conclusion on the performance of theoretical models, which is in part due to the results of an evaluation of such models by Dr. Ioannidis (who determined their performance is very poor) is that "extreme caution should be exercised by public health decision makers in using compartment models to forecast the future direction of the pandemic and in predicting the effects of policy interventions such as lockdowns on Covid-19 outcomes such as mortality and hospitalization."[109]

101. Further, as Dr. Kettner points out, the **only** output variable shown on the model projections results in Dr. Loeppky's affidavit are the numbers of cases.[110] As described above, the "cases" are based on unreliable diagnoses, which are in turn used to create flawed models used to justify locking down Manitoba.

iv. No Scientific Evidence to Justify Restrictions on Outdoor Gatherings

102. Dr. Kindrachuk states that more research needs to be done to determine the risk of outdoor transmission of Covid-19. He does not provide any study to support the

[108] Loeppky Affidavit, Exhibit "F", at p. 25
[109] Bhattacharya Affidavit1, Exhibit "C", at p. 11
[110] Loeppky Affidavit, Exhibit "F", at pp. 30-33

PHOs which restrict outdoor gatherings. The Respondents also do not provide any evidence of outbreaks resulting from outdoor events, or cases of Covid-19 being linked to people specifically gathering outdoors.

103. Prohibiting outdoor assembly on the premise that it may pose some hypothetical risk of transmission of Covid-19, whether for social reasons or protests, with no scientific evidence or data to justify such a restriction is irrational. Fining Mr. McKay in such circumstances for his peaceful protest of the PHOs which have deprived him of his civil liberties is tyrannical, egregiously arbitrary and massively unfair. The right to peacefully protest government measures is one of the cornerstones of democracy. Preventing citizen protest of Dr. Roussin's unilaterally issued orders is not only cruel and undemocratic, it leaves aggrieved citizens with no means to express their suffering. The stifling of democratic protest is unconstitutional and breeds distrust and resentment of the government, and sows the seeds of civil unrest and instability.

104. *Beaudoin v British Columbia* [111] involved a constitutional challenge to public health orders of Provincial Health Officer Dr. Bonnie Henry, to the extent that those orders prohibited or unduly restricted outdoor public protests and in-person religious gatherings. Based upon a concession from the Attorney General of British Columbia, Chief Justice Christopher Hinkson issued a declaration that the prohibition by Dr. Henry of outdoor public protests unjustifiably infringed the petitioner Alain Beaudoin's rights under sections 2(c) and (d) of the *Charter* and is consequently of no force or effect.

v. Poor Evidence to Show that Places of Worship Needed to be Closed/Restricted

105. As noted above, the only "evidence" provided linking the spread of Covid-19 to religious gatherings is the list of clusters from Dr. Loeppky's affidavit.[112] As Dr. Kettner points out, this list does not provide sufficient data for a risk assessment. He states that without a transparent protocol for determining the most probable source and setting of

[111] *Beaudoin v British Columbia,* 2021 BCSC 512, at paras. 68, 147, 151 (Applicants' BOA, **TAB 35**)
[112] Loeppky Affidavit, at para. 14

transmission, one cannot assess the likelihood that these cases actually acquired their virus at a religious service. People are typically awake 16 hours a day and 112 hours a week. People attending religious services attend them one hour a week. As Dr. Kettner illustrates, less than one percent of their awake time is spent at a place of worship. He states, "Without a clear and reasonable protocol to determine the likeliest source of exposure, the probability that transmission happens elsewhere – such as a retail outlet, educational setting, or restaurant is, by exposure proportion, more likely."[113]

106. He determined that there should be an estimation of a denominator such as the number of Manitobans that attend places of worship during the relevant time period. He explains,

> Even assuming that the church exposure was actually the one responsible for their infections and that this included all worship, and using all cases in Manitoba until January 14, 2021 as the denominator, the data provided represents an estimate of 0.7% of all Manitoba cases over a one year period. These data provided by the Respondents show that the risk from attendance at settings of worship are significantly less than other settings which have remained – to some degree and intermittently – open.[114]

107. Dr. Roussin and Dr. Kindrachuk both highlight how the spread of Covid-19 is worsened while indoors and when in poorly ventilated areas.[115] But as Mr. Tissen illustrates, the Respondents made no attempt to visit his church to determine the quality of the ventilation in that building.[116]

108. Further, the chart in the modelling section of Dr. Loeppky's affidavit shows that of 633 cases reported in September 2020, 3.2% were "potentially" acquired at faith-based settings.[117] A "potential" acquisition does not rise to the level required to justify closing churches, especially when establishments higher on that list, such as retail establishments (includes big-box, grocery, liquor/cannabis stores), universities, financial/white collar, were permitted to stay open. These associations and links

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[113] Kettner Affidavit, at Exhibit "B", at p. 32
[114] Kettner Affidavit, at Exhibit "B", at pp. 30-31
[115] Roussin Affidavit, at para. 27; Kindrachuk Affidavit, at p.7
[116] Tissen Affidavit2, at para. 7
[117] Loeppky Affidavit, Exhibit "E", at p. 17

between religious services and "cases" are weak, and closing places of worship based on this "evidence" (or lack thereof) is irrational, arbitrary and unfair.

