Court File No.: CV-22-00683592-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
(proceeding commenced at Toronto)

B E T W E E N:

WILLIAM ADAMSON SKELLY ~~and ADAMSON BARBECUE LIMITED~~

Applicant~~s~~

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO, CITY OF TORONTO, BOARD OF HEALTH FOR THE CITY OF TORONTO, and EILEEN DE VILLA

Respondents

FACTUM OF THE RESPONDENT
HIS MAJESTY THE KING IN RIGHT OF ONTARIO
(Application returnable February 25 - 27, 2026)

February 9, 2026

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PART I – OVERVIEW

1. COVID-19 is a highly contagious and potentially deadly respiratory disease that caused the worst global pandemic in over a century. In Ontario alone—even with stringent public health measures in place—by May 2021, more than 24,000 people were hospitalized for COVID-19 and more than 8,000 people had died.

2. Indoor dining, like other settings where people are in close and prolonged proximity, posed a distinct and increased risk of COVID-19 transmission. To reduce that risk, in November and December 2020, Ontario implemented targeted public health measures that temporarily prohibited indoor dining in restaurants. Mr. Skelly ("the Applicant") did not agree with these restrictions and continued to offer indoor dining at his restaurant, "Adamson Barbecue Limited", in open defiance of the law.

3. Mr. Skelly has been charged with a number of criminal and regulatory offences relating to that open defiance. Instead of raising his constitutional arguments as a defence at his trial, he has elected to pursue this civil application.

4. This application purports to challenge the constitutionality of the entirety of the *Reopening Ontario (A Flexible Response to Covid-19) Act, 2020*, S.O. 2020, c. 17 ["*ROA*"] and the *O. Reg. 82/20: "Rules For Areas in Shutdown Zone and at Step 1"* on the grounds that they violate s. 36 of the *Constitution Act, 1982*, ss. 91(11) and 91(27) of the *Constitution Act, 1867* and the Applicant's rights under ss. 2(b), 2(c), 7, 8, 9, 12 and 15 of the *Canadian Charter of Rights and Freedoms* [the "*Charter*"].

5. Even if the Applicant had standing to bring such a challenge, there is no merit to any of these arguments. There is no constitutional right to offer indoor dining at a restaurant. This fact is a complete answer to all of the Applicant's *Charter* arguments.

6. In the alternative, even if a *Charter* infringement was made out, any limit on the Applicant's *Charter*-protected rights would be justified under s. 1 of the *Charter*. Courts across the country have found that tailored public health measures in response to the COVID-19 pandemic either did not breach *Charter* rights or were justified under s. 1 of the *Charter*. Like other temporary public health measures imposed by Ontario during COVID-19, the prohibition on indoor restaurant dining is an "eminently reasonable means of achieving public protection during the throes of a deadly pandemic."[1]

7. Finally, neither s. 36 of the *Constitution Act, 1982,* nor ss. 91(11) and 91(27) of the *Constitution Act, 1867* provide any basis to invalidate the impugned legislation. Section 36 of the *Constitution Act, 1982* does not create actionable rights for individuals. Under a federalism analysis, the pith and substance of the legislation, namely the protection of public health and the administration of the provincial response to the COVID-19 pandemic, falls within the provincial Legislature's jurisdiction.

8. The application should be dismissed with costs.

PART II – FACTS

A. The regulatory scheme

9. On March 17, 2020, a state of emergency was declared in Ontario under the *Emergency Management and Civil Protection Act* ["*EMCPA*"][2] in response to the COVID-19 pandemic. Orders were made pursuant to s. 7.0.1 of the *EMCPA* that, among other things, regulated the conduct of businesses in Ontario, including restaurants.

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[1] *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134 at para 28 ["*Trinity Bible* ONCA"], leave to appeal to SCC ref'd, 2023 CanLII 72135.
[2] *Emergency Management and Civil Protection Act*, RSO 1990 c E.9, s. 7.0.1; *Declaration of Emergency*, O Reg 50/20.

10. The Legislature subsequently enacted the *ROA*. The *ROA* continued various orders that had been made pursuant to s. 7.0.1 of the *EMCPA*.[3] One of these orders, O. Reg. 82/20, was continued under the *ROA*. The *ROA* set out a regulatory framework by which the Government determined staged control measures to be applied to public health units across Ontario at reducing COVID-19 transmission. The *ROA* was designed to allow for a targeted approach to identify what stage a public health unit would be placed in based on epidemiological statistics, among other considerations.[4]

11. The Applicant operated restaurants located in areas that in November 2020 were at Step 1 of re-opening under the O. Reg. 363/20.[5] At Step 1, restaurants were permitted to operate under the O. Reg. 82/20 if they complied with certain conditions. The condition that is material to this proceeding is that restaurants, subject to limited exceptions which do not apply here, "may open only for the purpose of providing take-out, drive-through or delivery service."[6] Indoor dining was not permitted. In November 2020, Toronto's Medical Officer of Health also issued an Order under s. 22 of the *Health Protection and Promotion Act* ["*HPPA*"][7], which also prohibited indoor dining.

12. The Applicant, as a person responsible for a business that was subject to conditions under the *ROA*, the O. Reg. 82/20 and the *HPPA* Order, was required to ensure that his business either met those conditions or was closed.[8]

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[3] *Reopening Ontario (A Flexible Response to Covid-19) Act, 2020,* SO 2020, c 17 ["*ROA*"], ss 1-2.
[4] *Her Majesty the Queen in Right of Ontario v. Adamson Barbecue Limited*, 2020 ONSC 7679 at para 2 ["*Adamson Restraining Order Decision*"].
[5] *Steps of Reopening*, O Reg 363/20, Sched. 1, s. 1 (version as of November 23, 2020).
[6] *Rules for Areas in Shutdown Zone and at Step 1*, O Reg 82/20, Sched. 2, s. 3 (version as of November 23, 2020) ["O Reg 82/20"].
[7] *Health Protection and Promotion Act*, RSO 1990, c H.7, ss 22(1) ["*HPPA*"].
[8] O Reg 82/20, Sched. 1, s. 1(2) (version as of November 23, 2020).

13. The Applicant did not agree with the temporary restrictions on indoor restaurant dining. As he states in his factum, Mr. Skelly was "committed to doing whatever was necessary to keep his business alive and repair the financial harm caused by the First Lockdown".[9] He opened his restaurant for indoor dining on November 24, 2020, in open defiance of the law and, as a result, was subject to charges under the *ROA*, the *HPPA*, the *Provincial Offences Act* ("*POA*") and the *Toronto Municipal Code*. Despite those charges, the Applicant opened his restaurant two more times for indoor dining on November 25 and 26, 2020, which led to his *Criminal Code* charges.

14. Mr. Skelly's behaviour more broadly reveals a pattern of disregard for law and court orders. Mr. Skelly did not pay past costs orders of this Court until he realized it was necessary to do so for this new application to proceed.[10] In proceedings related to non-COVID-related municipal charges, Mr. Skelly told the presiding justice that he was not the Defendant, William Adamson Skelly, but rather, that he was an "agent" for the Defendant. The Court ordered that Mr. Skelly pay nine fines of $1,500 each. Mr. Skelly never paid the fines, nor did he ever clarify to the Court that he was William Adamson Skelly.[11] Finally, Mr. Skelly admitted on cross-examination that he deliberately failed to comply with municipal licensure requirements.[12]

15. Because of the Applicant's history of non-compliance with the O Reg 82/20, the Attorney General of Ontario applied to this Court in December 2020 for an order

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[9] Factum of the Applicant dated February 19, 2026, at para 29.
[10] Endorsement of Justice Centa dated September 6, 2022, Book of Authorities of the Respondent, His Majesty the King in Right of Ontario ("OBOA"), Tab 1, p. 4.
[11] Cross-examination of William Adamson Skelly ["Skelly Cross"], pp. 30-37, qq. 90-114, Applicant's Record dated December 16, 2025 ["AR"], Tab 14, pp. 1538-1545.
[12] Skelly Cross, pp. 40-48, qq. 122-128, AR, Tab 14, pp. 1548-1556.

