Court File No.: CV-22-00682682-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

RANDY HILLIER

Applicant

-and-

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO

Respondent

FACTUM OF THE RESPONDENT

July 7, 2023

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PART I – OVERVIEW

1. COVID-19 is a highly contagious and potentially deadly respiratory disease that has caused the worst global pandemic in over a century. In Ontario alone, even with stringent public health measures, more than 14,000 people have died due to COVID-19.

2. Outdoor gatherings, like other settings where people gather together for extended periods of time, pose a risk of COVID-19 transmission. To reduce that risk, save the healthcare system from being overwhelmed, and save lives, Ontario implemented emergency public health measures (the "**Gathering Limits**") in the spring of 2021 that temporarily prohibited outdoor public events and social gatherings between members of different households and temporarily prohibited leaving one's residence for non-essential purposes. These prohibitions were in effect for 69 days and 55 days, respectively. Once the public health situation improved, the Gathering Limits were eased and eventually lifted entirely.

3. The Respondent, His Majesty the King in Right of Ontario ("**Ontario**"), concedes that the Gathering Limits limited the right under s. 2(c) of the *Charter* to freedom of peaceful assembly. At the time those measures were required, however, the situation was so dire that the additional risk of COVID-19 transmission from in-person gatherings risked putting Ontario's healthcare system and the health and safety of its citizens in jeopardy. The Gathering Limits' restrictions on peaceful assemblies were therefore justified limits under s. 1 of the *Charter*. Courts across the country, including the Ontario Court of Appeal, have upheld limits on outdoor gatherings as reasonable means of public health protection in response to the COVID-19 pandemic. Temporary and narrowly tailored intrusions on *Charter* rights in response to a true emergency are exactly what s. 1 of the *Charter* is for.

PART II – FACTS

A. Ontario's Experts

4. Ontario tendered two expert public health witnesses:

- **Dr. David McKeown** is the Associate Chief Medical Officer of Health for Ontario and held that office in spring 2021. He is a certified specialist in public health and preventative medicine in Canada and the United States. He has over 35 years of experience in public health, including 12 years as Medical Officer of Health for the City of Toronto, where he led local health responses to the H1N1 pandemic, a major outbreak of Legionnaire's disease, and Canada's first West Nile Virus outbreak.[1]

- **Dr. Matthew Hodge** is a certified specialist in public health and preventative medicine and an emergency physician at Scarborough General Hospital. He has a Ph.D. in epidemiology and biostatistics from McGill University and a master's degree in healthcare management from Harvard University. He has over 20 years experience in public health and preventative medicine.[2] From November 2020 to April 2021, he was the co-lead for Epidemiology & Surveillance activities within the Incident Management System structure of the Health Protection division of Public Health Ontario.

5. The opinion evidence of both experts on very similar issues was accepted by this Court in *Trinity Bible Chapel*, which upheld limits on indoor and outdoor religious gatherings. Justice Pomerance concluded that their evidence was "the most informative in explaining the challenges

[1] Affidavit of Dr. David McKeown affirmed November 22, 2022 ("McKeown Affidavit") at paras 1-2, Respondent's Record ("RR"), Tab 2, pp. 382-383, CaseLines: B-1-388 to B-1-389.
[2] Affidavit of Dr. Matthew Hodge affirmed November 18, 2022 ("Hodge Affidavit") at paras 1-2, RR, Tab 1, pp. 2-3, CaseLines: B-1-8 to B-1-9.

faced by those with responsibility for public health decision making" and she deferred to the medical opinion of Dr. McKeown on the issue of the impact of restrictions on infection rates.[3] The Court of Appeal recently confirmed that Justice Pomerance committed no error by doing so.[4]

B. The Public Health Emergency Caused by COVID-19

6. Starting in March 2020, Ontario experienced a public health emergency caused by COVID-19.*5* COVID-19 has killed over 46,000 people in Canada and over 14,000 people in Ontario alone, despite stringent public health measures.[6]

7. COVID-19 can vary widely in its symptoms and outcomes, ranging from mild or even no symptoms to very serious complications leading to hospitalization and death.[7] Older people, particularly those over age 60, are at much higher risk of severe illness, but people of any age can develop serious and sometimes fatal complications from the disease.[8] Those with certain underlying medical conditions, such as heart disease, asthma or diabetes, are particularly vulnerable to COVID-19 and face a higher risk of hospitalization and death.[9] Some individuals will develop long-term COVID-19 symptoms which are still not well understood.[10]

8. Without sufficient beds, equipment or staff to treat severely ill patients, patient care would be jeopardized, leading to greater morbidity and death, including for patients who do not have COVID-19. A health system in which every available bed is occupied by someone infected

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[3] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at paras 146, 163.
[4] *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134 at paras 38-51.
[5] McKeown Affidavit at para 7, RR, Tab 2, p. 384, CaseLines: B-1-390.
[6] McKeown Affidavit at para 7, RR, Tab 2, p. 384, CaseLines: B-1-390.
[7] McKeown Affidavit at para 8, RR, Tab 2, p. 384, CaseLines: B-1-390.
[8] McKeown Affidavit at para 9, RR, Tab 2, p. 385, CaseLines: B-1-391.
[9] McKeown Affidavit at para 9, RR, Tab 2, p. 385, CaseLines: B-1-391.
[10] McKeown Affidavit at para 10, RR, Tab 2, p. 385, CaseLines: B-1-391.

with COVID-19 has no way to respond to people with heart attacks, hip fractures or strokes.[11] Once overwhelmed, the healthcare system would face a prolonged recovery period, as the diversion of resources to COVID-19 patients creates a backlog of other medical procedures. The harms caused by COVID-19 would then be compounded with additional preventable deaths.[12]

C. Risk Factors for COVID-19 Transmission

9. Because COVID-19 can spread rapidly through the population, reducing the risk of COVID-19 transmission is critical to protecting public health and preserving the healthcare system, particularly before vaccination became widely available. The primary method of COVID-19 transmission is through direct contact with respiratory droplets or aerosols from an infected person. Transmission occurs predominantly as a result of close contact of 2 metres or less with an infected individual, although transmission can occur over longer distances.[13]

10. COVID- 19 transmission is more likely when people are in close physical proximity for a prolonged period of time. The longer people gather in the same place, the more opportunity there is for potentially infectious respiratory particles to travel from one person to another.[14]

11. Large gatherings present an especially high risk of COVID-19 transmission. The larger the gathering, the greater the likelihood that there will be individuals in that gathering who have COVID-19 and who will transmit the virus to others. Furthermore, if individuals who attend a gathering become infected, they will often transmit the virus to co-workers, customers, or other household members, including those who did not attend the gathering. As a result, large gatherings of people from different households significantly increase the risk of widespread

[11] Hodge Affidavit at para 21, RR, Tab 1, p. 10, CaseLines: B-1-16.
[12] Hodge Affidavit at para 21, RR, Tab 1, p. 10, CaseLines: B-1-16.
[13] McKeown Affidavit at para 11, RR, Tab 2, p. 385, CaseLines: B-1-391.
[14] McKeown Affidavit at para 12, RR, Tab 2, p. 385, CaseLines: B-1-392.

transmission throughout the population.[15] There is also a higher risk of transmission when individuals engage in certain behaviours that may cause respiratory particles to travel longer distances, such as shouting, loud talking or heavy breathing. [16]

12. Dr. McKeown opined that "[w]hile the evidence suggested that there was a *lower* risk of SARS-CoV-2 in outdoor settings, likely due to increased air circulation that dispersed infectious respiratory particles, being outdoors did not *eliminate* the risk of SARS-CoV-2 transmission."[17] The risk of transmission at any particular gathering is based on a number of inter-related factors and the setting of the gathering (e.g. whether it is indoors or outdoors) is only one of those factors.[18]

13. Even a low probability of transmission can generate a large number of new infections if a gathering includes enough people and therefore generates a high number of person-to-person interactions.[19] These primary infections would in turn be expected to result in secondary infections once the gathering's attendees return to their households.