109. In *Beaudoin,* although the Chief Justice held that Dr. Henry's prohibition of in-person religious services limited the rights of the religious petitioners under sections 2(a), (b), (c) and (d) of the *Charter*, he deferred to Dr. Henry's decision-making in concluding that this prohibition was reasonable and therefore justified under the D*oré/Loyola* analysis. The decision is under appeal.[118]

vi. Failure to Conduct A Cost / Benefit Analysis

110. Dr. Roussin states in his affidavit that he has sought to impose the least restrictive measures necessary. Yet, as Dr. Kettner points out, he has not provided a transparent strategy and response plan.[119] There has been no evidence of a cost / benefit analysis which would have been useful to determine whether or not alternative, less restrictive measures were considered, and why they were rejected taking into account the costs and the benefits of the current strategy versus an alternate one. Without this information, the Respondents have not demonstrated how they have met the relevant public health standards.

vii. Smoking Causes 2000 deaths in Manitoba per year, but is not Prohibited

111. According to Manitoba Health, Seniors, and Active Living, smoking is the leading cause of *preventable* death in Manitoba.[120] The activity causes 2000 deaths a year, which is *nearly triple* the number of Covid-19 deaths in 2020. And a whopping 50% of smokers will die from a tobacco related illness, whereas the median infection survival rate from Covid-19 is 99.77%.[121] While deaths from Covid-19 began in 2020 and ought

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[118] *Beaudoin*, *supra,* at paras. 124, 126, 168, 172, 174, 177, 218, 247-248 (Applicant's BOA, **TAB 35**)
[119] Kettner Affidavit, Exhibit "B", at p. 28
[120] "Health Impacts of Tobacco Use", Health, Seniors and Active Living, https://www.gov.mb.ca/health/tobacco/impacts.html (Applicants BOA, **TAB 47**)
[121] Bhattacharya Affidavit1, Exhibit "C", p. 2

to end when the pandemic is over, deaths from smoking accumulate every year as they have for decades. And yet, the Respondents have chosen not to ban cigarettes. Surely this would prevent most of the 2000 deaths per year, and would protect innocent children from the harms of second-hand smoke in a home.[122] But this easily preventable cause of death is a perfectly legal activity, even where adults put their own childrens' health and lives at risk when they smoke in the family home. Research has shown that, in 2002, exposure to second-hand smoke alone caused 831 deaths in Canada, including 579 deaths from heart disease and 252 lung cancer deaths.[123]

112. Dr. Roussin offers that "[m]atters that are within the scope of public health include more traditional death and illness threats like...tobacco consumption..."[124] He states that "Public health intervention seeks to reduce mortality and morbidity, and places emphasis on disease prevention and health promotion for a community.[125] Dr. Roussin says that the "basic thrust of the PHOs" has been to prevent Covid-19 from "caus[ing] serious outcomes", yet he takes no action to prevent 2000 deaths per year from smoking.[126] The Applicants submit that it is stunning how the Respondents have shut down society and trampled upon their *Charter* freedoms to protect Manitobans from Covid-19 in one year, but have refused to ban smoking which causes 2000 Manitobans to die annually and sicken their own children with second hand smoke.

113. Due to these considerations, it cannot be said that the PHOs bear any rational connection to their objective, even on the basis of reason or logic. These restrictions are therefore unjustifiably arbitrary.

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[122] "Secondhand Smoke" Health, Seniors and Active Living https://www.gov.mb.ca/health/tobacco/secondhand.html (Applicants' BOA, **TAB 48**)
[123] Government of Canada, "Second Hand Smoke", https://www.canada.ca/en/health-canada/services/health-concerns/tobacco/legislation/tobacco-product-labelling/second-hand-smoke.html (Applicants' BOA, **TAB 49**)
[124] Roussin Affidavit, at para. 52
[125] Roussin Affidavit, at para. 53
[126] Roussin Affidavit, at para. 83

b. The Impugned Restrictions Do Not Minimally Impair the Charter Rights they Infringe

114. Under section 1 of the *Charter*, minimal impairment means that the impugned measure is unjustified if it does not "impair the protected right as little as reasonably possible", meaning that the measure "must be carefully tailored so that rights are impaired no more than necessary." A failure to "explain why a significantly less intrusive and equally effective measure was not chosen" may be fatal to the impugned measure.[127]