restraining Mr. Skelly from contravening public health measures. Justice Kimmel made an order enjoining the Applicant from contravening the O. Reg. 82/20. She found that the Applicant "openly disregarded" public health orders, operated "in open defiance of" the rules, and was in "clear breach" of O. Reg. 82/20.[13] While Mr. Skelly characterized this defiance of the law as "civil disobedience", Justice Kimmel held that "[t]his court does not condone civil disobedience of public health and welfare regulations."[14]

16. The restraining order is now spent. O. Reg. 82/20, which prohibited indoor dining in restaurants located at Step 1 of re-opening, was revoked on March 16, 2022. On April 27, 2022, Ontario revoked all remaining emergency orders under the *ROA*.[15]

B. The expert evidence

17. To explain the facts of the pandemic, Ontario relies on the expert evidence of Dr. Matthew Hodge, 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 of experience in public health and preventative medicine.[16] 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.[17]

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[13] *Adamson Restraining Order Decision* at paras 23-25 & 27.
[14] *Adamson Restraining Order Decision* at para 31; Affidavit of William Adamson Skelly, sworn September 20, 2024, at paras 3-4, AR, Tab 3, pp 36-37.
[15] *Revoking Various Regulations*, O. Reg. 346/22.
[16] Affidavit of Dr. Matthew Hodge affirmed November 19, 2024 ("2024 Hodge Affidavit"), at paras 3-9 and Exhibit E, Ontario's Application Record ("OAR"), Tab 1, pp 2-4 & 46-47.
[17] 2024 Hodge Affidavit at para 6, OAR, Tab 1, pp 3-4.

18. The Applicant, by contrast, relies on the evidence of a doctor suspended by the College of Physicians and Surgeons of Ontario for incompetence and professional misconduct for statements such as "[t]he criminal covid enterprise spent years creating and patenting biologic weapons, infiltrating governments, quietly changing rules and definitions, and preparing their covid schemes".[18]

19. Even if the Applicant's evidence was credible and reliable, none of the evidence proffered by the Applicant rebuts the public health consensus that allowing indoor restaurant dining in fall 2020 to winter 2021 in Ontario would have increased the probability of transmission of COVID-19 and therefore contributed to the harms and health care system burdens associated with higher rates of COVID-19.[19]

C. The harms caused by COVID-19

20. As Dr. Hodge explains, COVID-19 is a deadly infectious disease that caused an unprecedented global public health emergency, killing millions worldwide and thousands of Ontarians. In the first year of the pandemic, 4.8% of people with COVID-19 needed hospital-based care, often ICU-level care. Complications leading to death included respiratory failure, acute respiratory distress syndrome (ARDS), sepsis and septic shock, thromboembolism, and/or multiorgan failure, including injury of the heart, liver or kidneys.[20] In Ontario—despite stringent public health measures—by May 2021, over 24,000 people had been hospitalized for COVID-19 and over 8,000 had died.[21]

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[18] *College of Physicians and Surgeons of Ontario v. Trozzi*, 2023 ONPSDT 22 at para 5.
[19] 2024 Hodge Affidavit at para 25, OAR, Tab 1, p 9.
[20] 2024 Hodge Affidavit, Exhibit F, Affidavit of Matthew Hodge Affirmed May 14, 2021 ("2021 Hodge Affidavit") at para. 8; OAR, Tab 1, p 52 (data as of May 11, 2021).
[21] 2021 Hodge Affidavit at para. 9, OAR, Tab 1, pp 52-53.

21. COVID-19 challenged Ontario's ICU capacity, meaning both physical beds and the people needed to staff those beds and deliver care. Further, a health care system in which every bed is occupied by someone infected with COVID-19 has no way to respond to people with heart attacks, hip fractures or strokes, which added to the elevated mortality attributable to COVID-19. Put simply, the harms caused by COVID-19 include preventable deaths due to heart attacks, hip fractures and other health conditions from which Ontarians would not be expected to die if beds and staff were available to care for patients with these conditions.[22]

22. The effects of the COVID-19 pandemic on Canadian mortality in the first year of the pandemic are evident in the increase in excess mortality in 2020 compared to 2019. Statistics Canada reported an estimated 13,798 deaths that year beyond what would have been expected without the COVID-19 pandemic. This excess mortality represents a 5% increase in the number of deaths among Canadians. This is the equivalent of two fully booked Montreal-Toronto flights crashing with no survivors every week for a year.[23]

D. How is COVID-19 transmitted

23. Dr. Hodge explains that COVID-19 is caused by the SARS-CoV-2 virus and its variants, which spreads between people, mainly when an infected person is in close contact with another person. The virus can spread from an infected person's mouth or nose in small liquid particles when they cough, sneeze, speak, sing, or breathe heavily. Inhaling aerosols containing SARS-Cov-2 virus have been confirmed to be a significant

[22] 2024 Hodge Affidavit, at paras. 16-17, OAR, Tab 1, p 7; 2021 Hodge Affidavit at paras 13-14, OAR, Tab 1, pp. 54-55.
[23] 2021 Hodge Affidavit at para 15, OAR, Tab 1, pp 55-56.

mode of transmission. These particles travel further indoors than outdoors and their survival on surfaces appears to be greater indoors. [24] People can contract COVID-19 when the virus enters their mouth, nose, or eyes.[25]

24. Many people infected with the virus show no symptoms (asymptomatic) or experience several days between when they are infected and when they develop symptoms (presymptomatic). This is challenging as transmission risk seems to be highest prior to symptoms appearing. Therefore, in Dr. Hodge's opinion, the public health measures implemented in 2020 and 2021 needed to apply to people who did not exhibit COVID-19 symptoms to be effective.[26]

E. The risk factors for COVID-19 transmission

25. Risk factors for virus transmission include being in close contact for prolonged periods, higher voice volume, being indoors, inconsistent use of face coverings (such as removing a face covering to talk or shout, eat or drink), improper use of face coverings (e.g. not covering the nose or wearing one that is too loosely fitted), and background infection rates in the community(s) from which a gathering's attendees are drawn.[27] Risks of virus transmission are increased when more than one of these factors occur.[28]

26. The risk from any particular setting is also determined by the likelihood that other people who are present are infected with COVID-19. Community prevalence describes the percentage or rate of COVID-19 infection in a population. When

[24] 2024 Hodge Affidavit, at para 12, OAR, Tab 1, p 7; 2021 Hodge Affidavit, at paras 16-17, OAR, Tab 1, p 56.
[25] 2021 Hodge Affidavit, at para 17, OAR, Tab 1, p 56.
[26] 2021 Hodge Affidavit, at para 18, OAR, Tab 1, p 57.
[27] 2021 Hodge Affidavit, at para 20, OAR, Tab 1, p 57.
[28] 2021 Hodge Affidavit, at para 22, OAR, Tab 1, p 58.

community prevalence is elevated, even lower risk activities can pose significant transmission risks and contribute to pressures on hospital and ICU capacity.[29]

27. In addition, gatherings that draw individuals from different households together increase the expected burden of COVID-19. High rates of household transmission, with entire families being hospitalized, highlight the importance of implementing public health measures that reduce the chances of COVID-19 entering a household.[30]

F. Measures needed to limit COVID-19 in Ontario

28. To protect persons from mortality and morbidity from COVID-19 and to reduce the likelihood that the acute care system was not overwhelmed by persons requiring care for COVID-19 infection, Ontario implemented a bundle of public health measures, generally referred to as non-pharmacologic interventions ("NPIs"). The NPIs were broadly similar to those implemented in most if not all OECD jurisdictions and sought to reduce close conduct and thus reduce the risk of COVID-19 transmission.[31]

29. In fact, prior to vaccine availability, non-pharmaceutical interventions, including the limits on restaurant occupancy, were the only effective policy tools available to reduce harm and death due to COVID-19 infection.[32]

G. Limits on restaurant operations reduced COVID-19 harms

30. During the relevant period, restaurants posed distinct transmission risks.[33] Because transmission risk was heightened when people are in close contact, the limits

[29] 2021 Hodge Affidavit, at para 21, OAR, Tab 1, pp 57-58.
[30] 2021 Hodge Affidavit, at para 22, OAR, Tab 1, pp 58-59.
[31] 2021 Hodge Affidavit, at para 20 (sic 23), OAR, Tab 1, p 59.
[32] 2024 Hodge Affidavit, at para 17, OAR, Tab 1, p 7.
[33] 2021 Hodge Affidavit, at para 25, OAR, Tab 1, p 60.

