

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE *COURT OF APPEAL FOR ONTARIO*)

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Respondent
(Respondent)

and

**TRINITY BIBLE CHAPEL, JACOB REAUME, WILL SCHUURMAN, DEAN
WANDERS, RANDY FREY, HARVEY FREY, and DANIEL GORDON**

Applicants
(Appellant)

AND BETWEEN:

HER MAJESTY THE QUEEN IN ONTARIO

Respondent
(Respondent)

and

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

Applicants
(Appellant)

APPLICATION FOR LEAVE TO APPEAL

MEMORANDUM OF ARGUMENT

**(Trinity Bible Chapel, Jacob Reaume, Will Schuurman, Dean Wanders, Randy Frey,
Harvey Frey, And Daniel Gordon) And (The Church Of God (Restoration) Aylmer, Henry
Hildebrandt, Abram Bergen, Jacob Hiebert, Peter Hildebrandt, Susan Mutch, Elvira
Tovstiga, And Trudy Wiebe)**

(Pursuant to S. 40(1) and 58(1) of the Supreme Court Act, RSC, 1985)

Rob Kittredge – [REDACTED]

Hatim Kheir – [REDACTED]

Counsel For The Applicants

TO: THE ATTORNEY GENERAL OF ONTARIO

Civil Law Division - Constitutional Law
Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

**Josh Hunter / Ryan Cookson / Andrea
Bolieiro / Maia Stevenson**



**Counsel for the Applicants
(Respondent on application for leave
to appeal), the Attorney General of
Ontario**

Table of Contents – Memorandum of Argument

MEMORANDUM OF ARGUMENT	1
Part I: OVERVIEW and STATEMENT OF FACTS	1
Appellants - Trinity Bible Chapel et. al.....	2
Provincial Offence Charges & Court Orders (Trinity).....	2
Appellants - The Church of God (Restoration) Aylmer et. al.....	3
Provincial Offence Charges & Court Orders (Church of God).....	3
The Legislative Framework.....	4
Summary of Regulations & Religious Gathering Restrictions.....	5
The Lower Court Motions.....	5
Argument at the Lower Court.....	6
The Motion Decision.....	7
The Court of Appeal Decision.....	7
Part II: THE QUESTIONS IN ISSUE	7
Constitutional Validity of the Restrictions.....	8
Part III: STATEMENT of ARGUMENT	8
Issue 1: <i>Trinity Western</i> and Compound Charter Infringements.....	8
The Holding in <i>Trinity Western</i>	9
Cases where every infringement is considered.....	10
Cases where a single breach was sufficient to strike down.....	11
Khawaja, the Outlier.....	11
Lower Court interpretation and application of <i>Trinity Western</i>	12
a) Cases that “Subsume” Charter Rights.....	12
b) Decisions with Complete Charter Findings.....	13
The Need for Correction from this Court.....	13
Issue 2: Inappropriate subjective limits on the Oakes test.....	15
The error in the case at bar.....	16
National Importance.....	19
Part IV: SUBMISSIONS on COSTS	20
Part V: ORDER SOUGHT	20
Part VI: TABLES of AUTHORITIES	21
Cases.....	21
Articles.....	22
Legislation/Regulation.....	23
Summary of Regulations with Point-In-Time Links.....	25
Transcript and Affidavit Evidence Cited.....	27
Part VII: EXCERPTS of LEGISLATION	28
Part VIII: Excerpts of Transcripts and Affidavits	29
Tab A - <i>Affidavit of Dr. Thomas Warren</i> , May 25, 2021.....	30
Tab B - <i>Affidavit of Heinrich Hildebrandt</i> , June 4, 2021.....	31
Tab C - <i>Affidavit of Jacob Reaume</i> , June 4, 2021.....	32
Tab D – <i>Reply Affidavit of Dr. Richard Schabas</i> , July 23, 2021.....	33
Tab E - <i>Transcript of Cross-Examination of Dr. Richard Schabas</i> , Dec 10, 2021.....	34
Tab F - <i>Transcript of Cross-Examination of Dr. Zain Chagla</i> , Dec. 14, 2021.....	35

Part I: OVERVIEW and STATEMENT OF FACTS

1. During the COVID-19 pandemic (the “**Pandemic**”), the province of Ontario enacted regulations which strictly limited attendance at both indoor and outdoor religious gatherings (the “**Restrictions**”). The Appellant churches brought a motion challenging the constitutionality of the Restrictions and seeking to set aside certain related court orders. The motion was dismissed by Pomerance J. at first instance, and her decision was upheld by the Ontario Court of Appeal. We are seeking leave to appeal that decision.
2. Among other grounds for appeal, the proposed appeal raises and turns on two errors which amount to issues of national importance, namely:
 - a. Having found that the Restrictions infringed upon the Appellants’ freedom of religion, the motion judge misinterpreted this Court’s finding in *Trinity Western* to stand for a general principle that she should decline to make findings with regard to any further alleged *Charter* section 2 breaches. This undermined her *Oakes* proportionality analysis; and
 - b. The motion judge erroneously allowed the fact that the Restrictions had been repealed by the time this matter came before her to lead her to conducting her *Oakes* analysis subjectively. She inappropriately favoured the evidence of Ontario’s experts and refused to weigh conflicting expert evidence because she conceived of the question before her as being “*whether it was reasonable for Ontario to do what it did*” based on the advice and information it considered when enacting the Restrictions, rather than whether the Restrictions were objectively justifiable under s. 1 in light of information available to experts and the public at the relevant time, whether Ontario was advised of that information or not.

3. The Motion Decision is already being cited as authority for both points above and followed.¹ Intervention by this court is justified in order to prevent the Motion Decision from undermining *Oakes* test jurisprudence.

Appellants - Trinity Bible Chapel et. al.

4. Trinity Bible Chapel ("**Trinity**") is a church located in Waterloo, Ontario. The individual Trinity parties are lead pastor Jacob Reaume, church elders and associate pastors. Trinity's church facility can safely house 900 people, based on fire code regulations.²

Provincial Offence Charges & Court Orders (Trinity)

5. When Ontario locked down churches for a second time in December of 2020, Trinity's elders decided they could not in good conscience close their doors to the faithful again. This resulted in numerous summonses issued to Trinity and its leadership. Each charge for individuals may result in a \$100,000 fine and/or one-year of imprisonment, and for the church each charge carries a maximum penalty of \$10 million. Those charges remain outstanding, pending the outcome of this hearing.³
6. The Attorney General Applied for a statutory injunction under s. 9 of the Reopening Ontario Act (the "**ROA**"). The Restraining Order was granted, with a 30-day period within which to move to set aside the Restraining Order on constitutional grounds or otherwise. That motion to set aside, and a subsequent one based on a more broadly-worded Restraining Order dated April 26, 2021, are the proceedings before this Court.⁴
7. Following the imposition of the statutory Restraining Orders, Trinity continued to meet in numbers exceeding the allowable limits and faced contempt of court proceedings and significant fines and legal costs totalling approximately \$200,000, which they have since

1 See, for example: *Grandel v Saskatchewan*, 2022 SKKB 209 (CanLII), <<https://canlii.ca/t/js9l4>>; and *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 (CanLII), <<https://canlii.ca/t/jtjqv>>

2 Affidavit of Jacob Reaume at para 4

3 Affidavit of Jacob Reaume at paras. 18, 21, 32-34, 52

4 Affidavit of Jacob Reaume at para. 40

paid. They were also locked out of their church building by Court order for several months.⁵

Appellants - The Church of God (Restoration) Aylmer et. al.

8. The Church of God (Restoration) Aylmer ("**Church of God**") is a non-denominational religious organization located in Aylmer, Ontario. Church of God's facility can safely accommodate more than 400 people. Many of the Church of God parishioners come from a Mennonite background.⁶
9. Heinrich (Henry) Hildebrandt is the pastor at the Church of God. Abram Bergen, Jacob Hiebert, Peter Hildebrandt, Susan Mutch, Elvira Tovstiga and Trudy Wiebe are elders or former elders of the church.⁷

Provincial Offence Charges & Court Orders (Church of God)

10. Church of God had no difficulties with police until January of 2021, when the Province reimposed a near total prohibition on religious gatherings. The Church and its leaders faced numerous charges over the ensuing weeks and ultimately a s. 9 Restraining Order was obtained by the Province. This, too, resulted in contempt of court proceedings and significant fines and costs totalling over \$274,000, which have been paid. Additional charges under the ROA are outstanding, pending the outcome of this hearing. Many of the charges and the final contempt finding related to outdoor services held on the church's large acreage. Aylmer Police harassed parishioners and flew drones overhead during services to obtain evidence to be used against the Church in court.⁸

5 Affidavit of Jacob Reaume at paras. 55, 58-5

6 Affidavit of Heinrich Hildebrandt at paras. 2, 4

7 Affidavit of Heinrich Hildebrandt at paras. 2-3

8 Affidavit of Heinrich Hildebrandt at paras. 33-47

The Legislative Framework

11. On March 17, 2020, at the beginning of the Pandemic, Ontario Regulation 52/20 declared a province-wide emergency pursuant to section 7.0.1 of the Emergency Management and Civil Protection Act ("**EMCPA**").⁹
12. On March 24, 2020, O. Reg.82/20 ordered the closure of all "non-essential" businesses and institutions and from March 18 to July 17, 2020 O. Reg.52/20 placed limits on the number of people permitted to attend public events, including indoor and outdoor religious gatherings.
13. On July 24, 2020 the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020 was proclaimed into force. It terminated the provincial emergency, but continued certain emergency orders made under the EMCPA, including O. Reg 82/20.¹⁰
14. On April 27, 2020 Ontario released its *Framework for Reopening our Province*, which set out a three stage approach to reopening the economy. Then, on November 3, 2020 The Province's *Keeping Ontario Safe and Open Framework* (the "**Framework**") refined the three stage approach by establishing five color-coded "zones"(the "**Zones**") of increasingly restrictive public health orders which the Province could apply on a regional basis. O. Reg. 363/20 assigns each of Ontario's public health units to one of the Framework Zones, and has been amended whenever one or more regions were assigned into a different Zone.¹¹
15. Concerned about increasing COVID case counts, on December 21, 2020 Ontario announced that effective December 26, the Framework would be suspended and a more restrictive "Provincewide Shutdown" would begin. On January 12, 2021 Ontario declared a second province-wide state of emergency, and issued a stay-at-home order which was

