

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT
OF ONTARIO

Applicant (Responding Party)

- and -

THE CHURCH OF GOD (RESTORATION) AYLMER, HENRY
HILDEBRANDT, ABRAM BERGEN, JACOB HIEBERT, PETER
HILDEBRANDT, SUSAN MUTCH, ELVIRA TOVSTIGA and TRUDY
WIEBE

Respondents (Moving Parties)

**NOTICE OF MOTION
(To Set Aside Order)**

The Respondents will make a motion on Monday, March 29, 2021, at 10:00 a.m., to be spoken to, or as soon after that time as the motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard in person or by videoconference.

THIS MOTION IS FOR:

- a) An order setting aside the Order of The Honourable Mr. Justice Thomas, dated February 12, 2021 (the “**Order**”), directing compliance with any continued section 7.0.2 order, as defined in the *Reopening Ontario (A Flexible Response to*

Covid-19) Act, 2020, S.O. 2020, c. 17 (“ROA”), in respect of gatherings for the purpose of a religious service, rite, or ceremony;

- b) A Declaration that section 1(1)(d) of both Schedule 4 (Shutdown Zone) and Schedule 9 (Grey Zone) of Ontario Regulation 82/20 (*Rules for Areas Under Stage One*); section 4 of Schedule 3 of Ontario Regulation 263/20 (*Rules for Areas Under Stage Two*); and, section 3 of Schedule 3 of Ontario Regulation 364/20 (*Rules for Areas Under Stage Three*), and any amendments thereto, of the ROA (collectively, the “**Religious Gatherings Restrictions**”), violate the Respondents’ freedom of religion and conscience guaranteed by section 2(a) of the *Canadian Charter of Rights and Freedoms* (the “**Charter**”), and that this violation is not justified under section 1 of the *Charter*;
- c) A Declaration that the Religious Gatherings Restrictions violate the Respondents’ freedom of expression, guaranteed by section 2(b) of the *Charter*, and that this violation is not justified under section 1 of the *Charter*;
- d) A Declaration that the Religious Gatherings Restrictions violate the Respondents’ freedom of peaceful assembly guaranteed by section 2(c) of the *Charter*, and that this violation is not justified under section 1 of the *Charter*;
- e) A Declaration that the Religious Gatherings Restrictions violate the Respondents’ freedom of association guaranteed by section 2(d) of the *Charter*, and that this infringement is not justified under section 1 of the *Charter*;
- f) A Declaration that the Religious Gatherings Restrictions disproportionately target and discriminate against houses of worship, religious services, and religious persons including the Respondents, contrary to section 15 of the *Charter*;
- g) A further Declaration that the said Religious Gatherings Restrictions are therefore of no force or effect, pursuant to s. 52(1) of the *Constitution Act, 1982*;

- h) A Declaration that the Religious Gatherings Restrictions do not meet the statutory criteria set out in subsections 7.0.2(1), (2) and (3) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 (“**EMCPA**”) (orders and regulations made under which are continued under the *ROA*), and are therefore *ultra vires*;
- i) A Declaration that the Religious Gatherings Restrictions are in direct contravention of section 176 of the *Criminal Code*, R.S.C., 1985, c. C-46, and are therefore of no force or effect pursuant to the doctrine of paramountcy;
- j) The Respondents’/Moving Parties’ costs of this motion on a substantial indemnity basis; and,
- k) Such further and other relief as counsel may advise and this Honourable Court deems just, including but not limited to further and other relief under section 24 of the *Charter* and section 52 of the *Constitution Act, 1982*.

THE GROUNDS FOR THE MOTION ARE:

The Terms of the Order

1. On February 12, 2021, on application by Her Majesty the Queen in Right of Ontario (“**Ontario**”), The Honourable Regional Senior Justice Thomas made an Order pursuant to s. 9 of the *ROA*.
2. The Order provides in part (at paragraph 2 thereof):

AND THIS COURT ORDERS that pursuant to section 9 of the [*ROA*], the Respondents [...] be and hereby are restrained from directly or indirectly, by any means whatsoever, contravening Ontario Regulation 82/20 in respect of gatherings for the purpose of a religious service, rite or ceremony at, inside, or in conjunction with the operations of the Church of God (Restoration) Aylmer.