on indoor dining reduced the likelihood of transmission compared to take-out only.[34] Since consuming food and drink is central to indoor restaurant dining, and as this is not possible while wearing a mask, transmission risks were also reduced by limiting restaurants to take-out and delivery service. Furthermore, close contact may occur when restaurant patrons travel to a restaurant and await entry or access washroom facilities, and these risks were reduced by limiting restaurants to take-out and delivery service.[35]

31. It is worth noting that limits on restaurant occupancy were not only implemented because people who eat in restaurants would die from COVID-19 infections they contact in restaurants. These limits were proposed in no small part because the people at highest risk, such as the elderly living in Long-Term Care homes, were entirely dependent on people who can eat in restaurants, or who live with or are otherwise in contact with people who eat in restaurants, for the basics of survival.[36] Limits on gatherings which posed elevated risks of COVID-19 transmission in the broader community, like indoor dining in restaurants, reduced the risk that workers or visitors would inadvertently bring COVID-19 into the LTC environment.[37]

32. The evidence confirms that the restrictions did achieve these objectives. As of May 2021, 60 outbreaks of COVID-19 had been identified in the City of Toronto in settings of bars/nightclubs/restaurants. [38] This figure does not address transmission of the virus in restaurants that led to outbreaks and death elsewhere. After restaurants were

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[34] 2021 Hodge Affidavit, at para 25, OAR, Tab 1, p 60.
[35] 2021 Hodge Affidavit, at para 26, OAR, Tab 1, p 60.
[36] 2024 Hodge Affidavit, at paras 19-20, OAR, Tab 1, pp 7-8.
[37] 2024 Hodge Affidavit, at para 20, OAR, Tab 1, p 8; Cross-examination of Dr. Matthew Hodge on May 25, 2021 ("Hodge Cross"), at qq. 193-194, pp. 66-67, OAR, Tab 1, pp. 129-130.
[38] 2021 Hodge Affidavit, at para 28, OAR, Tab 1, pp 60-61.

restricted to take-out and delivery service in November 2020, the rate of outbreaks per 100 days dropped 50% (23.4 to 11.7/100 days) accompanied by an 18% decrease in the average cases per outbreak (4.58 to 3.74 average).[39]

PART III – ISSUES AND THE LAW

33. Ontario submits that the issues raised on this application are as follows:

a) The Applicant only has standing to challenge the provisions of the legislation that have been applied to him;

b) The challenge to the *HPPA* Orders should be dismissed because it is a collateral attack on administrative orders;

c) Neither section 36 of the *Constitution Act, 1982* nor ss. 91(11) or 91(27) of the *Constitution Act, 1867* provide any basis to invalidate the impugned legislation;

d) The Applicant's *Charter* rights are not engaged in this proceeding; and

e) In the alternative, any infringement of the *Charter* is justified under section 1 of the *Charter*.

A. The Applicant only has standing to challenge the provisions of the legislation that have been applied to him

34. The Applicant does not have standing to challenge any pandemic-related law with which he disagrees. While the Applicant is entitled to his opinions, his "disdain for

[39] 2021 Hodge Affidavit, at para 28, OAR, Tab 1, pp 60-6.

the legislation [is not] a sufficiently direct interest to meet the test for the granting of standing"[40] to challenge the legislation as a whole.

35. As explained by this Court in *Banas*, a similar omnibus constitutional challenge to COVID-19 restrictions in restaurants, the Applicant only has private interest standing to challenge the provisions of the legislation that had an impact on him personally, namely the provisions that prohibited indoor dining in restaurants that are the subject of his prosecution under *ROA*.[41] He also only has standing to challenge the legislation as it was in force on the day that charges were laid against him. The constitutionality of COVID-19 laws that are not related to pending proceedings against the Applicant pose only moot, academic questions that have no bearing on the Applicant's legal interests.

36. Nor should the Applicant be granted public interest standing. To assess whether to grant public interest standing, a court must assess and weigh three factors: (i) whether the case raises a serious justiciable issue, (ii) whether the party bringing the challenge has a genuine interest in the matter, and (iii) whether the proposed challenge is, in all the circumstances, a reasonable and effective means of bringing the case to court.[42]

37. Here, the factors all weigh against granting the Applicant public interest standing. There is no serious issue concerning the validity of the emergency orders regulating restaurant operations. The Applicant has no genuine interest in the validity of the legislation, apart from the provision he is being prosecuted under. Further, the

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[40] *Infant Number 10968 v. Ontario*, 2006 CanLII 19946 (ON SC) at para 24, aff'd 2007 ONCA 787 at para 14.
[41] *Banas v. HMTQ*, 2022 ONSC 999 at para 13 ["*Banas*"]; See also *R. v. Banks*, 2007 ONCA 19 at paras 22-26;
[42] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27 at para 28.

Applicant has not been effective in bringing this matter to Court. First, the Applicant's omnibus challenge to the entirety of the *ROA* and the 27 Orders continued under it—which were sometimes amended weekly—is so expansive and diffuse that it is incompatible with constitutional adjudication.[43] Second, after nearly four years, the Applicant has failed to produce sufficiently tailored arguments with respect to the targeted laws and actions.[44]

38. In *Grandel v Government of Saskatchewan* ("*Grandel*"), the Saskatchewan Court of Appeal reached the same conclusion on standing in a similar challenge to COVID-19 public health measures.

39. In *Grandel*, the Appellants were issued summary offences tickets for violating a 10-person outdoor gathering restriction provisions of a public health order. The Court refused to grant the Appellants public interest standing to challenge an earlier 30-person limit because the Appellants had no interest in the challenge – they had not been charged with violating the 30-person limit and the gathering limits had been lifted.[45] The same principles apply in this case and the Court should reach the same conclusion.

B. The challenge to the *HPPA* Orders should be dismissed because it is a collateral attack on administrative orders

40. The Applicant's challenge to the *HPPA* Orders is a collateral attack on administrative orders and should be dismissed. The Applicant failed to avail himself of the requisite administrative procedures in the *HPPA* that could have been used to

[43] *Lho'Imggin v. Canada,* 2025 FC 1586 at paras 12-14.
[44] *Lho'Imggin v. Canada,* 2025 FC 1586 at paras 12-14.
[45] *Grandel v Government of Saskatchewan*, 2024 SKCA 53 at paras 41-43, leave to appeal to SCC ref'd, 2025 CanLII 17305.

challenge the Orders; instead, he brought this Application as an attempt to avoid prosecution and a civil action for having defied the Orders in the Fall of 2020.

41. The proper way to challenge the validity of a *HPPA* Order is through an appeal to the Health Services Appeal and Review Board ("HSARB") in the case of a s. 22 *HPPA* Order, or through an application for judicial review in the Divisional Court in the case of a s. 24 *HPPA* direction.[46] On December 8, 2020, Mr. Skelly requested a hearing before the HSARB to appeal the s. 22 *HPPA* Order. On February 22, 2021, the HSARB issued an Order declining to hear a motion to determine the Board's jurisdiction on the basis of mootness, noting that Mr. Skelly had withdrawn the appeal request on December 14, 2020.[47] There is no evidence that the Applicant pursued an application for judicial review of the s. 24 *HPPA* direction and the deadline to bring such an application is now long spent.

42. This evasion of the proper procedural route to challenge a decision is a collateral attack and is prohibited. The Supreme Court has held that a party who chooses to ignore an administrative appeal process is barred from contesting the validity of the administrative decision in court because the legislation directed appeals to an administrative body, not to the courts. A party cannot seek a remedy through proceedings when the statute provides for an administrative procedure.[48]

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[46] *HPPA*, ss. 44, 46.
[47] Affidavit of Paul Di Salvo, sworn September 26, 2025, at paras 57-58 and Exhibit P, City of Toronto Application Record, Tab 1, pp. 18 & 110.
[48] *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at paras 33-34, referring to *R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706 at paras 55-57, 60-64.

C. Neither s. 36 the *Constitution Act, 1982*, nor ss. 91(11) and 91(27) of the *Constitution Act, 1867* have any application here.