14. Mr. Hillier's expert witness, Dr. Kettner, emphasized that he was "not arguing that we shouldn't be concerned about the potential transmission or the rates of transmission from outdoor gatherings"[20] and it was not his view that "this risk of outdoor transmission should be ignored or that it is so low that it's not worth considering".[21]

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[15] McKeown Affidavit at para 13, RR, Tab 2, p. 386, CaseLines: B-1-392.
[16] McKeown Affidavit at para 14, RR, Tab 2, p. 386, CaseLines: B-1-392.
[17] McKeown Affidavit at para 49, RR, Tab 2, pp. 400-401, CaseLines: B-1-406.
[18] McKeown Affidavit at para 49, RR, Tab 2, pp. 400-401, CaseLines: B-1-406.
[19] Hodge Affidavit at para 34, RR, Tab 1, pp. 16-17, CaseLines: B-1-22.
[20] Transcript of Cross-Examination of Dr. Joel Kettner held May 5, 2023 ("Kettner Transcript") at pp. 41-42, q. 106, CaseLines: A590 to A591.
[21] Kettner Transcript at pp. 41-42, q. 106, CaseLines: A590 to A591.

15. Dr. Hodge noted that one study finding outdoor wind speed affects transmission rates provides confirmation that outdoor transmission does occur.[22] If outdoor transmission did not occur at all, then weather conditions would have no impact on transmission rates. Dr. Hodge also highlights that the Centers for Disease Control confirmed using molecular linkage that 51 people developed COVID-19 after attending an outdoor motorcycle rally in North Dakota in 2020.[23]

16. COVID-19 can be transmitted by people who are pre-symptomatic (i.e. have not yet developed symptoms) or asymptomatic (i.e. will never develop symptoms). Transmission risk is highest prior to the onset of symptoms, meaning that infected people will often unknowingly transmit the virus to others. As a result, screening for symptoms is insufficient to prevent the spread of SARS-COV-2 when individuals gather in groups, particularly when the level of COVID-19 in the general population is high. [24]

17. Importantly, the risk of COVID-19 transmission in ***any*** setting – indoors or outdoors – is dependent on the prevalence of COVID-19 in the community. The more COVID-19 cases there are in the population, the more likely that people who attend a gathering will have COVID-19 and transmit it. Gatherings that pose a low risk of transmission when the community prevalence of COVID-19 is low pose a much higher risk of transmission when the community prevalence is high.[25]

18. Wearing masks can help reduce, but not eliminate, the risk of COVID-19 transmission. For example, masks have been shown to be effective at reducing the spread of respiratory particles when worn by someone infected with COVID-19, but there is a high degree of

[22] Hodge Affidavit at para 35, RR, Tab 1, p. 17, CaseLines: B-1-23.
[23] Hodge Affidavit at para 30, RR, Tab 1, pp. 14-15, CaseLines: B-1-20.
[24] McKeown Affidavit at para 15, RR, Tab 2, p. 387, CaseLines: B-1-393.
[25] McKeown Affidavit at para 23, RR, Tab 2, p. 389, CaseLines: B-1-395.

variability in the effectiveness of masks depending on the mask's design, the materials used to construct it, and how well the mask fits.[26]

19. Physical distancing can also help reduce spread of COVID-19, as transmission is most likely when individuals are within 2 metres. Transmission, however, can occur over longer distances, particularly when there is poor ventilation or when individuals engage in behaviours more likely to generate droplets and aerosols.[27] The efficacy of such mitigation measures is "highly dependent on the degree to which participants strictly and uniformly adhere to those mandates," which does not always occur. [28]

20. Even if all participants at an outdoor gathering perfectly adhered to all of these measures, Dr. Hodge opines that transmission risks would still arise from ancillary activities innately associated with gatherings. Attendees from different households may socialize together before or after the gathering, when there is less pressure to observe distancing measures. In addition, attendees may travel together to the gathering by public transit or carpooling. If the gathering includes people from widespread geographic areas, this could both increase exposure during travel as people travelled further and thus for longer durations and would also increase the risk of transmission from parts of the province with higher rates to other areas with lower rates.[29]

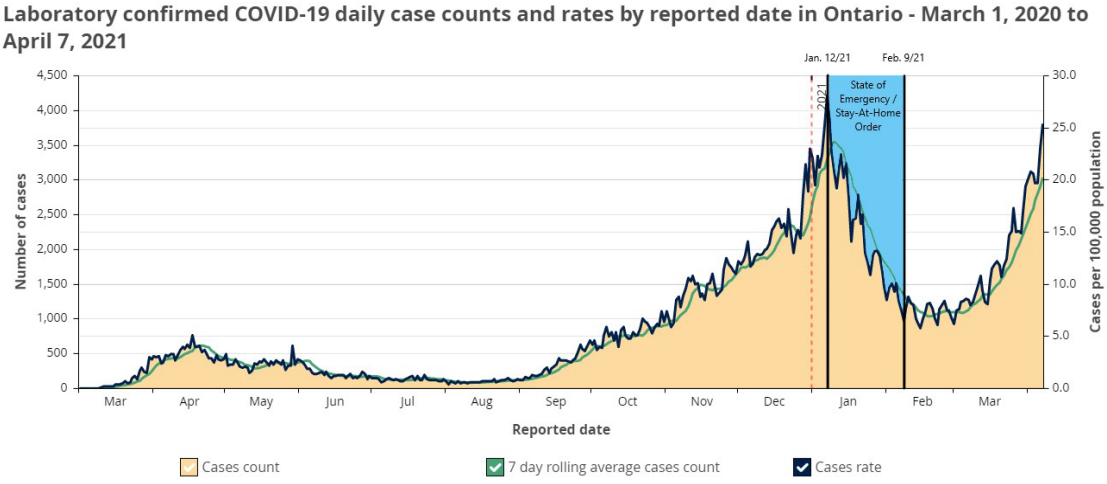
21. Outdoor gatherings, including political protests, may be unlikely to have an identified person in charge who has the power to enforce such measures, unlike in more structured environments such as a workplace, business or formal religious gathering. Political protests including shouting and/or singing, both of which increase transmission risks, would be similarly

[26] McKeown Affidavit at para 19, RR, Tab 2, p. 388, CaseLines: B-1-394.
[27] McKeown Affidavit at para 19, RR, Tab 2, p. 388, CaseLines: B-1-394.
[28] McKeown Affidavit at para 18, RR, Tab 2, p. 388, CaseLines: B-1-394.
[29] Hodge Affidavit at para 38, RR, Tab 1, p. 18, CaseLines: B-1-24.

unlikely to include an individual participant or participants able to stop fellow participants from shouting and singing.[30]

D. Spring 2021 was a Period of Acute, Increasing COVID-19 Risk and Health Care System Burden

22. Ontario's second state of emergency related to COVID-19 lasted from January 12, 2021 to February 26, 2021.[31] In March and April 2021, COVID-19 case and hospitalizations in Ontario began to rapidly increase. On March 1, 2021, the average number of new COVID-19 cases reported each day based on a 7-day rolling average was 1,113. By April 1, 2021, the 7-day rolling average of new cases per day had increased to 3,327 (a nearly 200% increase). By April 12, 2021, that number reached 4,484 (an increase of over 300% from early March 2021).[32] A graph of case counts from that period shows a sharp increase:[33]



[30] Hodge Affidavit at para 37, RR, Tab 1, pp. 18, CaseLines: B-1-24.
[31] O Reg 7/21 (Declaration of Emergency).
[32] McKeown Affidavit at para 38, RR, Tab 2, pp. 395-396, CaseLines: B-1-401.
[33] McKeown Affidavit at para 38, RR, Tab 2, pp. 395-396, CaseLines: B-1-401.

23. As of April 3, 2021, only 14.5% of the population had received a single dose of the COVID-19 vaccine. Thanks to Ontario's rapid rollout of vaccinations during this period, this figure had resident to 63.1% by June 12, 2021, when the Gathering Limits were lifted. [34]

24. The number of hospitalizations followed a similar trend in March and April 2021.[35] By April 16, 2021, COVID-19 cases, hospitalizations and ICU occupancy were at their highest levels since the start of the pandemic.[36] The dramatic increases in hospitalizations and ICU occupancy created a serious risk that the healthcare system would be stretched beyond its limits. Within that context, activities that pose a relatively low risk of transmission could significantly increase the burden on an already strained healthcare system.