3. The Order further provides (at paragraph 3 thereof):

AND THIS COURT ORDERS that the Respondents [...] be and hereby are restrained from directly or indirectly, by any means whatsoever, contravening any other continued section 7.0.2 order, as defined in the ROA, that applies or may subsequently apply to the Respondents in respect of gatherings for the purpose of a religious service, rite or ceremony at, inside, or in conjunction with the operations of the Church of God (Restoration) Aylmer.

4. The Order also provides (at paragraph 5 thereof):

AND THIS COURT ORDERS that the Respondents may, within thirty (30) days of the making of this order, deliver notice of a motion before this Court to vary, discharge or set aside this Order.

5. Finally, the Order provides (at paragraph 6 thereof):

AND THIS COURT ORDERS that in the event the Respondents bring a motion under paragraph 5, it will be adjudicated pursuant to a timetable endorsed by the Court and this Order remains in force unless and until it is varied, discharged or set aside by the Court.

6. The Order enforces compliance with unconstitutional provisions, namely the Religious Gatherings Restrictions, which limit gatherings for the purposes of a wedding, a funeral, or a religious service, rite, or ceremony to arbitrary caps ranging from 10 persons total, regardless of building capacity, to 30% of room capacity.

History of the Restrictions

7. On or about March 17, 2020, the Ontario cabinet, by way of an Order in Council, declared a state of emergency in response to the outbreak of a communicable disease, namely Covid-19, triggering the application of the *EMCPA*. The stated goal of these measures was to ensure that hospitals would not be overwhelmed by a sudden increase in patients requiring care, and that the best way to do that was to ‘flatten the curve’ and slow the spread of the virus.

8. Section 7.0.2 of the *EMCPA* sets forth the purpose and limitations of the emergency legislation as follows:

Purpose

7.0.2 (1) The purpose of making orders under this section is to promote the public good by protecting the health, safety and welfare of the people of Ontario in times of declared emergencies in a manner that is subject to the *Canadian Charter of Rights and Freedoms*.

Criteria for emergency orders

(2) During a declared emergency, the Lieutenant Governor in Council may make orders that the Lieutenant Governor in Council believes are necessary and essential in the circumstances to prevent, reduce or mitigate serious harm to persons or substantial damage to property, if in the opinion of the Lieutenant Governor in Council it is reasonable to believe that,

(a) the harm or damage will be alleviated by an order; and

(b) making an order is a reasonable alternative to other measures that might be taken to address the emergency.

Limitations on emergency order

(3) Orders made under this section are subject to the following limitations:

1. The actions authorized by an order shall be exercised in a manner which, consistent with the objectives of the order, limits their intrusiveness.

2. An order shall only apply to the areas of the Province where it is necessary.

3. Subject to section 7.0.8, an order shall be effective only for as long as is necessary.

9. By Order in Council on March 24, 2020, (Ontario Regulation 82/20) Ontario ordered the closing of “non-essential” businesses and institutions, including churches and other faith settings.
10. The state of emergency and the regulations (as varied from time to time) made pursuant to the *EMCPA* were extended by both the cabinet and the legislature periodically until approximately July 24, 2020, at which time the state of emergency was ended and the *ROA* came into force.
11. Pursuant to section 2 of the *ROA*, certain regulations made under the *EMCPA* were continued, amended, and renewed regularly as though there was still a state of

emergency in effect. This included restrictions on gatherings, which has seen a maximum permissible limit for religious gatherings of 30% of room capacity anywhere in the province, and at any time, since March 24, 2020.

12. On or about December 26, 2020, Ontario placed the entire province under a “shutdown”, which severely restricted many of the activities of Ontarians, including their attendance at places of worship which were limited to a hard cap of 10 persons indoors, regardless of capacity. Numerous businesses were granted exemptions, including but not limited to “big box” or discount retailers and liquor stores, provided they limited the number of persons inside to 25% of their building capacity; warehouses and distribution centres that support online retail (such as Amazon); various manufacturing facilities; construction activities; and fitness centres catering to “elite” athletes.
13. On or about January 12, 2021, the Province of Ontario was once again placed under a state of emergency, which lasted until approximately February 9, 2021, and provisions of both the *EMCPA* and the *ROA* were applicable during this period. The *ROA* continues in force to date, with various regions of the province moving in and out of certain “zones”. Although the Southwestern Public Health Region (which governs the Respondents’ location) is currently operating under the “orange zone”, each public health unit may move its jurisdiction in or out of more severe restrictions, depending on certain metrics which include hospital system capacity, outbreaks, reproduction rate, and public health system capacity.
14. Effective on or about March 15, 2021, Ontario has amended (or will amend) Regulation 89/20 to remove the 10-person cap and replace it with a 15% capacity limit.
15. Presently, there are no published criteria or options for the province or a region thereof to leave the lockdown framework, and even the lightest level of restrictions

(the “green zone”) continues to limit religious gatherings to 30% of room capacity.