43. Section 36 of the *Constitution Act, 1982*, is found under the heading "Equalization and Regional Disparities" and expresses the federal and provincial governments' commitment to promoting equal opportunities for the well-being of Canadians, furthering economic development to reduce disparity in opportunities, and providing essential public services of reasonable quality to all Canadians.[49]

44. In *Banas,* this Court held that section 36 of the *Constitution Act, 1982*, has no bearing on the constitutionality of COVID-19 public health restrictions on restaurant operations. Section 36 does not create actionable rights for individuals.[50] The expression of political commitment in section 36 of the *Constitution Act, 1982*, is, in Professor Hogg's words, "probably too vague, and too political, to be justiciable".[51] The provision expressly provides that it does not alter "the rights of [the provinces] with respect to the exercise of their legislative authority." It follows that it cannot be used to invalidate legislation. In any case, the impugned legislative provisions have nothing to do with equalization or regional disparities. The Applicant had the same economic opportunities available to every other restaurant owner in Ontario.

45. Nor does the *ROA* impermissibly encroach on the federal power over Quarantine (s. 91(11) of the *Constitution Act, 1867*) or Criminal Law (s. 91(27) of the *Constitution*

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[49] *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 36.
[50] *Banas* at para. 24. See also C*ape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44 at para 86, leave to appeal to SCC ref'd, 2009 CanLII 71470; See also *Banas* at para. 24.
[51] P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thompson Carswell, 2021) (online) at §6:6, OBOA, Tab 2, p. 10.

Act, 1867). The pith and substance of the *ROA* is the protection of public health and the administration of the provincial response to the COVID-19 pandemic.[52] The promotion of public health within a province falls within the provincial Legislature's jurisdiction.[53] Under the double aspect doctrine, the fact that the federal Parliament can impose quarantines and other restrictions under its enumerated powers does not change the fact that the province can use its power to regulate civil rights and local and private matters to limit indoor dining to protect public health.[54]

D. The Applicant's *Charter* rights are not engaged in this proceeding

46. There is no *Charter* right to operate a restaurant that offers indoor dining. This is a complete answer to the Applicant's *Charter* claims.

i. No infringement of *Charter* ss. 2(b) or 2(c)

47. The impugned provisions do not engage the Applicant's *Charter* s. 2(b) right to freedom of expression or his *Charter* s. 2(c) right to freedom of peaceful assembly. Neither the purpose nor the effect of the law is to prevent the Applicant from communicating any message,[55] nor engaging in group activities that are inherently

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[52] *Hudson's Bay Company ULC v. Ontario (Attorney General)*, 2020 ONSC 8046 at para 71.
[53] *Constitution Act, 1867 (UK),* 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss. 92 (10), (13), (16); see e.g., *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, at paras 211-297 ["*Taylor*"]; *Klassen v British Columbia (Attorney General)*, 2021 BCSC 2254 at paras 54-58.
[54] *Schneider v. The Queen*, [1982] 2 SCR 112 at 136; *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10 at paras 28, 69-78; *Sri Lankan Canadian Action Coalition v. Ontario (Attorney General)*, 2024 ONCA 657 at para 99.
[55] *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at paras 56-85; See also *Banas* at para 28.

collective and public.[56] As the Court of Appeal has held, "freedom of expression guarantees our right to express disagreement with government regulation; it does not guarantee the right to be free from government regulation with which we disagree."[57]

48. The same may be said of freedom of peaceful assembly. Freedom of peaceful assembly guarantees access to and use of public spaces, not the indoor dining area of a privately-owned restaurant.[58] This fact alone is sufficient to distinguish the Ontario Court of Appeal's decision in *Hiller v Ontario,* which concerned entirely different restrictions, including an "absolute ban on outdoor assembly" and charges related to what the Court found was "unquestionably" a "plain vanilla outdoor political protest."[59]

49. In fact, unlike for Mr. Hillier*,* at the time of the events at issue in this case, it was open to Mr. Skelly to organize an outdoor public event that complied with the public health requirements set out in Schedule 4, section 1 of O. Reg. 82/20.[60] He chose not to do so. Rather, similar to this Court's decision in *Banas*, what Mr. Skelly seeks—the right to earn a living by operating a restaurant unbridled by public health restrictions he disagrees with—does not fall within the ambit of s. 2(c) of the *Charter.*

ii. No infringement of *Charter* s. 7

50. The impugned provisions also do not engage the Applicant's *Charter* s. 7 rights. Section 7 does not protect the right to operate a restaurant that offers indoor dining.

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[56] *Beaudoin v. British Columbia,* 2021 BCSC 512 at para 173 ["*Beaudoin*"]; *Hussain v Toronto (City),* 2016 ONSC 3504 at paras 38 & 44 ["*Hussain*"].
[57] *Rosen v. Ontario (Attorney General)*, 1996 CanLII 443 (ON CA) at 14.
[58] *Hussain* at para 38.
[59] *Hillier v. Ontario*, 2025 ONCA 259 at paras 17, 19 & 30 ["*Hillier* ONCA"].
[60] O. Reg. 82/20, Sched. 4, s. 1 (version as of November 23, 2020); the Court of Appeal affirmed in *Hillier* that restrictions on gathering for the purpose of peaceful assembly and protest of up to 10 people would be constitutional: 2025 ONCA 396 at para 20.

Binding authority holds that the *Charter* does not protect the right to engage in a business or to practice a profession unfettered by the applicable rules. This principle was confirmed by this Court in the specific context of COVID-19 restaurant regulation in *Banas*.[61]

51. To prove a violation of s. 7, one must show (i) a deprivation of life, liberty, or security of the person (ii) and that the deprivation is not in accordance with principles of fundamental justice. The onus remains on the claimant at both steps, which are analytically distinct: if the first part of the test is not met, the "analysis stops there."[62]

52. In *Siemens*, the Supreme Court held that "[t]he ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*."[63] In *Mussani*, the Court of Appeal for Ontario held that the *Charter* does not protect "the right to engage in the economic activity of [one's] choice" and that "there is no constitutional right to practise a profession unfettered by the applicable rules."[64] In *Banas*, in the context of non-compliance by a restaurant with COVID-19 masking and vaccine requirements imposed under *ROA* emergency orders, this Court observed that "it is settled law that s. 7 does not grant the right to engage in an economic activity free from government regulation".[65] These decisions are a complete answer to the Applicant's *Charter* s. 7 claim.

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[61] *Banas* at para 33.
[62] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 47.
[63] *Siemens v. Manitoba (Attorney General),* 2003 SCC 3 at para 46.
[64] *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653 (ON CA) at paras 39-43; *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 at para 40.
[65] *Banas* at paras 32-33. This Court also held in *Cherrier v. Attorney General of Canada*, 2017 ONSC 7336 at para 89 that the "right to engage in a particular job or profession, carry on a business, or earn a particular livelihood are not protected."

53. Even if the Applicant could establish a deprivation of life, liberty or security of the person, they have not pleaded that the challenged legislation is inconsistent with any identified principle of fundamental justice. The Court of Appeal has struck a claim as having no reasonable prospect of success for not pleading any identifiable principle of fundamental justice:

> It is not for a court to speculate which principles of fundamental justice might be in play in a proceeding; it is for the claimant to identify the operative principles of fundamental justice in its pleading. As acknowledged by appellants' counsel in oral argument, the Amended Claim does not particularize the principle of fundamental justice at play in the appellants' s. 7 claim. That is to say, their Amended Claim does not identify the principle or principles of fundamental justice offended by Ontario's termination of the BI Payments or which Ontario failed to follow when terminating the BI Payments.
>
> That omission in their Amended Claim is fatal to the appellants' appeal on this issue. Their Amended Claim fails to plead all the constituent elements of a claim for a violation of the s. 7 rights of class members. As a result, the Amended Claim does not disclose a cause of action and therefore the motion judge did not err in so holding.[66]

54. The Notice of Application here suffers from the same defect: it "does not identify the principle or principles of fundamental justice offended by" the impugned provisions. This defect is fatal to the applicant's case for the same reasons the claim was struck in *Bowman*.