25. The increase in hospitalized and ICU patients not only threatened the ability of the healthcare system to care for COVID-19 patients, but it also compromised the ability of the healthcare system to care for patients with other medical issues. The diversion of healthcare resources to serve seriously ill patients with COVID-19 created a backlog of surgical and other medical treatments. By April 2021, there was a cumulative backlog of nearly 250,000 surgical cases delayed due to COVID-19.[37]

26. During the same period, there were COVID-19 variants of concerns ("**VOCs**") emerging in Ontario each associated with increased transmissibility. At the beginning of each new variant's emergence throughout COVID-19, it was very hard to know with any certainty if the

[34] Hodge Affidavit at para 33, RR, Tab 1, p. 16, CaseLines: B-1-22.
[35] McKeown Affidavit at para 39, RR, Tab 2, p. 396, CaseLines: B-1-402.
[36] McKeown Affidavit at para 40, RR, Tab 2, p. 396-397, CaseLines: B-1-402.
[37] McKeown Affidavit at para 42, RR, Tab 2, p. 397-398, CaseLines: B-1-403.

new variant would have different transmissibility and severity of symptoms than previous variants.[38]

27. The Alpha, Beta and Gamma variants were each estimated to be at least 50% more transmissible than the original SARS-COV-2 virus. The Delta variant, which was first reported in India in March 2021 and quickly spread to 40 countries, is more transmissible than the original virus and also causes more severe illness.[39]

E. Ontario's Temporary Measures in Spring 2021

28. Emergency orders continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* ("**ROA**") set out gathering limits and other restrictions on a broad range of activities and business operations to prevent the transmission of COVID-19.[40] These restrictions, including gathering limits, were continually modified from 2020 to 2022 as the public health situation changed throughout different regions in Ontario.[41]

29. As of April 1, 2021, each of Ontario's public health units were under one of three levels of emergency orders under the ROA framework: Stage 1 (O. Reg. 82/20), Stage 2 (O. Reg. 263/20) or Stage 3 (O. Reg. 364/20). On April 3, 2021, Ontario moved all public health units into the Shutdown Zone of the Stage 1 order, which provided for the strictest level of restrictions.[42] Schedule 4, subsection 1(c) of the Stage 1 order prohibited attending an organized public event or social gathering of more than 5 people that is held outdoors.[43] This prohibition

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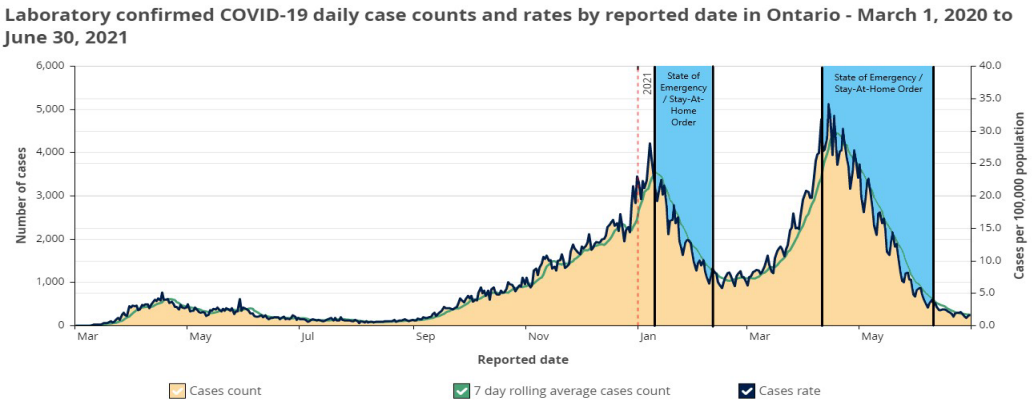
[38] Hodge Affidavit at para 17, RR, Tab 1, p. 8, CaseLines: B-1-14.
[39] McKeown Affidavit at para 28, RR, Tab 2, p. 391, CaseLines: B-1-397.
[40] SO 2020, c. 17, s 2.
[41] O Reg 363/20 (Stages of Reopening) as of April 1-2, 2021.
[42] O Reg 240/21, amending O Reg 363/20 (Stages of Reopening).
[43] O Reg 82/20 (Rules for Areas in Stage 1) as of April 3-6, 2021.

remained in effect for 69 days until all public health units were moved out of the Shutdown Zone on June 11, 2021.[44] The Stage 1 order was revoked on March 16, 2022.[45]

30. On April 7, 2021, Ontario declared an emergency[46] under s. 7.0.1(1) of the *Emergency Management and Civil Protection Act* and issued a Stay-at-Home Order requiring everyone to remain at home except for essential purposes, which did not include outdoor social gatherings.[47] The Stay-at-Home order was revoked on June 2, 2021, having been in effect for 55 days.[48] The declaration of a state of emergency was revoked on June 9, 2021.[49]

31. Dr. McKeown opines that there is evidence that these public health measures likely helped decrease the transmission of COVID-19, as demonstrated in the right-hand blue portion of this graph:[50]



32. Dr. Hodge estimates that based on a comparison with the death rates from COVI-19 in jurisdictions that adopted less stringent public health measures between March 2020 and June

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[44] O Reg 441/21, amending O Reg 363/20 (Stages of Reopening). From April 17, 2021 to May 22, 2021, this provision prohibited attending any outdoor social gathering regardless of size. See O Reg 295/21 and O Reg 344/21, s 3.
[45] O Reg 168/22 (Revoking Various Regulations).
[46] O Reg 264/21 (Declaration of Emergency).
[47] O Reg 265/21 (Stay-At-Home Order).
[48] O Reg 381/21, amending O Reg 25/21 (Extensions of Orders).
[49] O Reg 454/21 (Revoking Various Regulations), s 1.
[50] McKeown Affidavit at para 72, RR, Tab 2, p. 410, CaseLines: B-1-416.

2021, Ontario avoided between 11,000 and 25,000 deaths by implementing the temporary emergency measures it did.[51]

F. The Applicant

33. The Applicant, Randy Hillier, attended an outdoor gathering in Kemptville, Ontario on April 8, 2021 and another in Cornwall, Ontario on May 1, 2021.[52] He faces charges under the Provincial Offences Act for contravening the Stage 1 order and the Stay-at-Home Order in doing so. He is also facing other charges for attending gatherings in Smiths Falls, Belleville, Peterborough, Stratford, Kitchen and Chatham during April and May 2021.[53]

34. Mr. Hillier encouraged his supporters not to wear masks or get vaccinated against COVID-19.[54] The overwhelming majority of the hundreds of people at the outdoor gathering he attended in Stratford, Ontario on April 26, 2021 were not wearing masks and were not distanced from each other.[55]

35. Mr. Hillier led opinion evidence from three academics:

(a) Dr. Joel Kettner is the only one of Mr. Hillier's affiants who has expertise in public health. He conceded that the transmission risk posed by outdoor gatherings should not be ignored.[56]

(b) Dr. Thomas Warren holds a medical degree and describes his profession as being an "infectious diseases consultant and medical microbiologist".[57] He completed a

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[51] Hodge Affidavit at para 40, RR, Tab 1, p. 19, CaseLines: B-1-25.
[52] Applicant's Factum at paras 19-21, CaseLines: A371 to A372.
[53] Applicant's Factum at para 22, CaseLines: A372.
[54] Transcript of Cross-Examination of Randy Hillier held May 4, 2023 ("Hillier Transcript"), at pp. 25-26, 29-31, qq. 78-80, 97-100, CaseLines: A461 to A462 and A465 to A466.
[55] Hillier Transcript at pp. 34-35, qq. 109-116, CaseLines: A470 to A471.
[56] Kettner Transcript at p. 41, q. 108, CaseLines: A591.

masters degree in epidemiology in 2023.[58] He has no training or expertise in public health.[59] In a prior proceeding, the Saskatchewan Court of King's Bench did not admit Dr. Warren's evidence on public health issues relating to COVID-19, and instead limited his admissible evidence to that concerning the transmission of SARS-CoV-2.[60]

(c) Dr. Kevin Bardosh holds a doctorate in international development from the School of Social and Political Science of the University of Edinburgh.[61] He describes himself as a "medical anthropologist".[62] He did not attend medical school, is not licensed to practice medicine in any jurisdiction, and does not hold any degree in public health.[63] In his report, he miscalculated excess mortality statistics, overstating the proportion of excess deaths in Canada due to causes other than COVID-19.[64]

PART III – ISSUES

36. There are two issues on this application:

(a) Do the Gathering Limits infringe the right to peaceful assembly under s. 2(c) of the *Charter*?