Impact on Respondents

16. By expressly prohibiting religious services in numbers greater than 10 persons, or limiting their capacity by various arbitrary percentages, Ontario has effectively and capriciously declared the corporate worship of churches and other faith-based organizations as “non-essential”.
17. The Religious Gatherings Restrictions infringe the Respondents’ religious freedoms as protected under section 2(a) of the *Charter* by prohibiting or limiting them from holding religious services in a meaningful way, and prohibiting or limiting their gathering in homes to worship and hold Bible studies, which is a gross and outrageous overreach of state authority. The Religious Gatherings Restrictions further violate the section 2(a) protected conscience rights of religious persons such as the Respondents, who are bound by their faith to gather for corporate worship.
18. The Religious Gatherings Restrictions infringe freedom of expression as protected by section 2(b) of the *Charter* by prohibiting corporate prayer, preaching, singing and/or worship, and those rights of listeners who would hear said expression.
19. The very purpose and effect of the Religious Gatherings Restrictions is to prevent the peaceful assembly and association of citizens — rights which are guaranteed under sections 2(c) and 2(d) of the *Charter*. Section 2(c) protects the physical gathering together of people from unlawful restriction by government.
20. The Religious Gatherings Restrictions disproportionately target and discriminate against houses of worship, religious services, and religious persons including the Respondents, contrary to section 15 of the *Charter*.

21. The restrictions on gatherings for religious services are arbitrary, disproportionate, and not based on evidence that would demonstrably justify the restriction.
22. Ontario has imposed measures on its citizens which clearly violate their fundamental freedoms in a manner which does not minimally impair those freedoms and is not rationally connected to the purpose of the law. The regulation is overly broad geographically, in duration, and in the oppressive scope which prevents citizens from exercising their fundamental freedoms.
23. The Respondents have attempted to exercise their sincerely held religious beliefs which require regular in-person services, and their rights and freedoms as guaranteed under the *Charter*, but have faced, and will continue to face, harsh, excessive, and draconian penalties under Religious Gatherings Restrictions, which are unconstitutional and should be declared to be of no force or effect.
24. The Supreme Court of Canada has referred collectively to section 2 *Charter* freedoms as protecting rights fundamental to Canada's liberal democratic society. The fundamental importance of these freedoms requires that any attempt to restrict them must be subject to the most exacting scrutiny.

Ontario's Failure to Justify its Restrictions

25. The "lockdown" and restrictions on the fundamental freedoms of the Respondents and all Ontarians has continued unabated for approximately 12 months, with no fixed end in sight, and no clear benchmark by which the Respondents and other citizens can anticipate an end to the infringement of their liberties.
26. Ontario has failed to provide a timeline or metrics for the removal of these restrictions, notwithstanding that they no longer meet the requirements for an emergency, and has no apparent exit strategy.

27. Ontario has failed to undertake study and debate about restrictions in the legislature, including on their efficacy, the research claimed to justify them, or their impact on constitutional, economic, and socio-demographic interests. No cost-benefit analysis of lockdown harms has been conducted or published. No consideration has been given to other determinants of health, to the cost of these measures on Quality Adjusted Life Years of the general population, or to the long-term impacts to a free and democratic society resulting from the protracted denial of fundamental civil liberties.
28. Ontario has failed to demonstrate that there is a risk of harm in attending religious services that outweighs the detrimental impact of the denial of access to religious services for those who have sincerely held religious beliefs.
29. Ontario has failed to provide evidence that places of worship, which are effectively deemed “non-essential” and are negatively impacted by the Religious Gatherings Restrictions, pose a greater risk of facilitating the spread of Covid-19 than liquor stores, big-box stores, drug stores, or movie sets, which are deemed “essential” and have been permitted to stay open.
30. Ontario has failed to provide evidence that the Religious Gatherings Restrictions will or have reduced or prevented hospitalizations and deaths from Covid-19 in the province.
31. Ontario has failed to provide evidence that deaths from Covid-19 cannot be prevented by alternative, mitigative measures such as taking extra precautions to protect the immunocompromised and elderly populations.
32. Ontario has failed to lower its own metrics for continuing lockdowns by refusing or failing to properly protect long-term care homes, hospitals, and other congregate care settings under its own control and responsibility, and has instead deflected

responsibility onto the broader community, including places of worship.