55. In the further alternative, Ontario submits that the impugned legislation was not vague, arbitrary, overbroad or grossly disproportionate for the reasons set out below in the section 1 analysis. In its decision granting a restraining order against the Applicant under s. 9 of the ROA, this Court held that it was "incontrovertible that there has been a clear breach" of the O. Reg. 82/20 by the Applicant and that the Regulation's restaurant

[66] *Bowman v. Ontario*, 2022 ONCA 477 at paras 94-97 [emphasis added].

measures "were not being adhered to and no persons responsible for the business were attempting to ensure compliance."[67] It cannot be said that the *ROA* or the O. Reg. 82/20 were so vague that they did not provide fair notice to persons of what was prohibited, and did not provide clear standards for those entrusted with enforcement.[68]

56. The threshold for finding a law arbitrary is high: there must be "no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person."[69] The object of the impugned legislation was to reduce the risk of transmission of COVID-19, and the restrictions imposed were manifestly rationally connected to this objective. The Court of Appeal for Ontario held in *Hillier* that it seemed "rather obvious" that "restricting the gathering of people, even outdoors, was a rational means of reducing the transmission of COVID-19".[70]

57. The Court of Appeal for Ontario has also accepted judicial findings that public health measures which reduce person to person interaction are not arbitrary because they reduce the risk of COVID-19 transmission.[71] As the Divisional Court held in the context of an order under the *Health Protection and Promotion Act*, RSO 1990, c H.7:

> Too many COVID-19 cases can overwhelm medical resources, thereby putting medical personnel in the position of having to decide who gets access to the resources and who does not. Those who do not get access to proper medical care may die. Any steps that may reduce that risk are not arbitrary.[72]

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[67] *Adamson Restraining Order Decision* at para 25.
[68] *Working Families Ontario v. Ontario*, 2021 ONSC 4076 at para 38.
[69] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 83-85; *R. v. Long*, 2018 ONCA 282 at para. 63.
[70] *Hillier* ONCA at para 52.
[71] *Trinity Bible* ONCA at para 96.
[72] *Schuyler Farms Limited v. Dr. Nesathurai*, 2020 ONSC 4711 at para 101; See also *Sprague v. Her Majesty the Queen in right of Ontario*, 2020 ONSC 2335 at para 48 ["*Sprague*"].

58. For the same reason, the impugned provisions are not overbroad.[73] The provisions restricted indoor dining while permitting restaurants to operate in ways that posed less risk of COVID-19 transmission, including take-out and delivery service. The law went no further than necessary to achieve its risk-mitigation objectives. In setting COVID-19 restrictions in the face of a global pandemic, "Ontario was not required to choose the least ambitious means of protecting the public" and restrictions are not "overbroad simply because Ontario could have chosen from other alternatives."[74]

59. Finally, the principle against gross disproportionality "only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure."[75] Given that the objective of the impugned legislation was to reduce the risk of transmission of a deadly infectious disease that has killed thousands of Ontarians, any impact on the Applicant's business operations was minimal in comparison. Even a law imposing quarantine measures to all returning air travellers to Canada was not deemed grossly disproportionate because "given that there [was] no way to know in advance which asymptomatic air travellers [were] infected and incubating COVID-19 at the time they arrive[d] in Canada, there [was] a rational basis to test them all and to require that they stay in a GAA [government approved accommodation] or a DQF [designated quarantine facility] while they await[ed] their [test] result".[76]

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[73] *Sprague* at para. 49; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras 101-102, 108, 112-119 ["*Bedford"*]; *R. v. Moriarity*, 2015 SCC 55 at para 27.
[74] *Trinity Bible ONCA* at para 139. See also *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 66; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 37; *RJR-MacDonald Inc. v. Canada (Attorney General*), 1995 CanLII 64 (SCC) at para 160; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para 43; and *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at para 96.
[75] *Bedford* at para. 120.
[76] *Spencer v. Canada (Health)*, 2021 FC 621 at paras 134-135 ["*Spencer*"].

iii. No infringement of *Charter* s. 8

60. The impugned legislation also did not engage the protection against unreasonable search or seizure guaranteed by *Charter* s. 8. Section 8 has no application in this case since there has been no search or seizure, let alone an unreasonable one.[77] In *Banas*, this Court affirmed that a restraining order under s. 9 of the *ROA* is not a seizure within the meaning of s. 8 of the *Charter*.[78] The Applicant can have no reasonable expectation that his non-compliance with the COVID-19 restrictions applicable to restaurants should remain private and unsanctioned.

iv. No infringement of *Charter* s. 9

61. Nor did the impugned legislation engage the Applicant's *Charter* s. 9 protection against arbitrary arrest and detention. A lawful arrest based on reasonable and probable grounds that an offence is being committed will never be arbitrary.[79] The arrest or detention is not arbitrary unless the law authorizing it is itself arbitrary.[80]

62. In any event, Ontario is not the proper respondent to allegations concerning the actions of municipal police and by-law enforcement officers. Indeed, the only provincial employees whose actions are impugned in this application appear to be the counsel who acted for the Attorney General in the restraining order application and the Applicant's prosecution. The Applicant does not allege, though, any improper conduct by these

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[77] *R. v. Jones*, 2017 SCC 60 at para 11; *R v. Collins*, [1987] 1 SCR 265 at para 23; *R v. Tessling*, [2004] 3 SCR 432 at paras 18-19, 32; *R v. Evans*, [1996] 1 SCR 8 at para 11; *Hunter v. Southam,* [1984] 2 SCR 145 at 159, 166-168.
[78] *Banas* at para. 35.
[79] *R. v. Latimer*, [1997] 1 SCR 217 at paras 22, 26.
[80] *R. v. Grant*, 2009 SCC 32 at para. 54.

lawyers; instead, his true complaint is just about the underlying legislation that was being enforced in these proceedings.

v. No infringement of *Charter* s. 12

63. There is no merit to the Applicant's argument that the right not to be subject to cruel and unusual treatment or punishment is engaged here. The mere prohibition of conduct is not "treatment" within the meaning of s. 12.[81] Any sentence or penalty that Mr. Skelly will be subject to with respect to the underlying charge will be the result of an exercise of independent sentencing discretion of the Ontario Court of Justice and should not be the subject of premature challenge in this civil application.

64. In any event, the penalties available under the applicable scheme are neither cruel nor usual by nature nor are they necessarily grossly disproportionate.[82] Section 10 of the *ROA* and sections 430(4) and 129(a) of the *Criminal Code* do not contain mandatory minimum penalties. Further, s. 59(1) of the *Provincial Offences Act* grants the Ontario Court of Justice discretion to depart from any minimum sentence or fine.[83]

vi. No infringement of *Charter* s. 15

65. Lastly, the impugned legislation did not engage the Applicant's equality rights under *Charter* s. 15. There is no merit to the Applicant's claim that he experienced discrimination either because (i) other unspecified groups, who were not restaurant owners, were not disciplined for protesting against the public health restrictions, or (ii)

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[81] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519 at 611. While the Supreme Court has not articulated a general definition of "treatment", it has referred to the dictionary definition of treatment as "a process of manner of behavior towards or dealing with a person or thing: *Chiarelli v. Canada*, [1992] 1 SCR 711 at 735.
[82] *R v Bissonnette*, 2022 SCC 23 at paras 60-69.
[83] *Provincial Offences Act*, RSO 1990, c P.33, s. 59.

his political affiliations.[84] *Charter* s. 15 protects against discrimination on the basis of immutable personal characteristics, not on the basis of occupational status (i.e., being a restaurant owner) or political affiliations.[85] There is no evidence that the impugned legislation has any differential impact on any ground protected by s. 15,[86] and in any event, the law does not reinforce, perpetuate or exacerbate any disadvantage.[87]

E. In the alternative, any infringement is justified under *Charter* s. 1

66. Even if any *Charter* right of the Applicant were engaged in this proceeding, which is denied, no unjustified infringement of the *Charter* has been established.