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[57] Affidavit of Dr. Thomas Warren sworn September 8, 2022 ("Warren Affidavit") at para 2, Applicant's Record ("AR"), Tab 3, p. 155, CaseLines: A184.
[58] Transcript of Cross-Examination of Dr. Thomas Warren held May 3, 2023 ("Warren Transcript") at p. 5, q. 10, CaseLines: A797.
[59] Warren Transcript at pp. 6-7, qq. 13-18, CaseLines: A798 to A799.
[60] *Grandel v Saskatchewan*, 2022 SKKB 209 at para 27.
[61] Affidavit of Dr. Kevin Bardosh sworn September 15, 2022 ("Bardosh Affidavit") at Exhibit "A", p. 3, AR, Tab 5, p. 265, CaseLines: A294.
[62] Bardosh Affidavit at para 2, AR, Tab 5, p. 257, CaseLines: A286.
[63] Transcript of Cross-Examination of Dr. Kevin Bardosh held May 16, 2023 ("Bardosh Transcript") at pp. 8-9, qq. 19-22, CaseLines: A418 to A419.
[64] Bardosh Transcript at p. 22, qq. 82-83, CaseLines: A432.

(b) If so, are the Gathering Limits justified under s. 1 of the *Charter*?

PART V- LAW AND ARGUMENT

A. Section 2(c) – Freedom of Peaceful Assembly

37. Mr. Hillier states in his factum that the "only *Charter* claim being advanced" is an allegation that the Gathering Limits infringe the right to peaceful assembly under s. 2(c).[65] Mr. Hillier has abandoned the allegations from his Notice of Application that the Gathering Limits violate freedom of expression under s. 2(b) and freedom of association under s. 2(d).[66]

38. There is little jurisprudence interpreting s. 2(c), as issues surrounding peaceful assembly are often subsumed under the freedom of expression analysis.[67] While s. 2(c) generally protects physical gatherings in public spaces, the right is subject to internal limits.[68] Section 2(c) only protects *peaceful* assemblies which, at a minimum, means it does not protect activities that may cause actual or threatened harm to others, such as breaches of the peace or riots.[69] Furthermore, the courts have held that the right to assemble in public spaces under s. 2(c) is "subject to reasonable regulations governing the use of those places and having regard to public health and safety."[70]

39. Ontario takes no position as to whether the protests that Mr. Hillier organized and attended were peaceful assemblies protected by s. 2(c). However, Ontario concedes that the

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[65] Applicant's Factum at para 43, CaseLines: A379.
[66] Notice of Application at paras 1-6, AR, Tab 1, pp. 8-9, CaseLines: A3 to A4.
[67] *Gateway Bible Church v Manitoba*, 2021 MBQB 219 at para 213.
[68] *Roach v. Canada (Minister of State for Multiculturalism & Culture)*, [1994] 2 F.C. 406 at 435-6.
[69] P. Hogg and W. Wright, *Constitutional Law of Canada*, 5th Ed., at § 44:2; *R. v. Lecompte*, 2000 CarswellQue 3699 (C.A.) at para 16; *Stewart v. The Toronto Police Services Board*, 2018 ONSC 2785 at paras 59-61; see also *Brown v. Durham Regional Police Force*, 43 O.R. (3d) 223 (C.A.) at para 73 [WL] for the definition of "breach of the peace".
[70] *Gateway Bible Church v. Manitoba*, 2021 MBQB 219 at para 212, citing *Hussain v Toronto (City)*, 2016 ONSC 3504 at para 44.

Gathering Limits temporarily prohibited some peaceful assemblies within the scope of s. 2(c) and, therefore, they must be justified under s. 1 of the *Charter*.[71]

B. The Gathering Limits Are Justified Under s. 1 of the *Charter*

(1) Deference Should be Shown to Ontario's Response to a Global Pandemic

40. The Gathering Limits are justified under s. 1 of the *Charter*. Temporary restrictions on gatherings that could spread COVID-19 were a reasonable public health measure in the context of a rapidly changing global pandemic that was causing thousands of hospitalizations and deaths while straining the capacity of Ontario's healthcare system. Courts across Canada have held that restrictions on outdoor gatherings designed to limit the spread of COVID-19 were justified under s. 1.[72] The reasoning in those cases is equally applicable here.

41. The courts have held that substantial deference should be afforded to measures adopted to combat the COVID-19 pandemic. In *Trinity* Bible, where the court upheld restrictions on indoor and outdoor religious gatherings, the motion judge found that considerable deference is owed "where public health officials are dealing with a complex social problem, balancing the interests of competing groups, or seeking to protect a vulnerable segment of the population."[73] She held, and the Court of Appeal affirmed, that the COVID-19 pandemic was "a textbook recipe for deferential review" given the challenged faced by public health officials:[74]

> This case calls for even greater deference to government decision making. Public officials were faced with an unprecedented public health emergency

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[71] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para 39.
[72] *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at paras 47-48, 148-151; *Gateway Bible Baptist Church v. Manitoba*, 2023 MBCA 56 at paras 77, 107-117; *Grandel v. Saskatchewan*, 2022 SKKB 209 at para 54.
[73] *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at para 126, aff'd 2023 ONCA 134 (leave application filed at Supreme Court of Canada, file no. 40711), citing *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 at para 37.
[74] *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at para 128, aff'd 2023 ONCA 134.

> that foretold of serious illness and death. Ontario was called upon to protect public health, while respecting a host of other interests and considerations. Restrictive measures aimed at curbing transmission of the virus would necessarily impact on social, commercial, and religious activities. The task at hand called for a careful balancing of competing considerations, informed by an evolving body medical and scientific opinion.[75]

42. The motion judge's deferential approach is consistent with the findings of courts in other provinces. In *Gateway Bible*, the Manitoba Court of King's Bench held that "courts should be wary of second guessing those who are managing a pandemic…particularly when there may be divergent opinions on schools of scientific thought."[76] In *Beaudoin*, the British Columbia Court of Appeal explicitly adopted the motion judge's finding from *Trinity Bible* that the pandemic's "unprecedented threat to public safety…[was] a textbook recipe for deferential review."[77] The Saskatchewan Court of King's Bench adopted the same finding in *Grandel*, where the court held that COVID-19 restrictions on public outdoor gatherings were justified under s. 1.[78]

43. When assessing the Gathering Limits under s. 1, Ontario is "not required to justify its choices on a standard of scientific certainty."[79] As the motion judge noted in *Trinity Bible*, "[t]hat would set an impossible burden, particularly where, as here, the social problem defies scientific consensus."[80] Nor should the Gathering Limits be assessed with the benefit of

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[75] *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at para 127, aff'd 2023 ONCA 134 at paras 97-115.
[76] *Gateway Bible Church v. Manitoba*, 2021 MBQB 219 at para 281, aff'd 2023 MBCA 56.
[77] *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 (leave application filed at the Supreme Court of Canada, file no. 40622) at paras 151-152.
[78] *Grandel v. Saskatchewan*, 2022 SKKB 209 at para 83.
[79] *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at para 144; *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at para 137.
[80] *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at para 144, aff'd 2023 ONCA 134 at para 105; *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at para 137.

hindsight. The relevant question "is not what we know now; it is what was reasonably known and understood at the time of each impugned action."[81]