9 Declaration of Emergency, O Reg 50/20, <<https://canlii.ca/t/549l6>>; Emergency Management and Civil Protection Act, RSO 1990, c E.9, <<https://canlii.ca/t/53nmt>>

10 Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, SO 2020, c 17, <<https://canlii.ca/t/54clq>>

11 Stages of Reopening, O Reg 363/20, <<https://canlii.ca/t/55cq7>>

continued in force in most regions after the state of emergency ended on February 9, 2021 by amending O. Reg. 82/20 to add a new Stage 1 "Shutdown Zone".¹²

16. The regulations that set out the restrictions in effect for each Zone are listed below:

Zone	Regulation
Stage 3 - Green - Prevent	O. Reg. 364/20
Stage 3 - Yellow - Protect	O. Reg. 364/20
Stage 3 - Orange - Restrict	O. Reg. 364/20
Stage 2 - Red - Control	O. Reg. 263/20
Stage 1 - Grey - Lockdown	O. Reg. 82/20
Stage 1 - Shutdown	O. Reg. 82/20

17. On April 1, 2021 the Province moved all 34 public health units in Ontario into the "Shutdown Zone", and declared a third province-wide state of emergency on April 7, 2021. On May 20, 2021 Ontario government announced its three-step "Roadmap to Reopen", and the province-wide stay at home order was lifted on June 2, 2021.¹³

Summary of Regulations & Religious Gathering Restrictions

18. The Motion Decision (at paragraph 35) provides a chart summarizing the Restrictions in place in the Public Health Units relevant to this case, with point-in-time links to the version of the regulations in force at the time. A similar chart is reproduced at paragraph 6 of the Appeal Decision.

The Lower Court Motions

19. Trinity and the Church of God each brought separate motions to set aside the Orders against them, challenging the constitutionality of the Restrictions. The motions were heard together in the Superior Court of Justice at St. Thomas, Ontario by Pomerance J. via videoconference over three days from January 31 to February 2, 2022 (the "**Motion**"). The Association For Reformed Political Action (ARPA) Canada was granted intervenor status.

¹² Declaration of Emergency, O Reg 7/21, <<https://canlii.ca/t/54w8b>>

¹³ Declaration of Emergency, O Reg 264/21, <<https://canlii.ca/t/55278>>

Argument at the Lower Court

20. The Appellants argued that the Restrictions infringed on sections 2(a), 2(b), 2(c) and 2(d) of the *Canadian Charter of Rights and Freedoms* (the “**Charter**”) in a manner that could not be demonstrably justified in a free and democratic society.¹⁴
21. Ontario enacted regulations which imposed capacity limits on religious gatherings held indoors (the “**Indoor Restrictions**”) and outdoors (the “**Outdoor Restrictions**”). At certain times, both indoor and outdoor religious gatherings were governed by regulatory provisions that made no distinction between indoor and outdoor religious gatherings (“**Merged Restrictions**”).
22. The Appellants argued that the objective of each of these types of restrictions should be defined and considered separately when applying the Oakes Test. Because the evidence in this case does not establish a meaningful risk of COVID transmission outdoors, the objective of the Outdoor Restrictions (preventing the spread of COVID outdoors) was not pressing and substantial. In the event that the Court defined the objective more broadly (preventing the spread of COVID generally), restrictions on outdoor gatherings (where COVID transmission is unlikely) were not rationally connected to that objective.
23. The Appellants argued that Merged Restrictions must be struck down at the minimal impairment stage of Oakes, because while COVID may spread indoors, the risk of transmission at outdoor gatherings was negligible. Imposing the same restrictions on indoor and outdoor gatherings was never within a reasonable range of alternatives available to the Province – from the first days of the Pandemic, experts knew that COVID was unlikely to spread outdoors based on experience with other infectious respiratory diseases.
24. The capacity limits imposed on indoor religious gatherings were significantly more restrictive than those imposed on essential retailers. While Ontario argued that church services had characteristics (e.g.: duration, enclosed space, poor ventilation, raised voices,

¹⁴ *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. <<https://canlii.ca/t/ldsx>>, s. 2 (“**Charter**”)

socializing with friends) that exposed congregants to a higher risk than retail shoppers, the Appellants argued that retail workers share the same risk factors, work shifts that are much longer than a church service, and are likely to come in contact with more people. Orders of magnitude more COVID outbreaks have been traced to retail settings than to church services. The differential treatment of two settings with comparable risks demonstrates that the Indoor Restrictions on religious gatherings were not minimally impairing and were not within a range of reasonable alternatives.

The Motion Decision

25. Pomerance J. issued her decision dismissing the Appellants' motions on February 28, 2022 (the "**Motion Decision**").¹⁵

The Court of Appeal Decision

26. The Churches appealed the Motion Decision. In a decision dated March 1, 2023, the Ontario Court of Appeal upheld the Motion Decision and dismissed the appeal.¹⁶

Part II: THE QUESTIONS IN ISSUE

27. Among other grounds of appeal which may be argued if leave is granted, the proposed appeal raises and turns upon the following questions of national and public importance:
- i) **Misapplication of *Law Society of British Columbia v. Trinity Western University*¹⁷ ("*Trinity Western*"):** Are lower courts consistently misinterpreting this Court's *Trinity Western* decision to incorrectly bar consideration of multiple compound infringements of Charter rights? When is it appropriate for the court to decline to consider compound Charter infringements and their impact on the Oakes analysis?

¹⁵ *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 (CanLII), <<https://canlii.ca/t/jmp9d>> ("**Motion Decision**")

¹⁶ *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134 (CanLII), <<https://canlii.ca/t/jvw3m>> ("**Appeal Decision**")

¹⁷ *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 (CanLII), [2018] 2 SCR 453, <<https://canlii.ca/t/hsjpt>> ("**Trinity Western**")

- ii) **Inappropriate subjective limits on the scientific context for the Oakes test:**
Is deference to government decision makers or a desire to avoid “hindsight analysis” leading courts hearing *Charter* challenges of since-repealed legislation to refrain from properly weighing expert scientific evidence that contradicts the government’s position, and thereby imposing an inappropriately subjective limit on the scientific context for their Oakes analysis?

28. The national and public importance of these issues is compounded by the unique circumstances of COVID-19, and the severe and unprecedented manner in which the restrictions and other public health measures enacted by governments in response to the pandemic infringed upon *Charter* rights of Canadians. Canadians have a right to expect these measures to be subject to constitutional scrutiny at the highest levels. And in the event that the measures are upheld, government ought to have the benefit of the vindication that only a Supreme Court decision can bring.

Constitutional Validity of the Restrictions

29. If leave is granted, the proposed appeal will ask the Court to strike down the Restrictions on grounds that they infringe on *Charter* rights in a manner which is not justifiable in a free and democratic society.

Part III: STATEMENT of ARGUMENT

Issue 1: *Trinity Western* and Compound Charter Infringements

30. The Ontario Court of Appeal in the case at bar found that “*the motion judge did not err in relying on Trinity Western for the proposition that, having found the challenged regulations infringed the appellants’ Charter right to freedom of religion, she did not need to separately consider the alleged infringements of ss. 2(b), (c), and (d).*”¹⁸
31. In our submission, this represents an error of law by both the Motion Judge and the Court of Appeal, and is part of a pattern of misinterpretation of this Court’s ruling in *Trinity*

¹⁸ *Appeal Decision* at para 85

Western that is becoming apparent in court decisions across the country. *Trinity Western* does not stand for a general principle that once a breach of one *Charter* right is found, the court should decline to consider additional fully argued alleged *Charter* breaches.

32. And the proposed appeal turns on this error: by failing to fully take into account the Appellants' arguments regarding how the Restrictions infringed on other s. 2 rights, both courts below failed to properly weigh the full scope of the deleterious impacts of the Restrictions against their salutary effects at the final proportionality stage of the *Oakes* test.

The Holding in *Trinity Western*

33. In *Trinity Western*, the majority of this Court found a s. 2(a) infringement and declined to conduct a separate analysis for the other fundamental freedoms. The majority opinion did not provide extensive reasoning for the decision not to conduct separate analyses for ss. 2(b)-(d). However, the majority noted that “*the parties themselves have almost exclusively framed the dispute as centring on religious freedom.*”¹⁹
34. In his concurring opinion, Rowe J. provided further context. He found that the claimants had “*not discharged their burden with respect to these claims. In this case, the claimants have provided little to go on regarding these subsidiary arguments, nor were these claims argued extensively before the courts below or before this Court.*”²⁰
35. Prior to *Trinity Western*, this Court has generally considered every *Charter* infringement raised unless one infringement was sufficient to dispose of the matter in the favour of the claimant. In our submission *Trinity Western* must be interpreted consistently with this principle: Every *Charter* breach should be considered, provided that those allegations have been fully and properly put before the court. However, where the parties have framed their dispute around the breach of a single charter right, peripheral infringements that have not been fully argued may be subsumed under that breach.

¹⁹ *Trinity Western* at para. 77.

²⁰ *Trinity Western* at para. 252 per Rowe J.

Cases where every infringement is considered

36. See the following decisions of this Court, for example:

- *Ross v. New Brunswick School District No. 15*: Ross was removed from his teaching position after making religiously motivated discriminatory remarks. This Court found that both his ss. 2(a) and (b) rights were infringed.²¹
- *Libman v. Quebec (Attorney General)*: An impugned law infringed the right to free expression and “*freedom of association is also infringed for similar reasons.*”²² Overlapping considerations were the basis of, not a barrier to analysis under s. 2(d).
- *Suresh v. Canada (Minister of Citizenship and Immigration)*: The Court simultaneously considered whether ss. 2(b) and (d) of the *Charter* were limited.²³ Despite the overlapping analysis, this Court made findings on each *Charter* right.
- *Saskatchewan (Human Rights Commission) v. Whatcott*: This Court found that Saskatchewan’s *Human Rights Code* infringed both ss. 2(a) and (b) to the extent it limited Whatcott’s chosen expression.²⁴

37. In a case where the government conceded a limitation of liberty, the British Columbia Superior Court ruled that it must “*consider whether the impugned provisions engage the other two interests protected by s. 7 because of their relevance to the analysis under s. 1. A law that has deleterious effects on multiple protected interests will weigh differently in the balance than a law that impacts only one.*”²⁵

21 *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (SCC), [1996] 1 SCR 825, <<https://canlii.ca/t/1frbr>> at 867, 871.