67. Courts across the country have found that public health measures in response to the COVID-19 pandemic either did not breach *Charter* rights or were justified under *Charter* s. 1.[88] The temporary restriction on restaurants offering indoor dining would be

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[84] Applicant's Notice of Application at para. 51.
[85] *Baier v. Alberta*, 2007 SCC 31 at para. 65; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para 165; *Fair Voting BC v. Canad*a (Attorney General), 2025 ONCA 581 at paras. 92-95.
[86] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras 16-34.
[87] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para 81; *R. v. Sharma*, 2022 SCC 39 at paras 50, 55.
[88] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 (affirmed, 2023 ONCA 134); *Harjee v. Ontario*, 2022 ONSC 7033 at paras 85-111 (appeal dismissed as moot, 2023 ONCA 716); *Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology*, 2022 ONSC 5111; *Banas*; *Canadian Constitution Foundation v. Attorney General of Canada*, 2021 ONSC 4744; *Sprague*; *Maddock v. British Columbia*, 2022 BCSC 1605 (appeal dismissed as moot, 2023 BCCA 383); *Canadian Society for the Advancement of Science in Public Policy v. British Columbia*, 2022 BCSC 1606 (appeal dismissed, 2025 BCCA 20); *Beaudoin* (appeal dismissed, 2022 BCCA 427); *Grandel v. Saskatchewan*, 2022 SKKB 209 ["*Grandel* SKKB"] appeal dismissed, 2024 SKCA 53); *Gateway Bible Baptist Church et al. v. Manitoba et al*., 2021 MBQB 219 (appeal dismissed, 2023 MBCA 56); *Syndicat des métallos, section locale 2008 c. Procureur général du Canada*, 2022 QCCS 2455; *Taylor* (appeal dismissed as moot, 2023 NLCA 22); *Spencer* (appeal dismissed as moot, 2023 FCA 8).

justified by the extraordinary public health circumstances of a global pandemic of infectious deadly disease that has killed thousands of Ontarians.[89]

68. If it were necessary to justify the impugned law as a reasonable limit under *Charter* s. 1, it would be justified. The law served a pressing and substantial objective, was rationally connected to the objective, was minimally impairing, and was not disproportionate in its effects. Moreover, the Court should take a deferential approach to temporary public health measures enacted in response to a global pandemic.[90]

69. Judicial deference is appropriate where a law balances competing interests.[91] Ontario's public health response to COVID-19 involves complex choices to balance risks and benefits that may impact different segments of the provincial population, whether restaurant operators or vulnerable seniors and others with elevated health risks, all within the context of evolving information about a novel disease. Ontario did not need to wait for a definitive scientific answer on every aspect of COVID-19 transmission before taking action to protect the public from catastrophic loss of life.[92]

70. As the Court of Appeal for Ontario held in the context of a previous outbreak of infectious disease, "[t]he public officials charged with the responsibility for imposing and lifting [public health] measures must weigh and balance the advantages and disadvantages and strive to act in a manner that best meets the overall interests of the

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[89] See, for e.g., *Banas* at para 40 in the context of other COVID-19 public health restrictions on restaurants.
[90] *Jacob v. Canada (Attorney General)*, 2024 ONCA 648 at para. 140 (citing *JTI-MacDonald,* 2007 SCC 30 at para 43 and *Trinity Bible* ONCA at paras 97-102), leave to appeal to SCC refused, 2023 CanLII 72135.
[91] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 35-37.
[92] *Trinity Bible ONCA* at para 96; *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para 78; *R v. Michaud,* 2015 ONCA 585 at para 102; *Grandel* SKKB at para 84.

public at large" rather than any particular "narrow class of individuals."[93] The Court of Appeal for Ontario also held, in the context of the COVID-19 pandemic, that "Ontario [was required] to act on an urgent basis, without scientific certainty, on a broad range of public health fronts" and that this "context not only inform[ed] the degree of deference owed to government as the crisis shifted on the ground in real time, but also the heightened importance of vigilance by all branches of government over fundamental rights and freedoms during such times of crisis".[94] Similarly, in the COVID-19 context, the Divisional Court has held it is "not the Court's role" to engage in "a re-weighing of the complex and often difficult factors, considerations and choices that must be evaluated by [authorities] during a pandemic."[95]

71. Protecting the health of individuals and families by reducing the risk of COVID-19 transmission is obviously a pressing and substantive objective and has been identified as such by Canadian courts.[96] This Court in *Trinity Bible Chapel* observed, regarding Ontario's efforts to curb the spread of COVID-19, that "it is difficult to quarrel with the importance of these objectives" and that "[not] surprisingly, courts across Canada have held that 'containing the spread of the virus and the protection of public health is a legitimate objective that can support limits on *Charter* rights under s.1."[97] The Court of Appeal found no error in the Superior Court's identification of this objective or the

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[93] *Williams v. Ontario*, 2009 ONCA 378 at para 31; *Abarquez v. Ontario*, 2009 ONCA 374 at para 49.
[94] *Trinity Bible ONCA* at paras 102, 112-115.
[95] *Sprague* at para. 45; See also *The Fit Effect v. Brant County Board of Health*, 2021 ONSC 3651 at para 88.
[96] *Beaudoin* at para 224; *Taylor* at paras 436-437; *Trinity Bible ONCA* at para 88; *Hillier* ONCA at para 46.
[97] *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at para 132.

conclusion that it was pressing and substantial.[98] This Court has also recently held in *Hillier*, which concerns events in a subsequent wave of COVID-19, that "the rising caseloads and mounting deaths required government action" and "it [was] hard to envision a more pressing and substantial objective".[99]

72. The rational connection step of the justification test is "not particularly onerous."[100] Ontario is "not required to scientifically prove that the challenged regulations in fact reduced the spread of COVID-19".[101] Ontario need only establish that "it is reasonable to suppose that the limit may further the goal, not that it will do so."[102] The Court of Appeal for Ontario has accepted that COVID-19 is transmitted from person to person, and that reducing such contact reduces the risk of transmission.[103] Restaurant regulations that limit close contact between members of different households are clearly rationally connected to the goal of protecting individuals from the spread of an infectious respiratory disease.

73. With respect to minimal impairment, Ontario is entitled to take the means necessary to meet its objective of protecting health, including that of vulnerable members of the population. Legislative action to protect vulnerable groups is not "necessarily restricted to the least common denominator of actions taken elsewhere" and the Legislature is not required, in the name of minimal impairment, to "choose the least

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[98] *Trinity Bible* ONCA at para. 92.
[99] *Hillier v. His Majesty the King in Right of The Province of Ontario,* 2023 ONSC 6611 at para 73 (overturned but not on this point, 2025 ONCA 259).
[100] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para 228.
[101] *Trinity Bible* ONCA at para 96.
[102] *Hutterian Brethren* at para 48; see also *Beaudoin* at para 229.
[103] *Trinity Bible* ONCA at para 96.

ambitious means to protect vulnerable groups."[104] This Court has held that, in setting COVID-19 restrictions in the face of a global pandemic, "Ontario was not required to choose the least ambitious means of protecting the public" and restrictions are "not overbroad simply because Ontario could have chosen from other alternatives."[105]

74. Nor is the government required to compromise its objective under *Charter* s. 1. The Applicant has not established that any of his proposed alternatives would have equally achieved Ontario's objective of reducing the risk of COVID-19 transmission. There is no real debate that the consequence of many of the proposed alternatives, in fact, would have been increased COVID-19 transmission in the broader community.[106] This alternative, "instead of asking what is minimally required to realize the legislative goal, asks the government to significantly compromise it" and "is therefore not appropriate for consideration at the minimal impairment stage."[107]

75. Ontario is not required to justify its choices on a standard of scientific certainty. As this Court held in *Trinity Bible Chapel*, imposing such an onus "would set an impossible burden, particularly where, as here, the social problem defies scientific consensus."[108] Warning that the "bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened", the Court

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[104] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at 999; *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 at para 154; *Affleck v. The Attorney General of Ontario*, 2021 ONSC 1108 at para 98; *JTI-Macdonald* at para 43.
[105] *Trinity Bible* ONSC at para. 139, affirmed in *Trinity Bible* ONCA at paras 120-125. See also *Frank* at para 66; *Hutterian Brethren* at para 37; *RJR-Macdonald* at para 160; *JTI-Macdonald* at para 43; and *NAPE* at para 96.
[106] See for e.g., Factum of the Applicant at para 100.
[107] *Hutterian Brethren* at para 60.
[108] *Trinity Bible* ONSC at para 144, affirmed in *Trinity Bible* ONCA at paras 120-125.

went on to opine that "given the emergent and rapidly evolving developments, the time for analyzing evidence shrinks, all the more so when the margin for error relates to serious illness and/or death."[109]