44. The court should also take into account the precautionary principle, which holds that a lack of scientific consensus is not a reason to forego measures to combat a serious and urgent threat to public health.[82] In *Trinity Bible*, the motion judge held that "Ontario was not required to wait for scientific unanimity on the properties of the pandemic before taking steps to prevent illness and death," as "[t]o wait for certainty is to wait too long."[83] The Court of Appeal held that "it was appropriate for the motion judge to consider the precautionary principle," as this "accords with the contextual approach to the *Oakes* test generally."[84]

45. While reasonable experts may disagree on the details of COVID-19 transmission and the relative effectiveness of certain public health measures, it is not the court's role in the s. 1 analysis to "settle scientific disputes or to choose among divergent opinions of physicians on certain subjects."[85] Rather, Ontario need only demonstrate that its actions fell within "a range of reasonable alternatives."[86]

(2) The Gathering Limits Furthered a Pressing and Substantial Objective

46. The Gathering Limits furthered the pressing and substantial objective of reducing COVID-19 transmission to preserve the integrity of Ontario's healthcare system and minimize

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[81] *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at para 6; *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 at para 37.
[82] McKeown Affidavit at para 54, RR, Tab 2, p. 403, CaseLines: B-1-409.
[83] *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at para 145; *Grandel v. Saskatchewan*, 2022 SKKB 209 at para 84.
[84] *Ontario v. Trinity Bible Chapel*, 2023 ONCA 134 at para 110.
[85] *Beaudoin v. British Columbia*, 2021 BCSC 512 at paras 120-21; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 SCR 351 at paras 31-32; *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at para 6.
[86] *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 at para 37; *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at para 160.

serious illness, hospitalizations and deaths. Mr. Hillier has conceded that this is a pressing and substantial objective.[87]

(3) The Gathering Limits Were Rationally Connected to Ontario's Objective

47. The Gathering Limits are rationally connected to Ontario's objective. Limiting interactions between people at indoor and outdoor gatherings reduces the risk of COVID-19 transmission at those gatherings and the resulting further transmission of COVID-19 in the community. In turn, reducing COVID-19 transmission alleviates the resulting burden on the healthcare system, protects vulnerable individuals, and prevents deaths.[88]

48. The rational connection step of the *Oakes* analysis is "not particularly onerous."[89] The government need only show that "it is reasonable to suppose that the limit may further the goal, not that it will do so."[90] This may be established by showing "a causal connection between the infringement and the benefit sought on the basis of reason or logic" (emphasis added).[91]

49. Because the primary method of COVID-19 transmission is close person-to-person contact, reducing the number and size of in-person gatherings lowers the rate of transmission

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[87] Applicant's Factum at para 66, CaseLines: A385; see also *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at para 160, aff'd 2023 ONCA 134; see also *Grandel v. Saskatchewan*, 2022 SKKB 209 at para 88-89; *Gateway Bible Church v. Manitoba*, 2021 MBQB 219 at para 293; *Beaudoin v. British Columbia*, 2021 BCSC 512 at para 224, aff'd 2022 BCCA 427.

[88] McKeown Affidavit at paras 13, 63-65, RR, Tab 2, pp. 386, 406-407, CaseLines: B-1-392, B-1-412 to B-1-413; Hodge Affidavit at paras 34-40, RR, Tab 1, pp. 16-19, CaseLines: B-1-22 to B-1-25.

[89] *Little Sisters Book and Art Emporium v. Canada*, 2000 SCC 69 at para 228; *Canada (AG) v JTI-Macdonald Corp.*, 2007 SCC 30 at para 40; *CMDS v. CPSO*, 2019 ONCA 393 at paras 156-157

[90] *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 at para 48; see also *Beaudoin v. British Columbia*, 2021 BCSC 512 at para 229; *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at para 135.

[91] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at para 135; *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 at para 48.

across the population.[92] Dr. McKeown testified that "gatherings of people from different households present an especially high risk of widespread transmission throughout the population."[93] Dr. Hodge testified that "[f]rom an epidemiologic perspective, all gatherings as a class pose transmission risks that rise with increasing number of attendees".[94]

50. All the public health experts agree that COVID-19 can be transmitted both indoors and outdoors, although the risk of transmission is higher indoors.[95] Being outdoors reduces, but does not eliminate, the risk of transmission because it provides additional airflow that dilutes infectious respiratory droplets.[96] Because COVID-19 can be transmitted outdoors, outdoor gatherings were one potential source of transmission (among many others) that public health officials could not ignore, particularly during the most serious phases of the pandemic. Even Dr. Kettner, the only public health expert tendered by Mr. Hillier, conceded on cross-examination that he was "not arguing that we shouldn't be concerned about the potential transmission or the rates of transmission at outdoor gatherings."[97]

51. The fact that the risk of COVID-19 transmission is *lower* outdoors compared to indoors does not mean that outdoor gatherings posed no risk to public health. Outdoor gatherings could still transmit the virus, particularly if precautions like physical distancing and masking were not

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[92] McKeown Affidavit at para 13, RR, Tab 2, p. 386, CaseLines: B-1-392; Hodge Affidavit at para 34, RR, Tab 1, pp. 16-17, CaseLines: B-1-22; Kettner Transcript at pp. 17-18, qq. 47-51, CaseLines: A566 to A567.
[93] McKeown Affidavit at para 13, RR, Tab 2, p. 386, CaseLines: B-1-392.
[94] Hodge Affidavit at para 34, RR, Tab 1, pp. 16-17, CaseLines: B-1-22.
[95] McKeown Affidavit at para 13, RR, Tab 2, p. 386, CaseLines: B-1-392; Hodge Affidavit at para 34-40, RR, Tab 1, pp. 16-19, CaseLines: B-1-22 to B-1-25; Kettner Transcript at pp. 41-42, q. 106, CaseLines: A590.
[96] McKeown Affidavit at para 49, RR, Tab 2, pp. 400-401, CaseLines: B-1-406.
[97] Kettner Transcript at p. 41, q. 106, CaseLines: A590.

respected or if high-risk activities like shouting or chanting were taking place.[98] Furthermore, as Dr. McKeown noted, "[w]hile each individual outdoor gathering may result in a relatively small risk of additional cases, the cumulative impact of many such gatherings could result in a significant increase in transmission across the province."[99] Similarly, Dr. Hodge testified that even a small number of cases from outdoor gatherings could result in large number of "secondary infections once the gathering's attendees return to their households."[100]

52. Outdoor gatherings posed an even greater public health risk when the level of COVID-19 in the population was high and the healthcare system was nearing capacity. Higher levels of COVID-19 make it more likely that people at an outdoor gatherings will have COVID-19 and pass it on to others.[101] In addition, as Dr. McKeown testified, "[w]hen the burdens on the healthcare system are high, even small increases in transmission within the population can have a significant negative impact on the healthcare system and potentially impact patient care."[102] This was the case while the Gathering Limits were in force from April 7 to June 11, 2021, when hospitalizations and ICU occupancy were at their highest point in the pandemic.

53. Contrary to Mr. Hillier's factum, Ontario was not required to quantify the risk of transmission at outdoor gatherings through "scientific measurement" or "using statistical models."[103] As the motion judge held in *Trinity Bible*, "[t]his overstates the burden, certainly as it relates to the rational connection test, but also as it relates to the overarching question of

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[98] McKeown Affidavit at para 49, RR, Tab 2, pp. 400-401, CaseLines: B-1-406; Hodge Affidavit at para 37, RR, Tab 1, p. 18, CaseLines: B-1-24.
[99] McKeown Affidavit at para 65, RR, Tab 2, pp. 406-407, CaseLines: B-1-412.
[100] Hodge Affidavit at paras 29, 34, RR, Tab 1, pp. 14, 16-17, CaseLines: B-1-20, B-1-22.
[101] McKeown Affidavit at para 23, RR, Tab 2, p. 398, CaseLines: B-1-395; Hodge Affidavit at para 36, RR, Tab 1, p. 17, CaseLines: B-1-23.
[102] McKeown Affidavit at para 25, RR, Tab 2, p. 398, CaseLines: B-1-396; Hodge Affidavit at para 36, RR, Tab 1, p. 17, CaseLines: B-1-23.
[103] Applicant's Factum at para 68, CaseLines: A386.

proportionality."[104] Ontario need only show "a logical nexus between the objective sought and the means chosen to obtain it."[105] That standard is readily met here.