22 *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 SCR 569, <<https://canlii.ca/t/1fr09>> at paras. 35-36.

23 *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 SCR 3, <<https://canlii.ca/t/51wf>> at paras. 100-111.

24 *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (CanLII), [2013] 1 SCR 467, <<https://canlii.ca/t/fw8x4>> at paras. 62, 156.

25 *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 at para. 262.

Cases where a single breach was sufficient to strike down

38. This Court has departed from this practice where a single breach was sufficient to overturn the impugned law. In such circumstances no unfairness is caused to the claimants by failing to consider all breaches. See, for example:

- *Devine v. Quebec (Attorney General)*: This Court determined that an infringement of s. 2(b) of the *Charter* was not justified under s. 1 and declined to conduct a s. 15 analysis in part because s. 15 had not yet been interpreted and it would be inappropriate to do so in a case where it would not affect the outcome. Nevertheless, the Court did consider whether s. 15 could have altered the s. 1 analysis with respect to which provisions would ultimately be struck down.²⁶
- *Bedford v. Canada (Attorney General)*: The Court struck down impugned laws for violation of s. 7 of the *Charter* and found that it was “unnecessary to consider” whether they breached s. 2(b).²⁷
- *Carter v. Canada (Attorney General)*: This Court struck down the criminal prohibition on assisted dying on grounds that it unjustifiably infringed s. 7 of the *Charter* and found it unnecessary to consider s. 15.²⁸

39. *Figueiras v. Toronto Police Services Board* was cited by the Court of Appeal below. However, *Figueiras* fits with the pattern above. The court in that case found that a breach of s. 2(b) was not “prescribed by law” and so could not be saved by s. 1. The Court of Appeal did not consider it necessary to address the s. 2(c) argument.²⁹

Khawaja, the Outlier

40. In *Khawaja*, this Court declined to perform separate analyses for s. (a) and (d), finding no breach of s. 2(b) and that “[i]f freedom of expression is not infringed, on the facts of this case there is no basis to contend that freedom of religion and association are infringed.”³⁰

26 [1988] 2 S.C.R. 790 at 813-14, 819-20.

27 2013 SCC 72 at paras. 159-60, 163.

28 2015 SCC 5 at paras. 86, 93, 123.

29 2015 ONCA 208 at paras. 77, 78, 139

30 *R. v. Khawaja*, 2012 SCC 69 (CanLII), [2012] 3 SCR 555, <<https://canlii.ca/t/fv831>> at paras. 66, 84.

The conclusion on one s. 2 right was dispositive of the others raised. The Court made findings that ss. 2(a) and (d) were not breached.

Lower Court interpretation and application of *Trinity Western*

41. Although *Trinity Western* was decided in the absence of extensive argument from the parties on all but one *Charter* breach, some lower courts hearing challenges to COVID related religious gathering restrictions have mistakenly extrapolated a general principle that where *Charter* claims pertain to similar issues, they may be “subsumed” under the analysis of the one right deemed to be most characteristic of the complaint.

a) Cases that “Subsume” Charter Rights

42. In *Beaudoin v. British Columbia (Attorney General)*, the Court of Appeal upheld the decision of the chambers judge to decline to conduct a s. 15 analysis after finding breaches under ss. 2(a)-(d). Notably, the Court of Appeal relied on the acknowledgement of the *Charter* claimants that s. 15 was not the strongest argument and that the judge “need not decide this case on s. 15.”³¹ While the court’s reasoning was premised on the facts underpinning the claims being “indistinguishable”, the outcome is consistent with the narrow interpretation of *Trinity Western* that courts can decline to consider *Charter* rights that were not fully advanced by the claimants.
43. In the case at bar, the Ontario Court of Appeal upheld a decision of the motion judge refusing to consider whether ss. 2(b)-(d) were infringed after finding that s. 2(a) had been. Despite all four fundamental freedoms being the subject of thorough submissions by the Applicants, the Court of Appeal found that it was “not necessary” to consider the other s. 2 claims because s. 2(a) subsumed the other rights.³²

31 *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 (CanLII), <<https://canlii.ca/t/jtjqv>> at para. 232 (“*Beaudoin*”).

32 *Appeal Decision* at paras. 68, 71.

44. in *Grandel v. Saskatchewan*, the Saskatchewan Court of King's Bench relied on *Trinity Western* and found that, given Saskatchewan's concession that s. 2(b) was infringed, an independent analysis of ss. 2(c) and (d) was not required.³³

b) Decisions with Complete Charter Findings

45. In contrast to the above decisions, the Court in *Gateway Bible Baptist Church et al. v. Manitoba et al.* rejected arguments that it did not need to make rulings on each *Charter* right raised. Manitoba conceded that ss. 2(a)-(c) were breached and argued that the Court should not rule on ss. 7 and 15. However, the court ruled that "given the distinct protections" and "the distinct legal tests applicable to each section and given the specifically adduced evidentiary foundation" it would be improper to avoid making pronouncements on all rights raised. In particular, the court found that the analyses may have "implications for the s. 1 defence" and that to pre-empt that possibility would be "neither fair nor just."³⁴
46. Similarly, in *Taylor v. Newfoundland and Labrador*, the Court found that a law limiting inter-provincial travel violated s. 6(1) and went on to consider (and reject) arguments that it had infringed ss. 6(2) and 7.³⁵

The Need for Correction from this Court

47. The approach adopted in *Beaudoin*, *Grandel*, and the case at bar reads into *Trinity Western* a practice which undermines the broad and liberal interpretation that is to be afforded to *Charter* rights, and disregards the different interests protected by each right. Even related rights such as the fundamental freedoms are independent rights with "independent content."³⁶ Each right "protects a distinct...good and...has its own test."³⁷

³³ *Grandel v Saskatchewan*, 2022 SKKB 209 (CanLII), <<https://canlii.ca/t/js9l4>> at paras. 78, 80 ("**Grandel**").

³⁴ *Gateway Bible Baptist Church et al. v. Manitoba et al.*, 2021 MBQB 219 (CanLII), <<https://canlii.ca/t/jk2rp>> at paras. 225-228.

³⁵ *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 (CanLII), <<https://canlii.ca/t/j9p6v>> at paras. 366, 375-76.

³⁶ *Mounted Police Association of Canada v. Canada (Attorney General)*, 2015 SCC 1 at para. 49

³⁷ André Schutten, "Recovering Community: Addressing Judicial Blindspots on Freedom of Association" (2020) 98:2 SCLR 399 at 413.

48. Neglecting to perform distinct analyses obscures the deleterious impact of compound infringements, diminishes “the significance and severity of compound violations” and “discourages the Court from treating section 2 as a composite or suite of guarantees.”³⁸ It also neglects the way in which multiple rights infringements inform the severity of other intersecting infringements.³⁹ The intersectional nature of compound infringements was particularly present in the case at bar. The Applicants held gatherings which were not only religious, but also expressive and political.
49. Further, the scope of intrusion into each right is different. Infringement of religious expression may have been mitigated somewhat by an ability to hold virtual religious gatherings, for example. However, assembly *per se* was almost entirely prohibited at points, and religious expression was not the only expressive purpose of the gatherings. Proper assessment of the deleterious impact of the Restrictions requires full consideration of their impact on freedom of expression, association and assembly.
50. The significance of this issue and the divergence in the case law make it one of national importance – one which will arise whenever government action touches on more than one *Charter* right. Given the foundational nature of the issue, it is important to have uniformity across the country. Yet, the decisions discussed above may result in different levels of s. 1 scrutiny in different provinces.
51. The approach adopted in *Trinity Bible Chapel*, *Beaudoin*, and *Grandel* arises from a misinterpretation of three brief paragraphs in *Trinity Western* to support the broad proposition that courts can find a single *Charter* breach to be most representative and decline to make findings on other fully argued allegations of *Charter* infringement. Five years out from *Trinity Western*, this Court should revisit those three controversial paragraphs and provide guidance to the courts below as to how to approach compound *Charter* infringements.

38 Jamie Cameron, "Big M's Forgotten Legacy of Freedom" (2020) 98:2 SCLR 15 at 36.

39 Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms" (2019) 91: 2 SCLR 107

Issue 2: Inappropriate subjective limits on the Oakes test

52. A second issue of national importance arises around the question of what scientific evidence is relevant to the *Oakes* analysis, and how conflicting evidence must be evaluated in cases where the legislation being reviewed has been repealed before the court has a chance to review it. Concerns about “hindsight reasoning” cannot relieve the court of its responsibility to weigh competing expert evidence to objectively determine what scientific information was available while the legislation was in force.
53. *Oakes* is an objective test, not a subjective one. A government seeking to uphold *Charter* infringing legislation must demonstrate to a reviewing court that any such infringement is reasonable and justified in a free and democratic society. It is not sufficient for the government to simply assert that it believed its legislation to be justified.⁴⁰ Reviewing courts cannot limit their consideration to only that evidence that the government chooses to put before the court, nor can the court consider only information that the government was aware of and considered at the time it enacted the impugned legislation. In the words of MacLachlin C.J.: “*Even on difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the Charter. The Constitution, as interpreted by the courts, determines those limits.*”⁴¹
54. The *Oakes* test remains objective when applied to legislation that has been repealed before a challenge can make its way to court. Repealed legislation must be considered in the context of the totality of public scientific knowledge – all of the information that the government could have accessed, whether it did so or not. Advice relied upon by government when enacting legislation cannot automatically be given more weight than other scientific information that was available while the legislation was in force.
55. The motion judge found that the precautionary principle “*recognizes that, where there are threats of serious, irreversible damage, lack of full scientific certainty is not a reason to*

40 *R. v. Bryan*, 2007 SCC 12 (CanLII), [2007] 1 SCR 527, <<https://canlii.ca/t/1qsvr>> at para. 67

41 *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 SCR 199, <<https://canlii.ca/t/1frgz>> at para 168 (“*RJR MacDonald*”)

postpone harm reduction strategies."⁴² Science is rarely "certain" on any topic. An absence of certainty does not imply that we knew nothing about COVID at the time, or that past experience with other infectious respiratory diseases taught us nothing relevant. The precautionary principle is not a license for government or the courts to ignore existing science or to listen only to experts who tell one side of the scientific story.