76. The restrictions on restaurant operations in fall 2020 were minimally impairing. The restriction on indoor dining only applied when a Public Health Unit was moved into Step 1 of re-opening, based on epidemiological statistics, [110] and therefore the risk of COVID-19 transmission was at its highest.[111] The restrictions permitted restaurants to operate in ways that posed a lesser risk of COVID-19 transmission, including take-out and delivery service.[112] NPIs, including limits on restaurant occupancy, were the only effective tool prior to vaccine availability to reduce harms and death due to COVID-19.[113] The evidence indicates that contact tracing would not have been equally effective in limiting the risk of transmission of COVID-19,[114] nor is there any merit to the Applicant's evidence on the effectiveness of various medications.[115]

77. The final proportionality stage of the *Oakes* analysis requires "broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation."[116] The risks of COVID-19 are not borne only by the Applicant and his patrons: COVID-19 is an infectious disease and can be spread by asymptomatic or

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[109] *Trinity Bible* ONSC at para 144, citing *Taylor* at para 411.
[110] *Adamson Restraining Order Decision* at para. 2.
[111] 2021 Hodge Affidavit at para 21, OAR, Tab 1, pp. 57-58
[112] 2021 Hodge Affidavit at paras 26-27, OAR, Tab 1, p. 60.
[113] 2021 Hodge Affidavit at para 17, OAR, Tab 1, p. 56.
[114] 2021 Hodge Affidavit at para 29, OAR, Tab 1, pp 61-62.
[115] 2021 Hodge Affidavit at para 28, OAR, Tab 1, pp. 60-61.
[116] *Hutterian Brethren* at para. 77.

presymptomatic restaurant patrons to the wider community, including to vulnerable groups for whom COVID-19 presents a serious risk of illness, hospitalization and death.

78. In challenges to other COVID-19 restrictions, the Court of Appeal for Ontario had no difficulty finding that Ontario's manner of addressing the ongoing threat of the pandemic "fell within the range of reasonable alternatives" and that decisions made by public officials were "supported by sound medical opinion".[117] Given the implacable reality of how respiratory infections spread, the Applicant cannot simply assert their own freedom to conduct business as they see fit without regard to the negative health impacts their actions may cause. As this Court has affirmed, any impact on the Applicant must be considered in the "broader context of the pandemic and the burdens experienced by all residents of Ontario (…) in the interests of public health".[118] Against this salutary public health benefit, any deleterious impact on the Applicant's business is negligible and temporary.

PART IV – ORDER SOUGHT

79. Ontario submits that the Application should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
February 9, 2026

Padraic Ryan and Adam Kouri
Of counsel for the Respondent,
His Majesty the King in Right of Ontario

[117] *Trinity Bible* ONCA at para 156.
[118] *Trinity Bible* ONSC at para. 169, affirmed in *Trinity Bible* ONCA at paras. 132-133.

CERTIFICATE

Court File No.: CV-22-00683592-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
(proceeding commenced at Toronto)

B E T W E E N:

WILLIAM ADAMSON SKELLY ~~and ADAMSON BARBECUE LIMITED~~

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO, CITY OF TORONTO, BOARD OF HEALTH FOR THE CITY OF TORONTO, and EILEEN DE VILLA

Respondents

CERTIFICATE OF THE RESPONDENT
HIS MAJESTY THE KING IN RIGHT OF ONTARIO
(Application returnable February 25 - 27, 2026)

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1. I certify as to the authenticity of every authority cited in this Factum.

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SCHEDULE A

Case Law

1. *Abarquez v. Ontario*, 2009 ONCA 374
2. *Affleck v. The Attorney General of Ontario*, 2021 ONSC 1108
3. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37
4. *Baier v. Alberta*, 2007 SCC 31
5. *Banas v. HMTQ*, 2022 ONSC 999
6. *Beaudoin v. British Columbia,* 2021 BCSC 512
7. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44
8. *Bowman v. Ontario*, 2022 ONCA 477
9. *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27
10. *Canada (Attorney General) v. Bedford*, 2013 SCC 72
11. *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30
12. *Canadian Constitution Foundation v. Attorney General of Canada*, 2021 ONSC 4744
13. *Canadian Society for the Advancement of Science in Public Policy v. British Columbia*, 2022 BCSC 1606, appeal dismissed, 2025 BCCA 20.
14. C*ape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, leave to appeal to SCC ref'd, 2009 CanLII 71470
15. *Carter v. Canada (Attorney General)*, 2015 SCC 5
16. *Cherrier v. Attorney General of Canada*, 2017 ONSC 7336
17. *Chiarelli v. Canada*, [1992] 1 SCR 711
18. *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393
19. *College of Physicians and Surgeons of Ontario v. Trozzi*, 2023 ONPSDT 22.
20. *Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology*, 2022 ONSC 5111
21. *Fair Voting BC v. Canad*a (Attorney General), 2025 ONCA 581
22. *Frank v Canada (Attorney General)*, 2019 SCC 1
23. *Fraser v. Canada (Attorney General)*, 2020 SCC 28

24. *Gateway Bible Baptist Church et al. v. Manitoba et al*., 2021 MBQB 219, appeal dismissed, 2023 MBCA 56
25. *Grandel v Government of Saskatchewan*, 2024 SKCA 53 at paras 41-43, leave to appeal to SCC ref'd, 2025 CanLII 17305.
26. *Grandel v. Saskatchewan*, 2022 SKKB 209, appeal dismissed, 2024 SKCA 53
27. *Harjee v. Ontario*, 2022 ONSC 7033, appeal dismissed 2023 ONCA 716
28. *Harper v. Canada (Attorney General)*, 2004 SCC 33
29. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27
30. *Her Majesty the Queen in Right of Ontario v. Adamson Barbecue Limited*, 2020 ONSC 7679
31. *Hillier v. His Majesty the King in Right of The Province of Ontario,* 2023 ONSC 6611, overturned on appeal, 2025 ONCA 259
32. *Hudson's Bay Company ULC v. Ontario (Attorney General)*, 2020 ONSC 8046
33. *Hunter v. Southam,* [1984] 2 SCR 145
34. *Hussain v Toronto (City),* 2016 ONSC 3504
35. *Infant Number 10968 v. Ontario*, 2006 CanLII 19946 (ON SC), aff'd 2007 ONCA 787
36. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927
37. *Jacob v. Canada (Attorney General)*, 2024 ONCA 648, leave to appeal to SCC ref'd, 2023 CanLII 72135.
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73. *Toronto (City) v CUPE, Local 79*, 2003 SCC 63
74. *Williams v. Ontario*, 2009 ONCA 378

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SCHEDULE B

1. *Constitution Act, 1867 (UK),* 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5

Subjects of exclusive Provincial Legislation

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

13. Property and Civil Rights in the Province.

16. Generally, all Matters of a merely local or private Nature in the Province.

2. *Emergency Management and Civil Protection Act*, RSO 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).

Confirmation of urgent declaration

(2) An order of the Premier that declares an emergency is terminated after 72 hours unless the order is confirmed by order of the Lieutenant Governor in Council before it terminates. 2006, c. 13, s. 1 (4).

Criteria for declaration

(3) An order declaring that an emergency exists throughout Ontario or any part of it may be made under this section if, in the opinion of the Lieutenant Governor in Council or the Premier, as the case may be, the following criteria are satisfied:

1. There is an emergency that requires immediate action to prevent, reduce or mitigate a danger of major proportions that could result in serious harm to persons or substantial damage to property.

2. One of the following circumstances exists:

i. The resources normally available to a ministry of the Government of Ontario or an agency, board or commission or other branch of the government, including existing legislation, cannot be relied upon without the risk of serious delay.

ii. The resources referred to in subparagraph i may be insufficiently effective to address the emergency.

iii. It is not possible, without the risk of serious delay, to ascertain whether the resources referred to in subparagraph i can be relied upon. 2006, c. 13, s. 1 (4).

3. *Health Protection and Promotion Act*, RSO 1990, c H.7

Order by M.O.H. re communicable disease

22 (1) A medical officer of health, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a communicable disease. R.S.O. 1990, c. H.7, s. 22 (1).

[…]

Right to hearing

44 (1) An order by a medical officer of health or a public health inspector under this Act shall inform the person to whom it is directed that the person is entitled to a hearing by the Board if the person mails or delivers to the medical officer of health or public health inspector, as the case requires, and to the Board, within fifteen days after a copy of the order is served on the person, notice in writing requiring a hearing and the person may also require such a hearing. R.S.O. 1990, c. H.7, s. 44 (1).