54. Moreover, Dr. McKeown testified that "outdoor exposures are inherently difficult to identify" because they are often fluid and unplanned without any record of attendees.[106] He noted that it would have been "completely impractical" to do "an individual quantitative risk assessment of each of the hundreds or thousands of events that would have been taking place in Ontario at this time."[107] Ontario did not need to wait for those types of quantitative risk assessments before taking steps to combat an urgent threat to public health.

55. Ontario's expert evidence is bolstered by decisions of courts across the country that have upheld restrictions on outdoor gatherings. In *Trinity Bible*, *Beaudoin*, *Grandel* and *Gateway Bible*, the challengers all argued, as Mr. Hillier does here, that outdoor gathering restrictions did not further the objective of reducing the spread of COVID-19. In every case, the court rejected that argument.[108] As the court found in *Grandel*, "Outdoor Gathering Restrictions were rationally connected to the objective of averting, diminishing, and managing the transmission of SARS-CoV-2." The evidence in this case supports making the same finding here.

(4) The Gathering Limits Were Minimally Impairing

56. The Gathering Limits minimally impaired *Charter* rights. It is well-established that the minimal impairment stage of the *Oakes* test does not require the government to choose the least

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[104] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at para 137; *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at para 137.
[105] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at para 136.
[106] McKeown Transcript at p. 109, q. 208, CaseLines: A771.
[107] McKeown Transcript at p. 85, q. 179, CaseLines: A686.
[108] *Grandel v Saskatchewan*, 2022 SKKB 209 at para 93; *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at paras 135-136; *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 at para 300; *Gateway Bible Church v. Manitoba*, 2021 MBQB 219 at paras 296-297.

restrictive choice possible. The question is whether the government's measures "fall within a range of reasonable alternatives."[109] The Supreme Court of Canada has held that "[t]he tailoring process seldom admits of perfection and the courts must afford some leeway to the legislature."[110] As a result, "the courts will not find [a law] overbroad merely because they can conceive of an alternative which might better tailor the objective to infringement."[111]

57. Deference is particularly appropriate when the government is addressing "complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives," as the Supreme Court of Canada held in *JTI-Macdonald*:

> There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal…For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives. [Emphasis added.][112]

58. The restrictions on outdoor gatherings were carefully tailored and modified throughout the pandemic in response to the changing public health situation. For most of the pandemic, outdoor gatherings were permitted with capacity limits that were higher than the equivalent limits for indoor gatherings.[113] Where possible, gathering restrictions were also geographically limited to regions where the virus was most acute and were in force only for so long as was warranted by prevailing risk factors. The strictest limits were reserved for times when the

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[109] *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at para 160.
[110] *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at para 160.
[111] *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at para 160.
[112] *Canada (AG) v JTI-Macdonald Corp.*, 2007 SCC 30 at para 43.
[113] McKeown Affidavit at para 65, RR, Tab 2, pp. 406-407, CaseLines: B-1-412.

dangers of the pandemic were at their highest. Once the public health situation improved, the gathering limits were eased and eventually lifted entirely.

59. The Gathering Limits at issue here were in force only during the most serious phase of the pandemic, which began around April 2021. At that time, Ontario was in the midst of a third wave of COVID-19, driven by a new and more transmissible Delta variant.[114] Daily COVID-19 cases had increased by nearly 200% compared to the previous month.[115] Hospitalizations grew by 67% and ICU occupancy increased by 51%, which risked overwhelming the healthcare system.[116] If the healthcare system became overwhelmed, "the harms caused by COVID-19 would be compounded with additional preventable deaths."[117]

60. During this critical stage of the pandemic, the Gathering Limits were one of several time-limited public health measures designed to stop the exponential growth in cases, preserve the healthcare system, and allow sufficient time for vaccines to be administered. As Dr. McKeown noted, "in April and May 2021…the rate of transmission was so high that outdoor gatherings, which may otherwise have posed a relatively small risk of transmission, could still have a significant impact on the overall spread of the virus across the province."[118]

61. Even during this period of highest risk, there was never a complete ban on outdoor gatherings, as limited exceptions were made for activities that were important for physical or mental health. There were exceptions that permitted indoor and outdoor gatherings for weddings, funerals and religious services, subject to capacity limits, as "Ontario recognized that those

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[114] McKeown Affidavit at para 53, RR, Tab 2, pp. 402-403, CaseLines: B-1-408.
[115] McKeown Affidavit at para 38, RR, Tab 2, pp. 395-396, CaseLines: B-1-401.
[116] McKeown Affidavit, Exhibits "V" and "W", RR, Tab 2, pp. 275-291 and 292-293, CaseLines: B-1-679 and B-1-699.
[117] Hodge Affidavit at para 21, RR, Tab 1, p. 10, CaseLines: B-1-16.
[118] McKeown Affidavit at para 65, RR, Tab 2, pp. 406-407, CaseLines: B-1-412.

services can be important for mental health and are often sources of support, guidance and comfort."[119] In addition, to help prevent social isolation, individuals who lived alone could attend outdoor gatherings with one other household.

62. The Gathering Limits fell within a range of reasonable alternatives. Ontario was faced with a public health emergency with potentially catastrophic consequences if it failed to take immediate steps to stop the exponential growth of cases and hospitalizations. Allowing more or larger gatherings, whether indoors or outdoors, would have increased the risk of person-to-person contact that could spread the virus. Less than 3% of Ontarians were fully vaccinated and non-pharmaceutical interventions such as the Gathering Limits were the best means of reducing transmission.[120] Ontario had to act quickly and with imperfect information, as "it was not clear whether the Delta variant would spread more easily or whether it would result in more severe illness that would significantly increase the number of hospitalizations."[121]

63. In *Trinity Bible*, the motion judge found that "[i]t was imperative that Ontario take meaningful and timely steps to protect the public from the scourge of a deadly and unpredictable virus" and that stringent limits on religious gatherings were "minimally intrusive in that they were an eminently reasonable means of achieving public protection during the throes of a deadly pandemic."[122] The same is true with the Gathering Limits in this case.

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[119] McKeown Affidavit at para 70, RR, Tab 2, p. 409, CaseLines: B-1-415.
[120] McKeown Affidavit at para 45, RR, Tab 2, p. 399, CaseLines: B-1-405.
[121] McKeown Affidavit at para 53, RR, Tab 2, p. 402-403, CaseLines: B-1-408.
[122] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at para 157.

64. Mr. Hillier argues that the Gathering Limits were not minimally impairing because different public health measures, which he claims were "less restrictive", were in place for "other groups and activities".[123] There is no merit to that argument.

65. First, as Dr. McKeown noted, from the perspective of public health, "comparing the restrictions that apply in one circumstance to those that apply in another is not a useful or appropriate exercise," as "factors that apply in determining whether a measure is appropriate in one circumstance may not apply, or may not apply to the same degree, in another."[124] Each circumstance had to be assessed on its own merits and the fact that public health measures were in place in one setting does not mean they would be effective or appropriate in another setting. Mr. Hillier led no public health evidence about the relative risks posed by activities that were regulated differently than outdoor gatherings. Nor were either of Ontario's experts asked on cross-examination whether there was a public health rationale for why outdoor gatherings were regulated differently than retail stores or professional sports.[125]

66. Second, a similar argument was rejected in *Trinity Bible*, where the challengers argued religious gathering restrictions were not minimally impairing because less stringent limits were in place in retail settings. The motion judge did not accept that argument, adopting the evidence of Dr. McKeown (who also testified in that case) that the two settings were not comparable as a matter of public health.[126] The Court of Appeal upheld that finding, noting that the challengers' argument could be rejected on both public health grounds and because Ontario was entitled to balance competing objectives when imposing measures in different settings and circumstances:

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[123] Applicant's Factum at para 80, CaseLines: A389.
[124] McKeown Affidavit at para 67, RR, Tab 2, pp. 407-408, CaseLines: B-1-413.
[125] *R. v. Dexter,* 2013 ONCA 744 at paras 17-19; *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) [WL] .
[126] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at paras 152-154.