56. As the Court of Appeal put it in the case at bar: *"the COVID-19 pandemic required Ontario to act on an urgent basis, without scientific certainty, on a broad range of public health fronts. That context not only informs 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."*⁴³
57. A government that failed to or chose not to inform itself fully before enacting *Charter* limiting legislation has failed in its duty to safeguard the *Charter* rights of Canadians, and courts cannot allow wilful or negligent ignorance to be used to shield impugned legislation from full constitutional scrutiny.

The error in the case at bar

58. The motion judge framed the question before her as follows: *"The question is whether it was reasonable for Ontario to do what it did, on the basis of the evidence available to it at the relevant time. The views expressed by Dr. McKeown and Dr. Hodge [two government witnesses] best reflect what was known and understood by Ontario when it made its decisions."*⁴⁴
59. In our submission, the motion judge misdirected herself. The question before her was whether the Restrictions were demonstrably justified in a free and democratic society, not simply whether Ontario's actions were "reasonable." The case called for an objective analysis based on the body of scientific knowledge generally available at the time, not a

42 *Motion Decision* at para 145

43 *Appeal Decision* at para 102

44 *Motion Decision* at para. 40

subjective one based on what information happened to be available to the government or what government decision makers “knew and understood” at the time.

60. The Appellants put forward two experts whose testimony shed light on the scientific understanding of COVID-19 and other infectious respiratory diseases at the relevant time: Dr. Schabas, who served as Chief Medical Officer of Health for Ontario from 1988 to 1997, and Dr. Warren, a medical microbiologist and infectious diseases consultant. The Appellants also relied heavily on the evidence of Dr. Chagla, another expert put forward by Ontario, who acknowledged on cross-examination that *“outdoor religious gatherings are safe whether there are 10 cases of COVID per day or 10,000, regardless of variants of concern.”*⁴⁵
61. Nonetheless, at every stage of the analysis, the motion judge favoured the evidence of Dr. Hodge and Dr. McKeown, two of Ontario’s witnesses, over the evidence of the other experts, based on her conclusion that their views *“best reflect what was known and understood by Ontario when it made its decisions”*⁴⁶
62. While it may have been open to the motion judge to assign a greater weight to the evidence of Dr. McKeown and Dr. Hodge over that of the other experts, it was not open to her to do so on the basis of an error of law: namely, her determination that her *Oakes* analysis should always weigh the subjective knowledge and understanding of government decision makers more heavily than any conflicting evidence before her.
63. This was clearly the basis on which she assigned greater weight to the evidence of Drs. McKeown and Hodge, because she explicitly abdicated her responsibility to assign weight to expert evidence on any other basis. In her words: *“it is not my task to mediate or resolve conflicting views about Covid-19”*⁴⁷ and *“my role is not that of an armchair epidemiologist. I am neither equipped nor inclined to resolve scientific debates and controversy surrounding Covid-19. The question before me is not whether certain experts*

45 Motion Decision at para 39; Transcript of Cross-Examination of Dr. Zain Chagla at Q. 96-98, 119-120

46 Motion Decision at para. 40

47 Motion Decision, at para. 143

*are right or wrong. The question is whether it was open to Ontario to act as it did, and whether there was scientific support for the precautionary measures that were taken.”*⁴⁸

64. Here, again, she misdirected herself. It was not open to the motion judge to find the Restrictions were “demonstrably justified” for the purposes of Section 1 of the *Charter* simply because Ontario was able to put forward one or two expert witnesses willing to take the government’s side, while refusing to weigh conflicting expert evidence. If the Restrictions were enacted based on advice that was wrong, or advice that markedly overstated risk, that does not represent “scientific support” in the objective sense required by the *Oakes* test.
65. The motion judge’s treatment of outdoor gathering risk at the minimal impairment stage of her analysis is telling. She finds “*It is true that all experts*” - including Ontario’s experts - “*opined that the risk of transmission outdoors was lower than the risk of transmission indoors. However, Ontario’s experts contended that there was nonetheless a risk outdoors... At times when community risk was elevated, the health care system was sufficiently fragile that even a small number of infections could have dire consequences.*”⁴⁹
66. In fact, Dr. Schabas, and Dr. Warren did not simply testify that the risk of outdoor transmission was ‘lower’. Their evidence was that much like what has long been known about other infectious respiratory diseases, there was a negligible, near-zero risk of outdoor COVID transmission.⁵⁰ Ontario’s own witness Dr. Chagla testified that at least 99.9% of COVID cases are the result of indoor transmission, that outdoor transmission may be responsible for as few as 1 in 100,000 cases, and that restrictions on outdoor gatherings were not justifiable or appropriate from a public health perspective.⁵¹ Dr. Schabas also provided evidence that the health care system was not as fragile or overburdened as Ontario’s experts claimed.⁵²

⁴⁸ *Motion Decision*, at para. 6

⁴⁹ *Motion Decision* at para. 149

⁵⁰ *Affidavit of Dr. Thomas Warren* at paras 55 and 59; *Transcript of Cross-Examination of Dr. Richard Schabas* at Q. 83-84

⁵¹ *Transcript of Cross-Examination of Dr. Zain Chagla* at Q. 14-25, 86-90, 92-125

⁵² *Reply Affidavit of Dr. Richard Schabas*, sworn July 23, 2021 at para 6

67. Nonetheless, having determined that “*it is not my task to mediate or resolve conflicting views about COVID-19*” the motion judge found that “*Ontario’s experts contended that there was nonetheless a risk*”⁵³, and accepted this assertion at face value rather than assessing its validity against the overwhelming contradictory evidence before her as the *Oakes* test requires.
68. It is true that “*the context of [an] impugned provision determines the type of proof that a court will require of the legislature to justify its measures under s. 1*”⁵⁴ and direct scientific proof will not always be required. Courts applying *Oakes* may make logical inferences about the context, objectives, harms or efficacy of impugned legislation in cases where persuasive scientific evidence is not available or where precise quantification is impossible. But in the case at bar, the evidence that outdoor gatherings did not pose a serious risk was overwhelming, uncontroversial and not in serious dispute. The risk was not zero, because as Dr. Schabas put it, “*there are very few zeros in the natural world*”⁵⁵, but all experts agreed that the risk was very low. By refusing to weigh Ontario’s assertion against the totality of the evidence, the motion judge abdicated her duty of objectivity.
69. As MacLachlin C.J. put it in *RJR Macdonald*: “*Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament’s choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.*”⁵⁶

National Importance

70. The *Oakes* test is foundational to constitutional review. It provides the scaffolding for s. 1 *Charter* analysis and determines the availability of constitutional remedies for every right protected by the *Charter*. The Motion Decision has been cited in *Beaudoin*, *Grandel* and it is reasonable to assume that courts will continue to cite this case and apply the lower

53 *Motion Decision* at paras. 143 and 149

54 *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 SCR 827, <<https://canlii.ca/t/1h2c9>> at para 76

55 *Transcript of Cross-Examination of Dr. Richard Schabas* at Q. 84

56 *RJR MacDonald* at para 136

courts' reasoning to the treatment of scientific evidence in other covid related cases as they make their way through the courts. If courts apply the case to subjective used by Pomerance J. and approved by the Court of Appeal weakens the objectivity of all stages of *Oakes*.

71. and provides the government with a low threshold for justifying *Charter* violations. To ensure that courts continue to hold the government to a standard of proof under s. 1 commensurate with the context of this Court should correct the error in this case and provide guidance to courts around the country for evaluating competing experts in constitutional litigation.⁵⁷

Part IV: SUBMISSIONS on COSTS

72. The Appellants do not seek costs, and in light of the public interest nature of the matter, ask that no costs be awarded against them.

Part V: ORDER SOUGHT

73. The Appellants ask that leave to appeal the decision of the courts below to the Supreme Court of Canada be granted.

A handwritten signature in blue ink, appearing to read 'Rob Kittredge', with a large, sweeping loop at the end.

*Rob Kittredge (LSO #54027Q)
and Hatim Kheir (LSO #79576J)
Counsel for the Appellants*

April 30, 2023

⁵⁷ *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, <<https://canlii.ca/t/1ftv6>> at para. 68.