115. The Supreme Court of Canada, writing on the minimal impairment stage of the section 1 test in *Hutterian Brethren*, stated:

> **In considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure.** In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [2007] 1 S.C.R. 350. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is alternative, less drastic means of achieving the objective in a real and substantial manner.[128]

i. Religious Settings

116. Although the Respondents have provided their list of clusters of cases linked to religious settings, as argued above, the evidence attributing those settings to the acquisition of Covid-19 is weak. Dr. Roussin states that with respect to religious activities, "...distancing, hand hygiene, and wearing masks can attenuate the risk, but it is not fail-proof even assuming perfect compliance"[129]. This statement can be true for any of the

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[127] *Oakes*, at p. 139 (para. 70) (Applicant's BOA, **TAB 28**); *Hutterian Brethren*, at para. 54 (Applicant's BOA, **TAB 18**)
[128] *Hutterian Brethren*, at para. 55 (emphasis added) (Applicant's BOA, **TAB 18**)
[129] Roussin Affidavit, at para. 157

permitted activities at "essential businesses" or those given an exemption from the PHOs such as universities, public transportation and taxis, airports, movie sets, banks, and other workplaces such as lawyers at law firms and government offices.

117. The Respondents have tendered no evidence to indicate that the risks which Dr. Roussin associates with religious activities cannot be mitigated by measures less extreme and drastic than outright prohibiting in-person worship entirely. If there is concern about compliance with safety measures in the context of in-person worship, public health inspectors or other enforcers could randomly inspect these settings and events, presumably as they are doing for other settings.

118. It is a crucial point that pre-symptomatic and asymptomatic transmission in households, where there is likely to be no social distancing or mask wearing, is 0.7%. As Dr. Bhattacharya asserts,

> Spread of the disease in less intimate settings by asymptomatic individuals, including religious services, are likely to be even less likely than in the household. The clear implication of this scientific fact is that many intrusive lockdown policies (including church and business capacity limitations and closures) could be replaced with less intrusive symptom checking requirements, with little or no detriment to infection control outcomes.[130]

119. The Respondents could require temperature and symptom checking at the doors of places of worship, and require that signs be erected which remind people to stay at home if they are sick. There is no good reason to close churches. The Religious Applicants' *Charter* rights have been infringed in the most extreme manner possible. The complete ban on and prohibition of corporate worship is at the extreme end of the spectrum in terms of the violation of their right to worship and assemble. Short of incarceration for engaging in corporate worship (such as was recently experienced by Pastor James Coates of GraceLife Church in Edmonton, Alberta) nothing is more detrimental to the Religious Applicants' *Charter* protected rights to worship than closing churches. Closure orders go far beyond a minimal impairment in the instant circumstances. There is no evidence that the Respondents considered any such

[130] Bhattacharya Affidavit1, Exhibit "C", at p. 8

alternative measures before resorting to outright prohibition of in-person worship services, therefore, the justification for the PHOs affecting the Religious Applicants ought to fail this stage of the *Oakes* test.

ii. *Private In-Home Gatherings*

120. The Respondents do not provide specific evidence that in-home gatherings have resulted in outbreaks of Covid-19. Even Dr. Loeppky's chart, which only outlines "potential" acquisitions of Covid-19, does not specifically list in-home gatherings as the source of Covid-19 transmission. Since the best data on pre-symptomatic and asymptomatic spread reveals that it occurs *within households* only 0.7% of the time[131], it would make sense to ask homeowners to do symptom and temperature checks of all guests and ask their guests not to visit if they are symptomatic.[132] To completely prohibit or severely restrict Mr. MacKay (and other Manitobans) from visiting his friends or having his family and friends over to visit is an egregious infringement of his right to assemble.

iii. *Outdoor Gatherings*

121. The Respondent have provided no evidence that restricting outdoor gatherings and protests advances the objective of preventing transmission of Covid-19. The Respondents have also failed to consider measures short of restricting outdoor gatherings. Mr. MacKay submits that it is apparent that his right to assemble has not been minimally impaired - he has a $1296 fine for breaching a PHO which is devoid of a foundation in science.[133]

122. The Applicants argue that the Respondents' attempt to mitigate the severe mental health damage caused by the PHOs by offering two online counselling sessions, a help

[131] Bhattacharya Affidavit1, Exhibit "C", at p. 8
[132] Bhattacharya Affidavit2, Exhibit "A", at p. 11
[133] MacKay Affidavit1, Exhibit "B"

telephone line and online recreational activities has done little to assist Manitobans in one of the biggest mental health crises this province has faced.[134]

iv. *Focused Protection*

123. Dr. Bhattacharya is the co-author of The Great Barrington Declaration, which relies on the premise of building herd immunity in a population by allowing people at low risk of death to live their lives normally, while better protecting those who are at highest risk. This approach is called "Focused Protection." He outlines his strategy, which has been endorsed by more than 50,000 scientists, physicians and other medical professionals worldwide, which includes: frequently testing staff and visitors at long-term care homes, minimizing staff rotation, promoting grocery delivery to elderly people at home and having them meet family members outside, and for those not vulnerable, promoting hand washing and staying home while sick, and otherwise living their lives.[135]