[…]

Appeal to court

46 (1) Any party to the proceedings before the Board under this Act may appeal from its decision or order to the Divisional Court in accordance with the rules of court. R.S.O. 1990, c. H.7, s. 46 (1); 1998, c. 18, Sched. G, s. 55 (8).

4. O Reg 50/20: Declaration of Emergency

WHEREAS the outbreak of a communicable disease namely COVID-19 coronavirus disease constitutes a danger of major proportions that could result in serious harm to persons;

AND WHEREAS the criteria set out in subsection 7.0.1(3) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, chapter E.9 (the "Act") have been satisfied;

NOW THEREFORE, an emergency is hereby declared pursuant to section 7.0.1 of the Act in **the whole of the Province of Ontario**.

5. O Reg 82/20: Rules for Areas in Shutdown Zone and at Step 1 (version as of November 23, 2020).

Schedule 2
Businesses that may Open

3. (1) Restaurants, bars, food trucks, concession stands and other food or drink establishments that meet the conditions set out in subsection (2).

(2) A business described in subsection (1) may open only for the purpose of providing take-out, drive-through or delivery service.

(3) Despite subsection (2), the following establishments may provide in-person dining if they meet the conditions set out in paragraphs 1, 2, 3, 4, 6, 8, 9, 10, 12, and 13 of subsection 1 (1) of Schedule 2 to Ontario Regulation 263/20 (Rules for Areas in Stage 2):

1. Establishments on hospital premises.

2. Establishments in airports.

3. Establishments located within a business or place where the only patrons permitted at the establishment are persons who perform work for the business or place in which the establishment is located.

Schedule 4
Organized Public Events, Certain Gatherings

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

(a) an organized public event that is held indoors;

(b) a social gathering that is held indoors, including a social gathering associated with a gathering described in clause (d);

(c) an organized public event or social gathering of more than 10 people that is held outdoors, including a social gathering associated with a gathering described in clause (d); or

(d) a gathering of more than 10 people for the purposes of a wedding, a funeral or a religious service, rite or ceremony.

6. O Reg 363/20: Stages of Reopening (version as of November 23, 2020)

Schedule 1
Stage 1 Areas
1. City of Toronto Health Unit.
2. Peel Regional Health Unit.

7. *Provincial Offences Act*, RSO 1990, c P.33

Provision for minimum penalty

59 (1) No penalty prescribed for an offence is a minimum penalty unless it is specifically declared to be a minimum.

Relief against minimum fine

(2) Although the provision that creates the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence.

Idem, re imprisonment

(3) Where a minimum penalty is prescribed for an offence and the minimum penalty includes imprisonment, the court may, despite the prescribed penalty, impose a fine of not more than $5,000 in lieu of imprisonment. R.S.O. 1990, c. P.33, s. 59.

8. *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, SO 2020, c. 17

Definitions

1 In this Act,

"continued section 7.0.2 order" means an order continued under section 2 that was made under section 7.0.2 of the *Emergency Management and Civil Protection Act*; ("décret pris en vertu de l'article 7.0.2 et maintenu")

"COVID-19 declared emergency" means the emergency declared pursuant to Order in Council 518/2020 (Ontario Regulation 50/20) on March 17, 2020 pursuant to section 7.0.1 of the *Emergency Management and Civil Protection Act*. ("situation d'urgence déclarée en raison de la COVID-19")

"occupier" has the same meaning as in the *Trespass to Property Act*; ("occupant")

"premises" has the same meaning as in the *Trespass to Property Act*. ("lieux")
2020, c. 17, s. 1; 2020, c. 23, Sched. 6, s. 1.

[…]

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*.

Exception

(2) Subsection (1) does not apply to the order filed as Ontario Regulation 106/20 (Order Made Under the Act — Extensions and Renewals of Orders).

Clarification

(3) For greater certainty, an order that is in force is continued under subsection (1) even if, on the day that subsection comes into force, the order does not apply to any area of the Province.

[…]

Provisions applying with respect to orders

7 (1) Subsections 7.2 (3) to (8) of the *Emergency Management and Civil Protection Act* continue to apply, with necessary modifications, with respect to orders continued under section 2, including any amendments to such orders made under this Act.

Same

(2) Subsections 7.0.2 (6) to (9) of the *Emergency Management and Civil Protection Act* continue to apply, with necessary modifications and the modifications specified in subsection (3), with respect to continued section 7.0.2 orders, including any amendments to such orders made under this Act.

Modifications

(3) The modifications referred to in subsection (2) are the following:

1. The reference, in paragraph 1 of subsection 7.0.2 (7) of the *Emergency Management and Civil Protection Act*, to the emergency is deemed to be a reference to the COVID-19 pandemic and its effects.

2. The reference, in paragraph 2 of subsection 7.0.2 (7) of the *Emergency Management and Civil Protection Act*, to when the declared emergency is terminated is deemed to be a reference to when the order in relation to which that paragraph applies is revoked or ceases to apply.

Proceedings to restrain contravention of order

9 Despite any other remedy or any penalty, the contravention by any person of a continued section 7.0.2 order may be restrained by order of a judge of the Superior Court of Justice upon application without notice by the Crown in right of Ontario or a member of the Executive Council and the judge may make the order and it may be enforced in the same manner as any other order or judgment of the Superior Court of Justice.

Temporary closure by police, etc.

9.1 (1) A police officer, special constable or First Nations Constable may order that premises be temporarily closed if the police officer, special constable or First Nations Constable has reasonable grounds to believe that an organized public event or other gathering is occurring at the premises and that the number of people in attendance exceeds the number permitted under a continued section 7.0.2 order. 2020, c. 23, Sched. 6, s. 2.

Compliance with order

(2) Every individual who is on the premises shall comply with the order to temporarily close the premises by promptly vacating the premises after being informed of the order. 2020, c. 23, Sched. 6, s. 2.

Same

(3) No individual shall re-enter the premises on the same day that the premises were temporarily closed under subsection (1) unless a police officer, special constable or First Nations Constable authorizes the re-entry. 2020, c. 23, Sched. 6, s. 2.

Exception for residents

(4) Subsections (2) and (3) do not apply to individuals residing in the premises. 2020, c. 23, Sched. 6, s. 2.

[…]

Offences

10 (1) Every person who fails to comply with subsection 9.1 (2) or (3) or with a continued section 7.0.2 order or who interferes with or obstructs any person in the exercise of a power or the performance of a duty conferred by such an order is guilty of an offence and is liable on conviction,

(a) in the case of an individual, subject to clause (b), to a fine of not more than $100,000 and for a term of imprisonment of not more than one year;

(b) in the case of an individual who is a director or officer of a corporation, to a fine of not more than $500,000 and for a term of imprisonment of not more than one year; and

(c) in the case of a corporation, to a fine of not more than $10,000,000. 2020, c. 17, s. 10 (1); 2020, c. 23, Sched. 6, s. 3.

Separate offence

(2) A person is guilty of a separate offence on each day that an offence under subsection (1) occurs or continues. 2020, c. 17, s. 10 (2).

Increased penalty

(3) Despite the maximum fines set out in subsection (1), the court that convicts a person of an offence may increase a fine imposed on the person by an amount equal to the financial benefit that was acquired by or that accrued to the person as a result of the commission of the offence. 2020, c. 17, s. 10 (3).

Exception

(4) No person shall be charged with an offence under subsection (1) for failing to comply with or interference or obstruction in respect of an order that has been amended retroactive to a date that is specified in the amendment, if the failure to comply, interference or obstruction is in respect of conduct to which the retroactive amendment applies and the conduct occurred before the retroactive amendment was made but after the retroactive date specified in the amendment. 2020, c. 17, s. 10 (4).

9. *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

Equalization and Regional Disparities

Commitment to promote equal opportunities

36 (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

Court File No.: CV-22-00683592-0000

WILLIAM ADAMSON SKELLY ~~and ADAMSON BARBECUE LIMITED~~ Applicant	**- and -**	**HIS MAJESTY THE KING IN RIGHT OF ONTARIO, CITY OF TORONTO, BOARD OF HEALTH FOR THE CITY OF TORONTO, and EILEEN DE VILLA** Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto, Ontario

FACTUM OF THE RESPONDENT, HIS MAJESTY THE KING IN RIGHT OF ONTARIO

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