Part VI: TABLES of AUTHORITIES

Cases	at paras
<i>Beaudoin v. British Columbia (Attorney General)</i> , 2022 BCCA 427 (CanLII), < https://canlii.ca/t/jtjqv >	3, 42, 47
<i>British Columbia Civil Liberties Association v Canada (Attorney General)</i> , 2018 BCSC 62 (CanLII), < https://canlii.ca/t/hprxx >	37
<i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72 (CanLII), [2013] 3 SCR 1101, < https://canlii.ca/t/g2f56 >	38
<i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5 (CanLII), [2015] 1 SCR 331, < https://canlii.ca/t/gg5z4 >	38
<i>Devine v. Quebec (Attorney General)</i> , 1988 CanLII 20 (SCC), [1988] 2 SCR 790, < https://canlii.ca/t/1ft9r >	38
<i>Figueiras v. Toronto (Police Services Board)</i> , 2015 ONCA 208 (CanLII), < https://canlii.ca/t/ggwxd >	39
<i>Gateway Bible Baptist Church et al. v. Manitoba et al.</i> , 2021 MBQB 219 (CanLII), < https://canlii.ca/t/jk2rp >	45
<i>Grandel v Saskatchewan</i> , 2022 SKKB 209 (CanLII), < https://canlii.ca/t/js9l4 >	3
<i>Grandel v Saskatchewan</i> , 2022 SKKB 209 (CanLII), < https://canlii.ca/t/js9l4 >	44, 47
<i>Harper v. Canada (Attorney General)</i> , 2004 SCC 33 (CanLII), [2004] 1 SCR 827, < https://canlii.ca/t/1h2c9 >	68
<i>Libman v. Quebec (Attorney General)</i> , 1997 CanLII 326 (SCC), [1997] 3 SCR 569, < https://canlii.ca/t/1fr09 >	36
<i>Mounted Police Association of Ontario v. Canada (Attorney General)</i> , 2015 SCC 1 (CanLII), [2015] 1 SCR 3, < https://canlii.ca/t/gfxx8 >	47
<i>Ontario (Attorney General) v. Trinity Bible Chapel</i> , 2023 ONCA 134 (CanLII), < https://canlii.ca/t/jvw3m >	26, 43, 56
the “ Appeal Decision ”	
<i>Ontario v. Trinity Bible Chapel</i> , 2022 ONSC 1344 (CanLII), < https://canlii.ca/t/jmp9d >	25, 55, 58, 60, 61, 63, 65, 67
the “ Motion Decision ”	
<i>R. v. Bryan</i> , 2007 SCC 12 (CanLII), [2007] 1 SCR 527, < https://canlii.ca/t/1qsvr >	53

Cases	at paras
<i>R. v. Khawaja</i> , 2012 SCC 69 (CanLII), [2012] 3 SCR 555, < https://canlii.ca/t/fv831 >	40
<i>R. v. Oakes</i> , 1986 CanLII 46 (SCC), [1986] 1 SCR 103, < https://canlii.ca/t/1ftv6 >	71
<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , 1995 CanLII 64 (SCC), [1995] 3 SCR 199, < https://canlii.ca/t/1frgz >	53, 69
<i>Ross v. New Brunswick School District No. 15</i> , 1996 CanLII 237 (SCC), [1996] 1 SCR 825, < https://canlii.ca/t/1frbr >	36
<i>Saskatchewan (Human Rights Commission) v. Whatcott</i> , 2013 SCC 11 (CanLII), [2013] 1 SCR 467, < https://canlii.ca/t/fw8x4 >	36
<i>Suresh v. Canada (Minister of Citizenship and Immigration)</i> , 2002 SCC 1 (CanLII), [2002] 1 SCR 3, < https://canlii.ca/t/51wf >	36
<i>Taylor v. Newfoundland and Labrador</i> , 2020 NLSC 125 (CanLII), < https://canlii.ca/t/j9p6v >	46
<i>Trinity Western University v. Law Society of Upper Canada</i> , 2018 SCC 33 (CanLII), [2018] 2 SCR 453, < https://canlii.ca/t/hsjpt >	27

Articles	at paras
André Schutten, <i>"Recovering Community: Addressing Judicial Blindspots on Freedom of Association"</i> (2020) 98:2 SCLR 399	47
Dwight Newman, <i>"Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms"</i> (2019) 91: 2 SCLR 107	48
Jamie Cameron, <i>"Big M's Forgotten Legacy of Freedom"</i> (2020) 98:2 SCLR 15	48

Legislation/Regulation	at paras
<p><i>Canadian Charter of Rights and Freedoms</i>, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. <https://canlii.ca/t/ldsx> <i>Charte canadienne des droits et libertés</i>, Partie 1 de la Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, <https://canlii.ca/t/q3x8></p> <p>Sections 1, 2, 24(1)</p>	20
<p><i>Constitution Act</i>, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. <https://canlii.ca/t/ldsx> <i>Loi constitutionnelle de 1982</i>, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, <https://canlii.ca/t/q3x8></p> <p>Section 52(1)</p>	
<p><i>Declaration of Emergency</i>, O Reg 264/21, <https://canlii.ca/t/55278> <i>Déclaration de situation d'urgence</i>, Règl de l'Ont 264/21, <https://canlii.ca/t/6d3bl></p>	17
<p><i>Declaration of Emergency</i>, O Reg 50/20, <https://canlii.ca/t/54916> <i>Déclaration de situation d'urgence</i>, Règl de l'Ont 50/20, <https://canlii.ca/t/6cbpj></p>	11
<p><i>Declaration of Emergency</i>, O Reg 7/21, <https://canlii.ca/t/54w8b> <i>Déclaration de situation d'urgence</i>, Règl de l'Ont 7/21, <https://canlii.ca/t/6cxcn></p>	15
<p><i>Emergency Management and Civil Protection Act</i>, RSO 1990, c E.9, <https://canlii.ca/t/53nmt> <i>Loi sur la protection civile et la gestion des situations d'urgence</i>, LRO 1990, c E.9, <https://canlii.ca/t/6bpr5></p> <p>Section 7.0.1</p>	11
<p><i>Reopening Ontario (A Flexible Response to COVID-19) Act</i>, 2020, SO 2020, c 17, <https://canlii.ca/t/54clq> <i>Loi de 2020 sur la réouverture de l'Ontario (mesures adaptables en réponse à la COVID-19)</i>, LO 2020, c 17, <https://canlii.ca/t/6cdq2></p>	13
<p><i>Rules for Areas in Stage 1</i>, O Reg 82/20, <https://canlii.ca/t/553xj> <i>Règles pour les régions À l'étape 1</i>, Règl de l'Ont 82/20, <https://canlii.ca/t/6d51v></p>	16
<p><i>Rules for Areas in Stage 2</i>, O Reg 263/20, <https://canlii.ca/t/55c54> <i>Règles pour les régions À l'étape 2</i>, Règl de l'Ont 263/20, <https://canlii.ca/t/6dd8g></p>	16

Legislation/Regulation	at paras
<i>Rules for Areas in Stage 3</i> , O Reg 364/20, < https://canlii.ca/t/55cwg > <i>Règles pour les régions à l'étape 3</i> , Règl de l'Ont 364/20, < https://canlii.ca/t/6df0q >	16
<i>Stages of Reopening</i> , O Reg 363/20, < https://canlii.ca/t/55cq7 > <i>Étapes de la réouverture</i> , Règl de l'Ont 363/20, < https://canlii.ca/t/6ddtk >	14

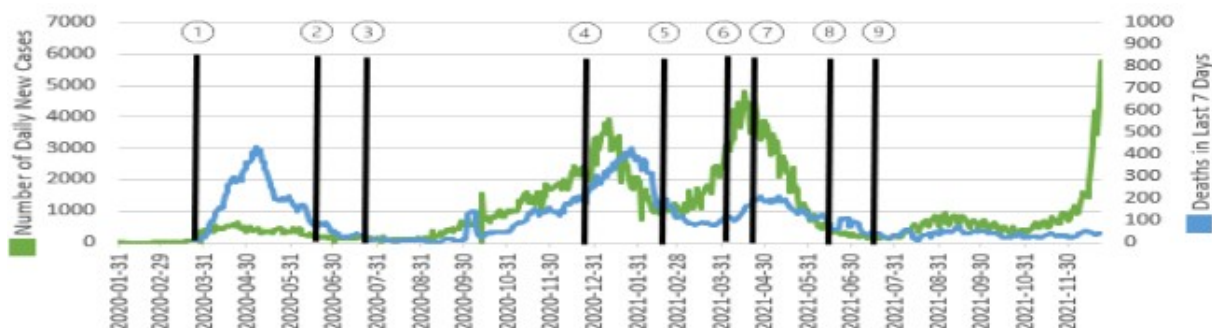
Summary of Regulations with Point-In-Time Links

The chart below summarizes the Capacity Restrictions applicable to indoor and outdoor religious gatherings in the Southwestern PHU (where the Respondent the Church of God of Aylmer is located - "SW") and the Waterloo PHU (where the Respondent Trinity Bible Chapel is located - "WA") from the beginning of the Pandemic to July 2021. Indoor capacity restrictions applicable to essential retail stores during the same time periods are also listed for comparison purposes. Hyperlinks are provided to the version of the regulations applicable to each time period.

Date (D/M/Y)	Outdoor	Indoor	Regulation	Essential Retail
18/3/20-27/3/20	50 ppl	50 ppl	52/20 (18/3/20)	Allowed to operate (82/20)
28/3/20-15/5/20	5 ppl	5 ppl	52/20 (28/3/20)	Allowed to open, must follow guidance on distancing, cleaning (82/20)
16/5/20-28/5/20	5 ppl	5 ppl	52/20 (16/5/20)	Allowed to open, must follow guidance on distancing, cleaning (82/20)
29/5/2020-11/6/20	5 ppl	5 ppl	52/20 (29/5/20)	Allowed to open, must follow guidance on distancing, cleaning (82/20)
12/6/20-16/7/20	50 ppl	30% cap.	52/20 (12/6/20)	Allowed to open, must follow guidance on distancing, cleaning (82/20)
13/7/20-6/11/20 (SW) 17/7/20-6/11/20 (WA)	100 ppl	30% cap.	364/20 (13/7/20) per 363/20	Capacity limited to number capable of maintaining 2m distance
7/11/20-22/11/20	100 ppl	30% cap.	364/20 (7/11/20) per 363/20	Capacity limited to number capable of maintaining 2m distance
23/11/20-26/12/20	100 ppl (SW) 100 ppl (WA)	30% cap. (SW) 30% cap. (WA)	364/20 (23/11/20) per 363/20	Capacity limited to number capable of maintaining 2m distance
26/12/20 - 9/2/21	10 ppl	10 ppl	82/20 (26/12/20) per 363/20	50% capacity and 2m distance
10/2/21-15/2/21	10 ppl	10 ppl	82/20 (10/2/21) per 363/20	50% capacity and 2m distance
16/2/21 - 28/2/21	100 ppl	30% cap.	263/20 (16/2/21) per 363/20	75% capacity and 2m distance
1/3/21 - 29/3/21	100 ppl (SW)	30% cap. (SW)	364/20 (26/2/21) (SW)	Capacity limited to number capable of maintaining 2m distance (SW)

	100 ppl (WA)	30% cap. (WA)	263/20 (26/2/21) (WA) per 363/20	75% capacity and 2m distance (WA)
29/3/21 - 2/4/21	No fixed limit Maintain 2m distance	30% cap.	364/20 (29/3/21) (SW) 263/20 (29/3/21) (WA) per 363/20	Capacity limited to number capable of maintaining 2m distance (SW) 75% capacity and 2m distance (WA)
3/4/21 - 18/4/21	Maintain 2m distance	15% cap.	82/20 (3/4/21) per 363/20	50% capacity and 2m distance
19/4/21 - 10/6/21	10 ppl	10 ppl	82/20 (19/4/21) per 363/20	25% capacity and 2m distance
11/6/21 - 29/6/21	Maintain 2m distance	15% cap.	82/20 (8/6/21) per 363/20	25% capacity and 2m distance
30/6/21 – 15/7/21	Maintain 2m distance	25% cap.	263/20 (29/6/20) per 363/20	50% capacity and 2m distance

To assist the Court in understanding the timing of the Capacity Restrictions summarized above in relation to the progress of the Pandemic, some of the more significant regulatory changes are flagged on the chart below which tracks new COVID cases and deaths in Ontario between January 31, 2020 and November 30, 2021.