124. In response to Dr. Bhattacharya's approach, Dr. Roussin states that the Respondents attempted a strategy of protecting personal care homes, but could not commit to the full focused protection approach which included lifting the PHOs because he feared community transmission of Covid-19 would lead to negative outcomes for the vulnerable population. He also rejects the concept of achieving herd immunity as a way out of the pandemic.[136] In response, Dr. Bhattacharya referenced the success of the Focused Protection strategy in Florida and compared its approach with California's. In Florida, Governor DeSantis partially lifted the lockdown measures in May 2020, and further relaxed restrictions in September 2020. Normal activities like university, school, sports, church, visits to the park, and going to Disneyworld, are common place again, and have been for many months. Masks are not mandated by law. Florida also followed the

[134] Affidavit of Szilveszter Jozsef Komlodi, affirmed March 5, 2021, at para. 6; Tissen Affidavit2, at paras. 4-6; Lowe Affidavit2, at paras. 4-6; Toews Affidavit2 at paras. 4-6, 9; Rempel Affidavit2, at para. 3; Affidavit of Ross MacKay, Affirmed April 1, 2021, at paras. 3-4 ("MacKay Affidavit2")
[135] Bhattacharya Affidavit1, Exhibit "C", at p. 30
[136] Roussin Affidavit, at paras. 165-166

Focused Protection approach which included increased testing and protection of its nursing home residents.[137]

125. Dr. Bhattacharya compared the trend in Covid-19 deaths in California and Florida through the entire pandemic. Despite California having one of the most draconian lockdowns in the US – closed schools, businesses, churches, curfews, stay-at-home orders, and mask mandates, California has had higher Covid-19 mortality since December 2020. He states, "At best, one can say that the lockdowns delayed spread of the disease in California by a few months, at enormous harm to the population."[138]

126. Even when considering the issue of VOC, Dr. Bhattacharya cites the example of Florida, with no lockdown, where the UK variant B.1.1.7 is widespread, but cases have dropped sharply over the same period that that variant has been spreading.[139]

127. Thus the Focused Protection approach could have, and should have been employed to protect those in society most at risk of Covid-19, while permitting the vast majority of Manitobans who are healthy to live normal lives. This would have increased herd immunity naturally before the vaccine was available and eliminated most of the harms discussed in the next section including excess deaths likely caused by mental health issues due to the PHOs. As stated above, this approach does not have to achieve the objective in the same way or to the same extent, but it has to do so in a real and substantial manner. The Applicants submit that this approach has been proven to work in Florida and is the most logical, scientifically backed, and least *Charter*-infringing approach that avoids the devastating harms of the PHOs.

128. The PHOs thus cannot be said to impair the Applicants' *Charter* rights as minimally as possible to achieve the objective of preventing transmission of COVID-19. Consequently, they are disproportionate and unjustified on this basis as well.

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[137] Bhattacharya Affidavit2, Exhibit "A", at pp. 2-3
[138] Bhattacharya Affidavit2, Exhibit "A", at p. 3
[139] Bhattacharya Affidavit2, Exhibit "A", at p. 8

c. The Severely Deleterious Effect of the Impugned Restrictions Outweigh any Salutary Effect Resulting from Them

129. The PHOs have an egregiously severe and unprecedented deleterious effects on the *Charter* rights they infringe, without yielding any discernable benefit established by the evidence.

130. To be justified, the salutary effect of a measure which infringes *Charter* rights must outweigh their deleterious effect on the rights at issue. In other words, the Court must weigh the impact "on protected rights against the beneficial effect of the [measure] in terms of the public good."[140]

i. Deleterious Effects

131. The PHOs at issue here have had the effect of prohibiting any person in the province from the exercise of certain rights which are both fundamental to the democratic nature of our society and involve what are for many sacred practices which are compelled by their most deeply-held convictions.

132. It is hard to fathom a more drastic limitation on the free exercise of religion than to outright prevent its exercise in a communal and a collective fashion as commanded by conscience and divine decree. It is also hard to fathom a restriction which strikes deeper into the beating heart of a free and democratic society than to prohibit the gathering of people for political protest, particularly at a time when the Respondents are encroaching on the people's most fundamental of rights and freedoms on a scale unprecedented in Canada's history.