> In my view, it was open to the motion judge to reject the analogy between retail settings and religious gatherings based on the public health rationale she cited. However, even if this differential treatment could not be justified purely on public health grounds, that would not determine whether the challenged regulations were sufficiently tailored to be minimally impairing. In other words, Ontario was entitled to balance the objective of reducing the risk of COVID-19 transmission in congregate settings with other objectives that did not arise in the context of regulating religious gatherings, such as preserving economic activity and preserving other social benefits which that activity made possible. [Emphasis added.][127]

67. In any event, the "less restrictive" measures that Mr. Hillier identifies were not appropriate for outdoor gatherings. Mr. Hillier notes Ontario's regulations had provisions that applied to the National Hockey League ("**NHL**") and American Hockey League ("**AHL**"), but he fails to note the stringent public health measures that applied to those leagues. Both established a comprehensive COVID-19 protocol, approved by the Ontario Chief Medical Officer of Health, with strict rules for quarantining, daily testing, daily screening for symptoms, a vaccination policy, mandatory masking and physical distancing, mandatory isolation procedures, among many other measures, all of which were enforceable by the league.[128]

68. The measures in place for the NHL and AHL were simply not a viable alternative for outdoor gatherings. It was not practical or realistic to require a comprehensive COVID-19 protocol for every outdoor gathering across the province and, even if one could be established, it could not be adequately enforced. Dr. McKeown noted that one of the reasons that outdoor gathering limits were necessary was because they are fluid and difficult to control, making it more difficult to ensure that mitigation measures are followed:

> Outdoor gatherings are often very fluid, unpredictable and can be difficult to control…There are often no barriers to entry at outdoor gatherings, which allows bystanders who may have no connection to organizers of the gathering to join and leave the gathering at any time. The nature of those

[127] *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134 at para 118.
[128] O Reg 82/20 (Rules for Areas in Stage 1) as of April 8, 2021, s. 11.

> gatherings makes it much more difficult for organizers or law enforcement officials to ensure that participants strictly comply with masking and physical distancing requirements. In addition, it is much more difficult at outdoor gatherings to keep accurate records of everyone who attended, which makes it challenging to conduct effective contact tracing if someone is subsequently diagnosed with COVID-19.[129]

69. Mr. Hillier's argument that different capacity limits were in place in various retail establishments, such as liquor or cannabis stores, should be rejected for the same reasons that they were rejected in *Trinity Bible*. As the motion judge noted:

> Risk factors are very different in the retail setting where attendance is transient, and people do not tend to linger. While staff are on site for prolonged periods, employers are bound by statute to employ measures to keep staff safe. Perhaps most importantly, the retail experience does not contemplate the same potential for infectious droplets to be passed from person to person.[130]

(5) The Benefits of the Gathering Limits Outweigh Any Deleterious Effects

70. The final stage of the *Oakes* analysis "allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitations."[131]

71. The benefits of the Gathering Limits outweighed any deleterious effects. The Gathering Limits helped reduce COVID-19 transmission, relieve pressure on the healthcare system, and prevent serious illness and death. The motion judge in *Trinity Bible* found these benefits to be "amongst the most compelling imaginable — the protection of human life in the face of an unprecedented and unpredictable virus, carrying a threat of devastating health consequences."[132]

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[129] McKeown Affidavit at para 50, RR, Tab 2, p. 401, CaseLines: B-1-407.
[130] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at para 153; *Gateway Bible Church v. Manitoba*, 2021 MBQB 219 at para 260.
[131] *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 at para 77.
[132] *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at para 160, aff'd 2023 ONCA 134; see also *Grandel v. Saskatchewan*, 2022 SKKB 209 at paras 88-89; *Gateway Bible Church v.*

72. Ontario took steps to minimize the adverse impact of its public health measures. Exceptions were made for activities that promoted physical and mental health, which included allowing outdoor exercise and other activities that did not involve different households gathering together. The measures were in place only for so long as was necessary to address the public health situation. However, as Dr. McKeown noted, "[n]one of [Ontario's] interventions could be implemented without some risk of adverse public health consequences."[133]

73. Significantly, "the potential for adverse impacts had to be weighed against the cost of *not* taking sufficient steps to stop the spread of COVID-19 at a critical stage of the pandemic" (emphasis added).[134] As Dr. Hodge put it, if Ontario failed to take urgent steps to preserve the healthcare system, "the harms caused by COVID-19 would be compounded with additional preventable deaths."[135]

74. Mr. Hillier relies on the evidence of Dr. Bardosh, who conducted a literature review on the "social harms" of COVID-19 restrictions.[136] Dr. Bardosh has a Ph.D. in international development and has no medical training or qualifications.[137] Many of the papers he cites were published well after the Gathering Limits were lifted and were not specific to Ontario. Most significantly, Dr. Bardosh discusses the potential harms of public health restrictions and *completely ignores the benefits* of those measures. For those reasons, Dr. Bardosh's evidence should be given little weight.

Manitoba, 2021 MBQB 219 at para 293; *Beaudoin v. British Columbia*, 2021 BCSC 512 at para 224, aff'd 2022 BCCA 427.
[133] McKeown Affidavit at para 68, RR, Tab 2, p. 408, CaseLines: B-1-414.
[134] McKeown Affidavit at para 69, RR, Tab 2, p. 408, CaseLines: B-1-414.
[135] Hodge Affidavit at para 21, RR, Tab 1, p. 10, CaseLines: B-1-16.
[136] Bardosh Affidavit, Exhibit "C" at p. 1, AR, Tab 1, p. 257, CaseLines: A305.
[137] Bardosh Transcript at p. 9, qq. 20-23, CaseLines: A419.

75. Dr. McKeown testified that, after the Gathering Limits and other measures were introduced in April 2021, "many key public health indicators showed signs of significant improvement"[138] and there were "substantial decreases in the number of COVID-19 cases and hospitalizations."[139] This benefited all Ontarians and protected "the interests of many Ontario residents who wished the government to keep them safe during a public health emergency."[140]

76. The Gathering Limits were a proportionate response to the extraordinary public health crisis posed by the ongoing COVID-19 pandemic. To the degree they infringed *Charter* rights, they were justified limits under s. 1 of the *Charter*.

PART IV – ORDER REQUESTED

77. The Respondent, His Majesty the King in Right of Ontario, respectfully requests that the application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 7TH DAY OF JULY, 2023.

Ryan Cookson

Padraic Ryan

[138] McKeown Affidavit at para 75, RR, Tab 2, p. 411, CaseLines: B-1-417.
[139] McKeown Affidavit at para 72, RR, Tab 2, p. 410, CaseLines: B-1-416.
[140] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at para 160.

SCHEDULE A – AUTHORITIES CITED

CASES

1. *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344
2. *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134
3. *Grandel v Saskatchewan*, 2022 SKKB 209
4. *Gateway Bible Church v. Manitoba*, 2021 MBQB 219
5. *Roach v. Canada (Minister of State for Multiculturalism and Citizenship),* [1994] 2 FC 406
6. *R. v. Lecompte*, 2000 CarswellQue 3699 (C.A.)
7. *Stewart v. The Toronto Police Services Board*, 2018 ONSC 2785
8. *Brown v. Durham Regional Police Force*, 43 O.R. (3d) 223 (C.A.)
9. *Hussain v Toronto (City)*, 2016 ONSC 3504
10. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295
11. *Gateway Bible Baptist Church v. Manitoba*, 2023 MBCA 56
12. *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37
13. *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427
14. *Beaudoin v. British Columbia*, 2021 BCSC 512
15. *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199
16. *Lapointe v. Hôpital Le Gardeur*, [1992] 1 SCR 351
17. *Little Sisters Book and Art Emporium v. Canada*, 2000 SCC 69
18. *Canada (AG) v JTI-Macdonald Corp.*, 2007 SCC 30
19. *CMDS v. CPSO*, 2019 ONCA 393
20. *R. v. Dexter,* 2013 ONCA 744

21. *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) [WL]

TEXTS

22. P. Hogg and W. Wright, *Constitutional Law of Canada*, 5th Ed.

SCHEDULE B – LEGISLATION CITED

Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, S.O. 2020, c. 17

Orders continued

2 (1) The orders made under section 7.0.2 or 7.1 of the Emergency Management and Civil Protection Act that have not been revoked as of the day this subsection comes into force are continued as valid and effective orders under this Act and cease to be orders under the Emergency Management and Civil Protection Act.