(1) 28/3/20 – Indoor/outdoor gathering limits reduced to 5 people; (2) 12/6/20 – Outdoor gathering limit raised to 50 people, indoor is 30% room capacity; (3) 13/7/20 – Outdoor gathering limit raised to 100 people; (4) 26/12/20 – Indoor/outdoor gathering limits reduced to 10 people; (5) 16/2/21 – Outdoor gathering limit raised to 100 people, indoor is 30% room capacity; (6) 29/3/21 – Outdoor gathering limit lifted; (7) 19/4/21 – Indoor/outdoor gathering limits reduced to 10 people; (8) 11/6/21 – Outdoor gathering limit lifted, indoor is 15% room capacity; (9) 16/7/21 – Indoor gathering limit lifted.

Tab	Transcript and Affidavit Evidence Cited	at paras
A	<i>Affidavit of Dr. Thomas Warren</i> , sworn May 25, 2021 paras 55, 59	66
B	<i>Affidavit of Heinrich Hildebrandt</i> , sworn June 4, 2021 paras 2, 3, 4, 33-47	8, 9, 10
C	<i>Affidavit of Jacob Reaume</i> , sworn June 4, 2021 paras 4, 18, 21, 32-34, 40, 52, 55, 58-59	4, 5, 6, 7
D	<i>Reply Affidavit of Dr. Richard Schabas</i> , sworn July 23, 2021 para 6	66
E	<i>Transcript of Cross-Examination of Dr. Richard Schabas</i> , Dec 10, 2021 Q. 83-84	66, 68
F	<i>Transcript of Cross-Examination of Dr. Zain Chagla</i> , Dec. 14, 2021 Q. 14-25, 86-90, 92-125	60, 66

Part VII: EXCERPTS of LEGISLATION

Hyperlinks are provided above.

Part VIII: Excerpts of Transcripts and Affidavits

Tab A - *Affidavit of Dr. Thomas*
Warren, May 25, 2021

Kitchener Court File No.: CV-21-00000095-0000
St. Thomas Court File No.: CV-21-08

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE ATTORNEY GENERAL OF ONTARIO

Applicant (Responding Party)

-and-

TRINITY BIBLE CHAPEL, JACOB REAUME, WILL SCHUURMAN, DEAN
WANDERS, RANDY FREY, HARVEY FREY and DANIEL GORDON

Respondents (Moving Parties)

A N D B E T W E E N:

HER MAJESTY THE QUEEN IN 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)

AFFIDAVIT OF DR. THOMAS WARREN
(Sworn May 25, 2021)

I, **THOMAS WARREN**, of the City of Oakville in the Province of, Ontario MAKE
OATH AND SAY:

1. I am an Infectious Diseases consultant and Medical Microbiologist currently practicing in Oakville, Milton and Georgetown, Ontario, and as such have knowledge of the matters hereinafter deposed to.
2. I have been a member of the College of Physicians and Surgeons of Ontario since 2009. My curriculum vitae is attached hereto and marked as **Exhibit "A"**.
3. I obtained my Doctor of Medicine (MD) from the University of Western Ontario in 2005, after which I completed a three-year residency in Internal Medicine through the University of Ottawa. Following my Internal Medicine residency, I completed a Fellowship in Infectious Diseases and a second residency in Medical Microbiology, both at the University of Toronto. During my residencies and fellowship, I regularly taught medical students and junior residents.
4. I have practiced in these specialty areas for ten (10) years. As part of my clinical practice, I teach through my appointment as an Assistant Clinical Professor (Adjunct) at McMaster University in Hamilton, ON. This includes supervising Infectious Diseases Clinical Rotations for physician assistant students, medical students, and Infectious Diseases fellows.
5. I am currently enrolled in a Master of Science (Epidemiology) at the London School of Hygiene and Tropical Medicine, University of London, with an expected completion date of 2022. Areas of study include the framework for understanding the epidemiology of infectious diseases and the mathematical theory underlying epidemiological studies.
6. In my medical microbiology residency, I was trained to develop, use and interpret reverse transcription polymerase chain reaction (RT-PCR) testing. I have practiced as a microbiologist for ten years in a microbiology laboratory that uses a variety of PCR tests. As an infectious diseases consultant, I interpret PCR test results in the context of clinical care.
7. The Moving Parties' counsel contacted me about providing expert testimony in support of their motion to set aside the enforcement order against them. I have

Outdoor transmission of SARS-CoV-2

55. The risk of outdoor transmission of SARS-CoV-2 at outdoor religious services is negligible when physical distancing is maintained. The evidence for this assertion can be examined in two domains: First, by examining the evidence for outdoor transmission of other important respiratory tract infections such as tuberculosis (TB) and influenza; second, by examining the evidence for transmission of SARS-CoV-2 itself.
56. Since we only have just over one year of experience with SARS-CoV-2, it is helpful to look at the risk of outdoor transmission of two other very important respiratory tract infections, TB and influenza. TB is a respiratory tract infection that is transmitted through airborne particles. The *Canadian Tuberculosis Standards* published by the Public Health Agency of Canada state that TB “transmission is rarely thought to occur outdoors”¹³⁰ and the “risk of [outdoor] transmission is negligible provided they are not in very close contact with susceptible individuals for prolonged periods of time”¹³¹. The result is that “outdoor exposures are not investigated during a contact tracing exercise”¹³².
57. Influenza is another important respiratory tract infection. In a systematic review of outdoor mass gatherings and respiratory disease (mostly influenza) performed by the United States Centers for Disease Control and Prevention, “no single-day mass gathering-related outbreaks were identified in our review”¹³³. Similarly, a global review of outbreaks (including influenza outbreaks) at outdoor large gatherings from 1980 to July 2012 did not identify any outbreaks associated with single day gatherings¹³⁴. These studies and others were included in a systematic review of outdoor transmission of SARS-CoV-2 and other respiratory viruses; influenza outbreaks only occurred in the context of multiday outdoor events or communal housing¹³⁵.

58. The primary mode of SARS-CoV-2 transmission is known to occur indoors. Household transmission (indoors) accounted for 78%-85% of all SARS-CoV-2 transmission in China in one report from the World Health Organization¹³⁶. Household contacts and travel together were the most important sources of SARS-CoV-2 transmission in another study¹³⁷. Outbreaks in indoor contexts such as long-term care facilities, hospitals and shelters have been established as an important source of indoor transmission in the Canadian context¹³⁸.
59. The evidence for outdoor SARS-CoV-2 transmission, when present, is negligible. In one comprehensive study from China¹³⁹, only one outdoor outbreak involving two cases occurred out of 7324 identified cases. The reason for negligible outdoor transmission is that airflow outdoors rapidly dilutes any SARS-CoV-2 virus present to negligible amounts not considered to be infectious¹⁴⁰.
60. As shown above, outdoor religious gatherings of short duration (less than 24 hours; no overnight component) should be considered safe based on the evidence. The risk of outdoor transmission of SARS-CoV-2 is negligible, similar to other important respiratory infections such as TB and influenza. As long as physical distancing can be maintained, outdoor religious gatherings should be considered safe.
61. I make this affidavit *bona fide*.

SWORN REMOTELY by videoconference)
 by Dr. Thomas Warren at the City of)
 Oakville in the County of Halton, before)
 me at the City of London, in the County of)
 Middlesex, this 25th day of May, 2021 in)
 accordance with O.Reg. 431/20)
 Administering Oath or Declaration)
 Remotely)

 A Commissioner, etc.)

LISA D.S. BILDY
 BARRISTER & SOLICITOR)



 DR. THOMAS WARREN

**Tab B - *Affidavit of Heinrich
Hildebrandt*, June 4, 2021**

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO

Applicant

- and -

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

Respondents

AFFIDAVIT OF HEINRICH HILDEBRANDT
(Sworn June 4, 2021)

I, HEINRICH (HENRY) HILDEBRANDT, of the Town of Aylmer in the Province of Ontario, MAKE OATH AND SAY:

1. I am one of the Respondents herein, and as such have personal knowledge of the matters hereinafter deposed to, except where they are based on information and belief, in which case I verily believe them to be true.
2. I am the pastor at The Church of God ("**the Church**"), located in Aylmer, Ontario, and have held that position since April of 1993. The Church is a not-for-profit non-denominational religious organization, incorporated in 1992. I was born in Mexico and immigrated to Canada in 1985, becoming a Canadian citizen in 1989. I have been married since 1982 and have two adult sons.

3. The other personal Respondents are elders or former elders of the Church.
4. Since its inception, the Church has been the spiritual home for a congregation comprised mainly of small-town and rural parishioners, many of whom come from a Mennonite background and speak Low German. The congregation currently numbers approximately 260 people. Our facility can safely house over 400 people.
5. Church is not merely a Sunday morning event for our congregation. It is a way of life for us, as a traditional community. We would normally hold full services at least three times per week (Sunday mornings and evenings, and Wednesday evenings) as well as prayer services on Saturdays. We operate a school in our building and our parishioners have always used it as a sort of community centre. It was the home base for social events, support groups, BBQs and soccer nights. Our church members dress in distinctive plain and modest clothing, which is also a reflection of how central to our way of life the Church is.
6. Given the demographics of my parishioners, and the fundamental importance to my congregation of communal worship, it has been of utmost importance to me as their pastor to at least bring them together for one worship service per week throughout the lockdown, and I tried to do so creatively while honouring the government's restrictions from the outset.