133. A District Court Judge in Weimar, Germany, recently struck down gathering limits in a scathing landmark decision. In this case a citizen of Weimar had been prosecuted and was to be fined €200 for celebrating his birthday together with seven other people in the courtyard of a house at the end of April 2020, thus violating the contact requirements

[140] *Oakes*, at p. 140, para. 71, (Applicant's BOA, **TAB 28**); *Carter*, at para. 122 (Applicant's BOA, **TAB 2**)

in force at the time. This only allowed members of two households to be together. The Court found the prohibition on social contact to be unconstitutional. It held:

> A general ban on contact is a serious encroachment on civil rights. It is one of the fundamental freedoms of people in a free society to be able to determine for themselves with which people (assuming they are willing) and under what circumstances they enter into contact. The free encounter of people with each other for the most diverse purposes is at the same time the elementary basis of society. The state has to refrain from any purposeful regulating and restricting intervention. **The question of how many people a citizen invites to his home or with how many people a citizen meets in public space to go for a walk, to do sports, to go shopping or to sit on a park bench is of no fundamental interest to the state.**[141]
>
> ...
>
> In addition, and as an aspect to be considered separately, it should be noted that by imposing a general ban on contact for the purpose of protecting against infection, the state treats every citizen as a potential risk to the health of others. If every citizen is regarded as a danger from which others must be protected, he or she is at the same time deprived of the opportunity to decide what risks he or she will expose himself or herself to, which is a fundamental freedom.[142]

134. The Judge went through a comprehensive analysis of the lockdown harms experienced by German citizens, and the ineffectiveness of the lockdowns by citing some of the same studies cited by Dr. Bhattacharya. He concluded:

> According to what has been said, **there can be no doubt that the number of deaths alone that can be attributed to the measures of the lockdown policy exceeds the number of deaths prevented by the lockdown many times over.** For this reason alone, the standards to be assessed here do not satisfy the proportionality requirement. Added to this are the direct and indirect restrictions on freedom, the gigantic financial damage, the immense damage to health and the non-material damage. **The word "disproportionate" is too colourless to even hint at the dimensions of what is happening. The lockdown policy pursued by the state government in the spring (and now again) of which the general ban on contact was (and is) an essential component, is a disastrous political mistake with dramatic consequences for almost**

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[141] *Amtsgericht Weimar*, Urteil vom 11.01.2021, Az. 6 OWi - 523 Js 202518/20 / *Weimar* District Court, judgment of January 11th, 2021, Az. 6 OWi - 523 Js 202518/20, at para. 40 (See original and English translated versions)(Applicants' BOA, **TAB 36**)("*Weimar*")

[142] *Weimar*, *supra*, at para. 43 (Applicant's BOA, **TAB 36**)

> **all areas of peoples' lives,** for society, for the state, and for the countries of the Global South.[143]

135. The comments of the court in Weimar are just as true in Manitoba as they are in Germany. The deleterious effects of the PHOs are staggering. Mental health problems have risen dramatically, which can be seen not only in national studies but also within the Respondents' own evidence. The PHOs which restrict gatherings in homes, outdoors or in churches have caused immense stress, depression, anxiety, despair, and a crisis of conscience to the Applicants and many other Manitobans. The social isolation which results from these kinds of PHOs causes more serious problems and behaviours. Dr. Bhattacharya outlines the immense psychological harm from social isolation, which has caused sharp rises in drug overdoses in Canada. Social isolation of the elderly has contributed to a sharp rise in dementia-related deaths.[144] A Canadian Mental Health Association survey found that nearly 1 in 5 young adults had suicidal thoughts, and 18% of Manitobans surveyed said they had increased substance abuse since the start of the PHOs in March 2020.[145]

136. A recent Mental Health Commission of Canada Summary Report made the following findings from their survey of people suffering with mental health issues during the pandemic:

- The mental health and substance use impacts of the pandemic have been greater for people living with, or at risk of, mental health and substance use disorders.
    - Only 2 in 5 respondents report strong (very good/excellent) mental health.
    - 14% of respondents report moderately severe/severe current symptoms of depression, 24% report moderate/severe symptoms

      of anxiety, and 5–6% have seriously contemplated suicide since March 2020.
    - 1 in 3 respondents who use alcohol report increased use and 1 in 5 report problematic use; 2 out of 5 who use cannabis report increased use AND problematic use.