33. Ontario has failed to produce evidence that places of worship are responsible for any appreciable increase in deaths, hospitalizations, or outbreaks, particularly as compared to the aforementioned institutional settings under its own control.
34. Ontario has failed to provide a satisfactory, reasonable, rational or any evidentiary basis on which this continuing *de facto* state of emergency, including ongoing limits on worship services, is justified.
35. In summary, Ontario has failed to consider or balance the harms that flow from lockdown measures and restrictions on civil liberties, including the right to corporate worship, for any period of time, let alone nearly a year of such restrictions. The *EMCPA*, and by extension the *ROA*, expressly limits its own purpose, namely to promote the public good by protecting the health, safety and welfare of the people of Ontario in a manner that is subject to the *Charter*.
36. The rule of law and the constitutional rights of the Respondents and all Ontarians are not suspended by the declaration of a public health crisis. The Constitution, both written and unwritten, continues to apply to all legislation and government decisions and operates to protect the fundamental freedoms and civil rights of all Ontarians, notwithstanding the presence of an infectious illness.
37. Such further and other grounds as counsel may advise and this Honourable Court will permit.

THE RESPONDENTS INTEND TO RELY ON THE FOLLOWING AUTHORITIES:

38. *Emergency Management and Civil Protection Act*, R.S.O. 1990, c.E.9;
39. *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17;

40. Ontario Regulation 82/20: Rules for Areas in Stage 1, *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17;
41. Ontario Regulation 263/20: Rules for Areas Under Stage 2, *ROA*;
42. Ontario Regulation 364/20: Rules for Areas Under Stage 3, *ROA*;
43. *Canadian Charter of Rights and Freedoms*, sections 1, 2(a), 2(b), 2(c), 2(d), 15 and 24(1);
44. *Constitution Act, 1982*, section 52(1);
45. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including Rules 1.08, 2.03, 37, 37.14(4);
46. *Courts of Justice Act*, R.S.O. 1990 c. C.43, section 97;
47. Such further and other enactments as the counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

1. Affidavit of Heinrich Hildebrandt, to be sworn;
2. Additional affidavit and expert evidence, to be sworn;
3. Such further and other material as counsel may advise and this Honourable Court may permit.

March 15, 2021

**JUSTICE CENTRE FOR
CONSTITUTIONAL FREEDOMS**
253-6720 Elbow Drive SW
Calgary, Alberta T2V 1K2
Tel: 403-475-3622

Lisa D. S. Bildy, LSO #36583A
Tel: 519-852-6967
lbildy@jccf.ca

Sayeh Hassan, LSO #53406E
shassan@jccf.ca

Counsel for the Respondents The
Church of God (Restoration)
Aylmer, Henry Hildebrandt, Abram
Bergen, Jacob Hiebert, Peter
Hildebrandt, Susan Mutch, Elvira
Tovstiga and Trudy Wiebe

TO:

MINISTRY OF THE ATTORNEY GENERAL

Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, Ontario M7A 2S9
Tel: 416-326-4008

Josh Hunter, LSO #49037M
Tel: 416-908-7465
joshua.hunter@ontario.ca

Connie Vernon, LSO #43385J
Tel: 416-605-8234
connie.vernon@ontario.ca

Lisa Brost, LSO #49279G
Tel: 416-529-3031
lisa.brost@ontario.ca

Counsel for the Applicant, Her Majesty
the Queen in Right of Ontario

**HER MAJESTY THE QUEEN IN
RIGHT OF ONTARIO**

and

CHURCH OF GOD (RESTORATION) AYLMEY ET AL.

CV-21-08

Applicant

Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE**
Proceedings commenced at Kitchener

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253-6720 Elbow Drive SW
Calgary, Alberta T2V 1K2
Tel: 403-475-3622

Lisa D. S. Bildy, LSO #36583A
Tel: 519-852-6967
lbildy@jccf.ca

Sayeh Hassan, LSO #53406E
shassan@jccf.ca

Counsel for the Respondents The Church
of God (Restoration) Aylmer, Henry
Hildebrandt, Abram Bergen, Jacob
Hiebert, Peter Hildebrandt, Susan Mutch,
Elvira Tovstiga and Trudy Wiebe