Initial Response to Covid-19 and Government Restrictions

7. On or about March 17, 2020, the Ford government declared a state of emergency due to the outbreak of Covid-19 and began issuing unprecedented lockdown orders.
8. On March 24, 2020, we learned through an Order in Council that church was not essential, as the cabinet ordered the closing of "non-essential" businesses and institutions, including churches and other faith settings. The Church initially abided by these restrictions.
9. On Sunday, April 12, 2020, which was the Christian holy celebration of Easter, and by then nearly a month into the lockdown, we held a small "drive-in" sunrise service at the

31. On that Sunday, local community members held a full demonstration against us, which they called “Plague Rat Tour”. This “tour” started at the church, where at least 15 or more vehicles lined up along both sides of the highway in front of our church. Throughout our drive-in service, they honked their horns and blasted through a megaphone, trying to disrupt the service as much as possible. Although the police were in attendance, as they almost always were for our services, they left these protestors alone. Part way through the service, the protestors left and did a drive-by of the homes of our parishioners that they knew of, and others who were part of the “movement”, including the local couple who invited me to join their protest in November. Security camera footage, as well as advice from members of my congregation who had stayed home from church that day, informed me of this and I verily believe it to be true.
32. This community group, calling itself “Canadians Against Freedom Rallies and Misinformation”, has continued to harass me, my family and our Church. Posters with my face or my son’s have been plastered around the town, saying “Lock Him Up!” Attached hereto and marked as **Exhibit “F”** to this Affidavit are true photos of one depicting Herbert, and another poster affixed to a post with our church shown in the background. Both of these photos were taken by Herbert, and he advises and I believe them to be accurate depictions.
33. We continued with permissible drive-in services until January 24. At the conclusion of the service, we allowed people into the building for a “tour” and received charges for that.
34. The following week, on January 31, we joined other Ontario congregations in holding our service inside the Church as an act of civil disobedience. This resulted in the Attorney General obtaining an interim order on February 5, followed by a final order on February 12, enforcing compliance with the regulations. We reverted back to drive-in services for Sunday February 7 and 14.
35. From about February 16 until just before Easter Sunday, capacity for religious services in our region was at 30%. There were no charges laid for our indoor services during that period.

36. The Ford government reduced capacity again to 15%, just in time for Easter Sunday, the holiest day in the Christian calendar. This remained in effect until April 19, at which time (and continuing presently) the limit for religious services was further reduced to 10 people, indoors or out.
37. Ultimately, we as a church decided that we could no longer refrain from in-person services. We held a service on Easter Sunday, as well as the following Sunday.
38. On April 14, 2021, we were served through our lawyer with a Motion for Contempt by the Attorney General's office for the services held on April 4 and 11.
39. On April 18, we had police surveilling our property from the woods behind the building.
40. On April 20, I am aware that there was a gathering of fewer than ten people in a choir practice at the Church, while a business meeting occurred in another wing of the building, also with fewer than ten people. Our members were in compliance with the regulations, as far as I understood. The business meeting involved two police officers, who went outside when the Aylmer Police turned up. According to the CBC, police were tipped off by a complaint, which is typical. A heated exchange occurred between the officers, and the off-duty police (from a different force) were charged. Attached hereto and marked as **Exhibit "G"** is a CBC article dated April 23, 2021.
41. After a brief adjournment, we were in court for the contempt proceedings on April 30, 2021, at which time Justice B.G. Thomas found church elder Peter Wall, the Church, and me guilty of contempt of his order of February 12, 2021.
42. On May 14, 2021, we returned for the sanctions hearing and were ordered to pay a total of \$117,000 in fines and costs, payable within 90 days. The Sheriff was also ordered to lock our church doors.
43. Later that day, while we were in the Church holding a service, the Sheriff, a locksmith and numerous police officers arrived and entered the building. All parishioners were asked to leave, and did so in an orderly fashion. A video recording of the event was

taken by my son, Herbert, and posted to YouTube at this link:
<https://www.youtube.com/watch?v=WJbEI8XWak4>

44. On May 16, we held an outdoor service on the lawn of the church, which attracted approximately 300 people. There was a police drone circling over the church. This was a greater number than usual.
45. We were then served on May 21 with a second Notice of Motion for a finding of contempt, with a hearing before Justice Thomas scheduled later that same day. A brief adjournment was granted to May 31.
46. We held outdoor services on May 23 and May 30, before returning to court on May 31, 2021. The services grew in size each week, as punitive measures by the government increased. During the service on May 30, I asked if anyone felt ready to commit themselves to Christ, and at least a dozen people, not normally part of our church, came forward. There was much tearful rejoicing as these individuals felt the power of God working in their lives and committed themselves to Christ. To me, this made every penny of every fine worthwhile.
47. On May 31, 2021, Justice Thomas again found the Church, church elder Peter Wall, and me in contempt of the court order of February 12, 2021. We were ordered to pay a total of \$66,000 in fines and costs, forthwith.
48. The Church has now received about six charges, each with a maximum penalty of \$10 million. I have personally received twelve charges, each carrying a maximum penalty of \$100,000 and one year in jail.
49. Many of our members have been charged too. After one service, the police made late evening visits to their homes while it was dark outside to give them tickets.
50. We are under constant threat of more summonses, potential jail time, and are now locked out of our church building. The stress on our leaders and parishioners, as normally law-abiding citizens, cannot be overstated; although our commitment to following God's Word and our resolve to accept any punishment, including

Tab C - *Affidavit of Jacob Reaume,*
June 4, 2021

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN

THE ATTORNEY GENERAL OF ONTARIO

Applicant (Responding Party)

-and-

**TRINITY BIBLE CHAPEL, JACOB REAUME, WILL SCHUURMAN, DEAN WANDERS,
RANDY FREY, HARVEY FREY, AND DANIEL GORDON**

Respondents (Moving Parties)

**AFFIDAVIT OF REV. JACOB REAUME
(Constitutional Challenge)
(Sworn June 4, 2021)**

I, JACOB REAUME, of the Village of Hawkesville in the Province of Ontario, MAKE
OATH AND SAY:

1. I am one of the Respondents (Moving Parties) herein, and as such have personal knowledge of the matters hereinafter deposed to, except where they are based on information and belief, in which case I verily believe them to be true.
2. I am the senior pastor of the Respondent, Trinity Bible Chapel ("**TBC**") and have been pastoring there since 2009. I achieved a baccalaureate degree in Religious Education in 2003 and have a Master of Divinity from the Southern Baptist Theological Seminary in Louisville, Kentucky. I was ordained as a Minister on November 20, 2005, and served in churches across Ontario and the United States before becoming a lead Pastor at TBC. In 2020, I helped found and became Chancellor of King Alfred Academy, a private Christian school which operates out of the TBC campus. I was

born and raised in Guelph, have been happily married for 20 years, and I have 5 children with another on the way.

3. The other personal Respondents are elders and associate pastors of TBC and form the leadership team of the church.
4. Trinity Bible Chapel has been in existence for 20 years. Prior to the first lockdown in March of 2020, we often had between 600-700 people in attendance for services each week, usually including between 100-150 university students. Our facility can safely house over 900 people based on fire code regulations, including the sanctuary and a large gymnasium.

Initial Response to Covid-19 and Government Restrictions

5. In the early months of the first lockdown, commencing in March 2020, the TBC facility was shut down for in-person services, provided online productions, and our staff members called each regularly attending household to provide pastoral guidance. At that time, we were banned from any gathering of more than five people and drive-in services were not permitted. In the very earliest stages of the declared public health emergency, we did not know what we were dealing with and were prepared to give the government the benefit of the doubt for a short period of time.
6. On April 23, 2020, we submitted an open letter to governing officials requesting that they work with us to reopen. In it we included our proposed course of action to mitigate the spread of Covid-19. We received no substantive reply. Attached hereto and marked as **Exhibit "A"** to this my Affidavit is a copy of the said letter and risk management addendum.
7. After the first lockdown had continued for some weeks, we became involved with a group of pastors who started a website called Reopen Ontario Churches. The group wrote a letter to our authorities in May of 2020, providing recommendations and seeking a safe re-opening of our churches. Our pleas and lobbying were ignored. Attached hereto and marked as **Exhibit "B"** to this my Affidavit is a copy of the letter.

13. Shortly thereafter, the Ontario Government announced that houses of worship would be permitted to open to 30% capacity, effective June 12, 2020.
14. Following that announcement, our church switched back to in-person services, which was a great and profound relief. We initially maintained 30% building capacity limits, set up a massive overflow section in our gymnasium to space people out further, provided access to hand sanitizers and face masks, and developed a comprehensive policy to mitigate the spread of COVID-19. For example, when serving the Lord's Supper all elders wore masks. We implemented public health protocols, in accordance with the document dated June 25, 2020, attached hereto as **Exhibit "E"** to this Affidavit.
15. It was a wonderful blessing to our community to meet in person over the summer months. However, as the fall approached the Government began making public comments about potential further restrictions. In early autumn, we wrote a letter to our local MPP asking for churches to remain open and continue to operate safely. Attached hereto and marked as **Exhibit "F"** to this my Affidavit is a true copy of the said letter, dated September 18, 2020, to which we did not receive a response.
16. On or about November 3, 2020, the Ontario Government abandoned its Stage 1, 2 and 3 approach, and introduced a colour-coded system and some apparently objective benchmarks for imposing further restrictions. For each of the stages, including "red", houses of worship were to remain at 30% capacity.
17. It was not long before the Government changed gears again, and introduced a more restrictive "grey zone", modelled on the earlier Stage 1 restrictions. Toronto and Peel were the first areas to go back into the grey zone, which permitted houses of worship to only have ten (10) persons in attendance, regardless of building capacity.