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[143] *Weimar, supra*, at para. 104 (emphasis added) (Applicant's BOA, **TAB 36**)
[144] Bhattacharya Affidavit1, Exhibit "C", at p. 15
[145] Bhattacharya Affidavit1, Exhibit "C", at p. 24

- The pandemic is amplifying the close relationship between mental health and substance use.
    - Respondents with past and current substance use concerns report more mental health symptoms. Nearly 1 out of 2 respondents with past substance use disorders report moderately severe to severe depression symptoms since March 2020.
    - Respondents with past and current mental health concerns report greater increases in substance use. Almost 1 out of 2 respondents with current mental health symptoms who consume cannabis report increased consumption.
- Access to services is not keeping up with increasing need.
- Only 22% of respondents with current mental health symptoms and 24% with current problematic substance use report access to treatment since March 2020; about 1 in 5 of respondents who have received care report finding access difficult.[146]

137. Further, the Canadian Centre for Child Protection released a report that revealed that reports to Cybertip.ca (Canada's tipline for reporting online child sexual predation and "sextortion") increased by 88%, due to more youth spending more time online.[147] Whether this is through school closures or the prohibition and restriction on visiting friends in homes, it is only natural that youth would turn to online activities to quell their boredom and loneliness.

138. Another harm which can reasonably be said to be linked to PHOs which force social isolation upon a population is excess deaths, which means that there are more deaths than expected for a certain period of time. Statistics Canada released an analysis of excess deaths in Canada in 2020. It found:

> During the fall of 2020, younger people became more heavily affected by excess deaths, as 35% of these deaths involved individuals under the age of 65, up from 14% in the spring. The number of deaths was 24% higher than expected. By comparison, there were 6% more deaths than expected among those aged 85 and older during the fall period. As these shifts imply an increase in deaths not directly caused by Covid-19, it is important to note

[146] "Mental Health and Substance Use During Covid-19" Canadian Centre for Substance Abuse and Addiction, Mental Health Commission of Canada, Summary Report, October 13-November 2, 2020 & November 19-December 2, 2020 (Applicants' BOA, **TAB 50**)

[147] "National Tipline Sees Rise in Reports of Sextortion" Canadian Centre for Child Protection, February 9, 2021 (Applicants' BOA, **TAB 51**)

> that **some deaths may be due to the indirect consequences of the pandemic, which could include increases in mortality due to overdoses**.[148]

139. Dr. Loeppky's affidavit provides a sobering glimpse into the negative mental health affects that Manitobans have suffered during the pandemic. In 2020, alcohol-related hospitalizations increased by 112%, especially in people aged 25-44.[149] The monthly number of calls to the Winnipeg Fire and Paramedic Service where a patient received naloxone for a suspected opioid overdose in Winnipeg skyrocketed from March to July 2020.[150] The monthly number of Manitobans hospitalized due to an intentional injury increased by 109% from April-August 2020.[151] Dramatic increases in suicide attempts, stabbings, assaults and self-harm incidences were seen from April-July 2020.[152] From April-August 2020, the top three crime categories that saw the highest increase in crimes were traffic (85% increase), intoxicated people (59% increase) and violence (55% increase).[153] Hospitalizations for mental and behavioural disorders, and for substance and alcohol abuse rose sharply from May-August 2020.[154] Violence related calls to the Winnipeg Police increased sharply from March-July 2020, as did the number of calls for property damage, public disturbance, "suspicious circumstances", and especially family or domestic trouble.[155]

140. The foregoing data illuminates the mental health suffering of Manitobans as a result of the PHOs (both the gathering restrictions and other PHOs). Ironically, the Respondents' stated efforts to reduce stress on the hospital system appears to have caused sharp increases in hospitalizations due to the mental anguish that Manitobans are feeling – anguish which has led to an explosion of crime, domestic abuse, online sextortion of children, substance abuse, self-harm, and suicide attempts. In their attempt to prolong the

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[148]Provisional Death Counts and Excess Mortality, January to December 2020, Statistics Canada (emphasis added) (Applicants' BOA, **TAB 52**)
[149] Loeppky Affidavit, Exhibit "D", at p. 20
[150] Loeppky Affidavit, Exhibit "D", at p. 21
[151] Loeppky Affidavit, Exhibit "D", at p. 23
[152] Loeppky Affidavit, Exhibit "D", at p. 24
[153] Loeppky Affidavit, Exhibit "D", at p. 31
[154] Loeppky Affidavit, Exhibit "D", at pp. 30-31, 38
[155] Loeppky Affidavit, Exhibit "D", at pp. 42-43

life of the elderly and vulnerable populations from Covid-19, the lives of younger Manitobans are being crushed under the PHOs.

ii. *No Salutary Effects – The Lockdowns Don't Work*

141. Dr. Bhattacharya explains that lockdowns push cases into the future, they do not prevent them altogether. He states that seasonality should be accounted for in any analysis of case spread. The best studies, according to him, are the ones which account for environmental, epidemiological, and economic factors alongside policy interventions. Those studies conclude that the mortality from Covid-19 infection is not primarily driven by lockdowns, but by other factors specific to each region. Countries that had a population predisposed to poor Covid-19 infection had worse outcomes irrespective of whatever lockdown policies they implemented.[156]