O. Reg. 82/20: RULES FOR AREAS IN STAGE 1

SCHEDULE 4

ORGANIZED PUBLIC EVENTS, CERTAIN GATHERINGS IN SHUTDOWN ZONE

Gatherings, Stage 1 areas

1. (1) Subject to sections 2 to 4, no person shall attend,

…

(c) an organized public event or social gathering of more than 5 people that is held outdoors, including a social gathering associated with a gathering described in clause (d);

(d) an indoor gathering for the purposes of a wedding, a funeral or a religious service, rite or ceremony where the number of persons occupying any particular room in a building or structure while attending the gathering exceeds 15 percent of the capacity of the room.

O. Reg. 441/21: STAGES OF REOPENING

3. **Schedule 1 to the Regulation is revoked and the following substituted:**

SCHEDULE 1

AREAS IN THE SHUTDOWN ZONE, AREAS AT STEP 1

Shutdown Zone

1. No areas are in the Shutdown Zone.

Step 1

2. The following areas are at Step 1:

1. Brant County Health Unit.
2. Chatham-Kent Health Unit.
3. City of Hamilton Health Unit.
4. City of Ottawa Health Unit.
5. City of Toronto Health Unit.
6. The District of Algoma Health Unit.
7. Durham Regional Health Unit.
8. The Eastern Ontario Health Unit.
9. Grey Bruce Health Unit.
10. Haldimand-Norfolk Health Unit.
11. Haliburton, Kawartha, Pine Ridge District Health Unit.
12. Halton Regional Health Unit.
13. Hastings and Prince Edward Counties Health Unit.
14. Huron Perth Health Unit.
15. Kingston, Frontenac and Lennox and Addington Health Unit.
16. Lambton Health Unit.
17. Leeds, Grenville and Lanark District Health Unit.
18. Middlesex-London Health Unit.
19. Niagara Regional Area Health Unit.
20. North Bay Parry Sound District Health Unit.
21. Northwestern Health Unit.
22. Oxford Elgin St. Thomas Health Unit.
23. Peel Regional Health Unit.

24. Peterborough County — City Health Unit.
25. Porcupine Health Unit.
26. Renfrew County and District Health Unit.
27. Simcoe Muskoka District Health Unit.
28. Sudbury and District Health Unit.
29. Thunder Bay District Health Unit.
30. Timiskaming Health Unit.
31. Waterloo Health Unit.
32. Wellington-Dufferin-Guelph Health Unit.
33. Windsor-Essex County Health Unit.
34. York Regional Health Unit.

O Reg 265/21 STAY-AT-HOME ORDER

Terms of Order

1. The terms of this Order are set out in Schedule 1.

Application

2. This Order applies as of 12:01 a.m. on April 8, 2021.

Requirement to remain in residence

1. (1) Every individual shall remain at the residence at which they are currently residing at all times unless leaving their residence is necessary for one or more of the following purposes:

Work, school and child care

1. Working or volunteering where the nature of the work or volunteering requires the individual to leave their residence, including when the individual's employer has determined that the nature of the individual's work requires attendance at the workplace.
2. Attending school or a post-secondary institution.
3. Attending, obtaining or providing child care.
4. Receiving or providing training or educational services.

Obtaining goods and services

5. Obtaining food, beverages and personal care items.
6. Obtaining goods or services that are necessary for the health or safety of an individual, including vaccinations, other health care services and medications.
7. Obtaining goods, obtaining services, or performing such activities as are necessary for landscaping, gardening and the safe operation, maintenance and sanitation of households, businesses, means of transportation or other places.
8. Purchasing or picking up goods through an alternative method of sale, such as curbside pickup, from a business or place that is permitted to provide the alternative method of sale.
9. Attending an appointment at a business or place that is permitted to be open by appointment only.
10. Obtaining services from a financial institution or cheque cashing service.
11. Obtaining government services, social services and supports, mental health support services or addictions support services.

Assisting others

12. Delivering goods or providing care or other support or assistance to an individual who requires support or assistance, or receiving such support or assistance, including,

i. providing care for an individual in a congregate care setting, and

ii. accompanying an individual who requires assistance leaving their residence for any purpose permitted under this Order.

13. Taking a child to the child's parent or guardian or to the parent or guardian's residence.

14. Taking a member of the individual's household to any place the member of the household is permitted to go under this Order.

Health, safety and legal purposes

15. Doing anything that is necessary to respond to or avoid an imminent risk to the health or safety of an individual, including,

i. protecting oneself or others from domestic violence,

ii. leaving or assisting someone in leaving unsafe living conditions, and

iii. seeking emergency assistance.

16. Exercising, including,

i. walking or moving around outdoors using an assistive mobility device, or

ii. using an outdoor recreational amenity that is permitted to be open.

17. Attending a place as required by law or in relation to the administration of justice.

18. Exercising an Aboriginal or treaty right as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Multiple residences and moving

19. Travelling to another residence of the individual if,

i. the individual intends to be at the residence for less than 24 hours and is attending for one of the purposes set out in this Order, or

ii. the individual intends to reside at the residence for at least 14 days.

20. Travelling between the homes of parents, guardians or caregivers, if the individual is under their care.

21. Making arrangements to purchase or sell a residence or to begin or end a residential lease.

22. Moving residences.

Travel

23. Travelling to an airport, bus station or train station for the purpose of travelling to a destination that is outside of the Province.

Gatherings

24. Attending a gathering for the purpose of a wedding, a funeral or a religious service, rite or ceremony that is permitted by law or making necessary arrangements for the purpose of such a gathering.

25. If the individual lives alone, gathering with the members of a single household.

Animals

26. Obtaining goods or services that are necessary for the health or safety of an animal, including obtaining veterinary services.

27. Obtaining animal food or supplies.

28. Doing anything that is necessary to respond to or avoid an imminent risk to the health or safety of an animal, including protecting an animal from suffering abuse.

29. Walking or otherwise exercising an animal.

(2) Despite subsection (1), no person shall attend a business or place that is required by law to be closed, except to the extent that temporary access to the closed business or place is permitted by law.

(3) This Order does not apply to individuals who are homeless.

(4) If this Order allows an individual to leave their residence to go to a place, it also authorizes them to return to their residence from that place.

(5) The requirement in subsection (1) to remain at an individual's residence does not prevent the individual from accessing outdoor parts of their residence, such as a backyard, or accessing indoor or outdoor common areas of the communal residences in which they reside that are open, including lobbies.

(6) For greater certainty, nothing in this Order permits a business or place to be open if it is required by law to be closed.

(7) For greater certainty, nothing in this Order permits an individual to gather with other individuals if the gathering is not permitted by law.

(8) For greater certainty, individuals may only attend an outdoor organized public event or social gathering for a purpose set out in subsection (1) if the event or gathering is permitted by law.

O. Reg. 168/22: REVOKING VARIOUS REGULATIONS

REVOKING VARIOUS REGULATIONS

Revocations

1. The following regulations are revoked:

    1. Ontario Regulation 82/20.

    2. Ontario Regulation 240/20.

    3. Ontario Regulation 263/20.

Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9

Declaration of emergency

7.0.1 (1) Subject to subsection (3), the Lieutenant Governor in Council or the Premier, if in the Premier's opinion the urgency of the situation requires that an order be made immediately, may by order declare that an emergency exists throughout Ontario or in any part of Ontario. 2006, c. 13, s. 1 (4).

O. Reg. 454/21: REVOKING VARIOUS REGULATIONS

REVOKING VARIOUS REGULATIONS

Revocations

1. The following regulations are revoked:

1. Ontario Regulation 264/21.
2. Ontario Regulation 291/21.

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IGHT OF THE PROVINCE

ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at TORONTO

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