142. His comparison of California and Florida provides a helpful example of how lockdowns don't work. As noted above, California had one of the harshest lockdowns in the US. Florida lifted all of its lockdown measures by September 2020. The two states' death rates were comparable, and once adjusted for age, Florida's mortality rate was more favourable than California's.[157]

143. Dr. Bhattacharya's own peer-reviewed study, published after his first expert report was drafted, found that there were no significant benefits on case growth of more restrictive non-pharmaceutical interventions.[158] He explains that the best peer-reviewed study evaluating the efficacy of lockdowns was published in March 2021 in *Scientific Reports*. It considered the effects of lockdown type non-pharmaceutical interventions on Covid-19 mortality in 87 regions globally. The primary finding was that in the vast majority of cases there is no detectable effect of lockdowns on Covid-19 mortality.[159]

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[156] Bhattacharya Affidavit1, Exhibit "C", at p. 13
[157] Bhattacharya Affidavit2, Exhibit "A", at pp. 2-4
[158] Bhattacharya Affidavit2, Exhibit "A", at p. 1
[159] Bhattacharya Affidavit2, Exhibit "A", at pp. 1-2

144. Overall, the deleterious effects of the PHOs far outweigh their salutary effects, which have not prevented Covid-19 deaths or reduced stress on the hospital system. As such, the Respondents' restrictions on gatherings are not "demonstrably justified in a free and democratic society", and are consequently unconstitutional.

5. Dr. Roussin's and Dr. Atwal's PHOs are not "reasonably necessary" as required by section 3 of *The Public Health Act* in order to respond to Covid-19, and are therefore *ultra vires* the *Act*

145. Section 3 of the *Act* 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.

146. The Applicants argue that the PHOs restrict their rights and freedoms, and that the restrictions are far greater than are reasonably necessary to respond to a public health emergency. As a result, the PHOs are *ultra vires* the *Act*.

147. The Applicants submit that this argument is substantially similar to their section 1 *Charter* argument, and will rely on the analysis in that section to argue that the PHOs also do not comply with section 3 of the *Act*.

6. PHOs Restricting And/Or Prohibiting Religious Gatherings Directly Conflict with Section 176 of the *Criminal Code of Canada* and are therefore *ultra vires*

a. Section 176 of the Criminal Code of Canada

148. Section 176 of the *Criminal Code of Canada* states:

Obstructing or violence to or arrest of officiating clergyman

176 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who

> **(a)** by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent an officiant from celebrating a religious or spiritual service or performing any other function in connection with their calling, or
>
> **(b)** knowing that an officiant is about to perform, is on their way to perform or is returning from the performance of any of the duties or functions mentioned in paragraph (a)
>
> > **(i)** assaults or offers any violence to them, or
> >
> > **(ii)** arrests them on a civil process, or under the pretence of executing a civil process.

Disturbing religious worship or certain meetings

(2) Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.

Idem

(3) Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on summary conviction.[160]

[160] *Criminal Code of Canada*, R.S.C., 1985, c. C-46, at section 176, (Applicants' BOA, **TAB 45**)

b. *The Doctrine of Paramountcy*

149. The doctrine of paramountcy provides that "where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency".[161]

150. The first step in a paramountcy analysis is to determine whether the federal and provincial laws are validly enacted. If both laws are validly enacted, the second step requires consideration of whether any overlap between the two laws constitutes a conflict sufficient to render the provincial law inoperative.[162]

151. There are two distinct forms of conflict, described by the Supreme Court of Canada as follows:

> The first is operational conflict, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" ... The second is frustration of purpose, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions".[163]

152. To prove that provincial legislation frustrates the purpose of a federal enactment, a party "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose".[164]

c. *The Purpose of Section 176*

153. The purpose of Section 176 is to protect the fundamental freedoms guaranteed by Section 2 of the Charter, specifically, freedom of assembly, freedom of association, and freedom of religion. The British Columbia Court of Appeal affirmed that "Such things

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[161] *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 (CanLII), at para. 15, (Applicants' BOA, **TAB 37**)
[162] *Lemare*, supra, at para. 16, (Applicant's BOA, **TAB 37**)
[163] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 (CanLII), at para. 65, (Applicants' BOA, **TAB 38**)
[164] *Orphan Well*, *supra*, at para. 65, at **TAB 38**; *Lemare, supra,* at para. 26, (Applicant's BOA, **TAB 38**)

as freedom of assembly and freedom of association, which are also in the Charter, could be meaningless without some such protection such as [s. 176(2)]."[165]

154. The Supreme Court of Canada emphasized the purpose and significance of Section 176, formerly Section 172, as follows:

> Subsection 172(3), much like subs. 172(2), is a prohibition which, by means of summary conviction penalty, protects people, who have gathered to pursue any kind of socially beneficial activity, from being purposefully disturbed or interrupted. The subsection is designed to safeguard the rights of groups of people to meet freely and to prevent the breaches of the peace which could result if these types of meetings were disrupted. ... There is no difficulty in concluding that this prohibition, with its consequent penal sanctions, serves the needs of public morality by precluding conduct potentially injurious to the public interest.[166]

d. *Incompatibility between the Purpose of Section 176 and the PHOs*

155. Pursuant to Section 176, "it is an offence simply to disturb or interrupt assemblage of persons met for religious worship regardless of the motive".[167]

156. In *R. v. Reed*, in upholding a Section 176 conviction as against an individual who had stood at the front door of a religious hall before a service while wearing placards and making offensive remarks, the British Columbia Court of Appeal stated that "the sanction of this section could begin as early as the time two or more members of the congregation were diverted from the front entrance of Kingdom Hall to the side door".[168]

157. The Alberta Court of Appeal cited *Reed* in stating that "While a conviction cannot be obtained merely for brief temporary annoyance, the offences were made out by conduct constituting a deliberate continuing annoyance which also obstructs or partially obstructs or causes parishioners to refrain from using the principal regular entrance to their place of worship."[169]

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[165] *R. v. Reed*, 1994 CanLII 1634 (BC CA), at para. 37 (Applicants' BOA, **TAB 39**)
[166] *Skoke-Graham v. The Queen*, 1985 CanLII 60 (SCC), [1985] 1 SCR 106, at paras. 19-20, (Applicants' BOA, **TAB 40**)
[167] *Reed, supra*, at para. 10, (Applicant's BOA, **TAB 39**)
[168] *Reed, supra*, at para. 17, (Applicant's BOA, **TAB 39**)
[169] *R. v. Geoghegan*, 2005 ABPC 255 (CanLII), at para. 10 (Applicants' BOA, **TAB 41**)

158. Mr. Tissen's evidence is clear that enforcement of the PHOs has obstructed and diverted persons from entering their place of worship and attending religious services, frustrating the purpose of the protections afforded by Section 176. Mr. Tissen states that while attempting to hold a drive-in church service in November 2020, a police barricade and tow truck were present, obstructing churchgoers from attending.

159. Accordingly, regardless of any stated public health motives, the effect of the PHOs, and the enforcement thereof, disturbs persons meeting for religious worship, and goes further still by precluding them from meeting for religious worship altogether, in violation of Section 176 and the fundamental freedoms it is intended to protect.

160. Therefore, even in the event it is found the PHOs are validly enacted, the PHOs are incompatible with the federal legislative purpose of Section 176 and must be declared inoperative to the extent of the inconsistency, specifically, insofar as meeting for religious worship is obstructed.

PART IV: RELIEF SOUGHT

161. The Applicants request that this Honourable Court find that the Respondents' PHOs which prohibit and/or restrict religious, private in-home and public outdoor gatherings violate their ss. 2(a)(b)(c), 7 and 15 *Charter* rights, and that those violations cannot be saved under section 1 of the *Charter*. In the alternative, the Applicants request that this Honourable Court find that the PHOs are *ultra vires* section 3 of the *Public Health Act*. In the further alternative, the Applicants request that this Honourable Court find that the PHOs which prohibit and restrict religious gatherings are inoperative because they conflict with section 176 of the *Criminal Code of Canada*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

A. K. Pejovic

D. Jared Brown / Allison Kindle Pejovic / Jay Cameron,
Legal Counsel for the Applicants

DATED at the City of Winnipeg, in the Province of Manitoba, this 12th day of April, 2021

PART V – LIST OF AUTHORITIES

List of Authorities

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2	*Carter v. Canada (Attorney General)*, 2015 SCC 5
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4	*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44
5	*Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519
6	*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46
7	*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35
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9	*Canada v. Bedford* [2013] 3 SCR 1101
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11	*Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548
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13	*Fraser v. Canada (Attorney General)*, 2020 SCC 28
14	*Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17
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18	*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37
19	*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12
20	*Lavoie v Canada, 2002 SCC 23*
21	*Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625
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25	*South Bay United Pentecostal Church v. Newsom* 592 U.S. (2021)
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27	*Alliance des Professeurs de Montreal v. A.-G. Quebec,* 1985 CanLII 3058 (QC CA)
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31	*R. v. Big M Drug Mart Ltd.,* 1985 CanLII 69 (SCC), [1985] 1 SCR 295
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37	*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.,* 2015 SCC 53
38	*Orphan Well Association v. Grant Thornton Ltd.,* 2019 SCC 5
39	*R. v. Reed,* 1994 CanLII 1634 (BC CA)
40	*Skoke-Graham v. The Queen,* [1985] 1 SCR 106
41	*R. v. Geoghegan,* 2005 ABPC 255

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42	Public Health Order, Province of Manitoba, April 8, 2021
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