Church Response to Threats of Second Lockdown

18. On December 3, 2020, fearing that the restrictions would spread to other parts of the province, I wrote an open letter advising that TBC would practice peaceful civil disobedience in the event of a second lockdown. At that time, Waterloo Region was

still open at 30% capacity for churches. Attached hereto and marked as **Exhibit “G”** to this my Affidavit is a true copy of this letter. I posted it publicly on our website and forwarded it to multiple provincial and federal representatives, as well as the mayor and other officials at the Region of Waterloo, who provided no substantive replies.

19. Indeed, the Premier announced on December 21, 2020, that the entire province, regardless of case counts or the presence or absence of any crisis regionally, would begin a four-week lockdown on Boxing Day. Attached hereto and marked as **Exhibit “H”** to this my Affidavit is a copy of the province’s news release.
20. The effect of these restrictions was a gross and substantial interference in the practice of our faith, individually and collectively.
21. We made the decision as a leadership team to continue to exercise our fundamental freedoms guaranteed under the *Charter of Rights and Freedoms* and to assemble in person for worship services with the risk mitigation protocols in place. We continued to make online services available for those who chose, for health or other reasons, not to attend in person. At that point, nine months into Covid-19, the lockdown harms I was observing and counselling my parishioners about were mounting. I wanted to provide hope and comfort to our congregation and our community through the continuation of our religious practices in association with other members of our faith community.
22. On December 23 I sent a letter to the Chief of Police and copied the mayor of Woolwich Township, inviting him to support our constitutional rights, just as he had supported the Black Lives Matter marches in June, which were also held during gathering restrictions. Attached hereto and marked as **Exhibit “I”** to this my Affidavit is a true copy of the letter. The Mayor replied with a brief email saying they would like compliance and that the police would be in touch with me.
23. On December 24, I received a visit from two police officers at the church. They advised that a second lockdown would be going into effect on December 26 across the entire province. I informed the officers that I could not, in keeping with my conscience and religious convictions, agree to a further shutdown of our church and that, while I had

published by Public Health Ontario, entitled “*COVID-19 Outbreaks and Cases in Ontario, by Setting: February 16, 2020 to December 26, 2020.*” The government has had this information since at least January 11, 2021, according to the report date.

29. The document includes various tables, which note the following data for the entire Province of Ontario:

Table 1: Fewer than 1% (0.55%) of all outbreaks (23 / 4151) are due to places of worship.

Table 2: Fewer than 1% (0.56%) of all outbreak cases (221 / 39774) are due to places of worship.

Table 3: Places of worship account for 0.1% (5 / 3460) of all outbreak associated hospitalizations.

Table 3: Places of worship account for 0% (0 / 3681) of all outbreaks associated deaths.

30. My observation and belief is that these times of isolation, due to the government’s restrictive actions, have harmed people and society by perpetuating loneliness, hopelessness, fear, poverty, division, anger, the deterioration of relationships, and a plethora of other evils which will become more evident with time. These observations do not surprise me because the restrictive actions of the government have wrongfully reduced human beings to biological units with little purpose to existence other than to avoid contracting and spreading a virus.
31. Scripture teaches us that people are much more than biological units. We are created in the image of God with dignity and worth to live free, love one another, worship together, grow families, eat with each other, laugh and cry together, embrace one another, exchange goods and services, and build things. Central to the Christian life is the ministry of the church, and TBC asserts that the church must remain open.

The Government’s Response – Charges and Contempt

32. On December 30, 2020, I, along with five other church leaders, Will Schuurman, Dean Wanders, Randy Frey, Harvey Frey and Daniel Gordon, were issued summonses to attend court on the charge of “being an owner/occupier of the said premises did host

or organize at prescribed premises being a place of worship and the number of people in attendance exceeded the number permitted contrary to s. 10.1 of the *Reopening Ontario Act* Ontario Regulation 82/20 Schedule 4 s. 1(d)” (“the *Act*”).

33. On January 6, 2021, Pastor Will Schuurman and I were issued two summonses each for a service held on January 3, 2021, on charges of “attended gathering of more than 10 people for the purposes of a religious service, rite or ceremony contrary to the *Act*,” and “host a gathering at a prescribed premises where the number of people in attendance exceeded the number permitted under a continued s. 7.0.2. contrary to the *Act*, section 10.1(1).”
34. Four other church elders, Dean Wanders, Randy Frey, Harvey Frey and Daniel Gordon, as well as Trinity Bible Chapel, also received summonses to attend court on the charge of “Host a gathering at a prescribed premises where the number of people in attendance exceeded the number permitted under a continued s. 7.0.2. contrary to the *Act*, section 10.1(1).” These charges also related to the service on January 3, 2021.
35. On January 7, 2021, we received a letter from counsel to the Attorney General of Ontario (the “**AG**”), threatening to bring a Section 9 Application under the *Act* to restrain TBC and anyone acting on its behalf from contravening Regulation 82/20 unless we provided an undertaking that there would be no further gatherings in excess of ten people at TBC.
36. Despite serious reservations and acting against our consciences, we undertook not to have any further gatherings at TBC in excess of ten people until January 23, 2021, which was the end of the scheduled second lockdown date. We abided by that undertaking.
37. Unfortunately, the goalposts moved again. On January 14, 2021, Premier Doug Ford issued a “stay-at-home order”, following a declaration of a “state of emergency”, extending the second lockdown to at least February 11, 2021.
38. On January 15, 2021, we received a second letter from the AG, once again threatening to bring enforcement proceedings unless we provided a second undertaking that there

would be no further gathering in excess of ten people at TBC until at least February 11, 2021.

39. After much deliberation among our church elders, we decided that we were no longer able to provide undertakings not to have in-person services because to do so deeply violates our sincerely held Christian beliefs and would sear our consciences. Furthermore, as indicated above, the gross interference with our essential communal religious practices was harmful to our parishioners on many levels. On January 21, 2021, we informed counsel to the AG through our lawyer that we would not be signing any further undertakings.
40. A motion was brought by the AG with a return date of the following day, January 22, 2021, at which time the Order of the Honourable Mr. Justice P.R. Sweeny was made, restraining TBC and those associated with it from violating Ontario Reg. 82/20 by holding gatherings of more than 10 persons in conjunction with the operations of the church.
41. We subsequently held two in-person services on January 24, 2021. Although some in the media have been critical of our decision, I have received many dozens of heart-felt emails and letters from people who either attended, or wished they could have attended, or who aren't even Christian but expressed a renewed bond with the church. We did what we set out to do – we shared hope and love with an oppressed and psychologically-ravaged community.
42. Following those services, Pastor Schuurman and I each received two more summonses to court, and the other elders and TBC each received one.
43. The AG brought an immediate motion for contempt, which was heard on January 27, 2021. We were found in contempt by Justice Sweeny of his order. Pending sentencing, scheduled for February 11, and feeling pressured by the weight of the state against us, we expressed a willingness through our lawyer to refrain from opening our facility for in-person services temporarily, and did in fact hold drive-in services only on January 31 and February 7, 2021.

51. On April 14, 2021, we were served through our lawyer with a second Motion for Contempt by the AG, for the services held on April 4 and 11.
52. On April 15, 2021, Waterloo Region by-law officers visited our church to hand deliver two new summonses to appear in court. One summons was for Trinity Bible Chapel, and the other summons was for me. This was the church's fourth summons. Each summons to the church carries a maximum penalty of \$10 million. This was my seventh summons. Each summons to me carries a maximum penalty of \$100,000 and one year in jail.
53. On April 15 and 16, 2021, our staff packed up our church offices because we faced a hearing on April 16 to have us locked out of our facility. The anticipation and the result of this action created stress to our staff and hindered our ability to provide pastoral care to our congregation.
54. The AG's motion was set for April 16, 2021, at which time the contempt hearing was adjourned and the AG's interim injunction request to lock the doors was denied, since there was a lack of clarity over whether the original order (limiting us to 10 persons) was still in effect.
55. After Justice P.R. Sweeny's oral ruling on April 16, while we were still in Zoom court, the AG brought a motion without notice for a new enforcement order. Justice Sweeny made a further Order pursuant to s. 9 of the *ROA*, mandating, in essence, that TBC and those connected with the church be restrained from contravening the maximum size of gathering as permitted from time to time under various regulations for the purpose of a religious service, rite or ceremony.
56. Subsequently, the entire province was placed again under a "shutdown" order, and as of April 19, 2021, and continuing to date, places of worship are again restricted to a maximum of ten persons inside the building, regardless of capacity limits.
57. Our congregation continued meeting but were impeded by the presence of police and/or by-law enforcers near our property. On April 25, several members of our congregation were charged for attending church. We have been under constant threat

of more summonses, more fines for contempt, potential jail time, and being locked out of our church indefinitely. The stress on our leaders, parishioners and volunteers, as law-abiding citizens, cannot be overstated.

58. On April 30, 2021, a new contempt motion was brought to court, based on the order of April 16. An interim injunction was granted to lock the church doors, even though we did not have an opportunity to file responding materials or cross-examine the AG's witnesses.
59. The following day, on May 1, the church doors were locked by the Sheriff. I went to the parking lot that afternoon, with a small informal group of people (about 30), and we prayed and sang outdoors. I received two new charges for organizing and hosting an illegal gathering. A number of our parishioners were also charged. There were so many cruisers and unmarked vehicles observing I could not easily count them all.
60. On May 6, 2021, that injunction was continued by Justice Krawchenko, pending a return to at least 30% capacity for religious gatherings. Further sentencing for contempt has been scheduled for July, 2021.
61. We now have more than 30 charges before the courts, and we are facing maximum penalties of over \$40 million with jail time, plus a further contempt penalty. We were continually monitored by bylaw officials and/or police, who attended many Sundays and parked near our church to count heads and intimidate worshipers. Police have driven by my home (at the end of a dead-end street), which is something I have not previously observed. I believe that this is to intimidate my family and me.
62. To say that our Charter-guaranteed freedoms to worship, assemble, associate, and express ourselves have been infringed is an understatement.
63. Additionally, we have been targeted relentlessly in the media, faced threats from members of the public, and even our lender has frozen our line of credit and has reminded us that they can call our loan anytime. When we took out our loan, we agreed to abide by the law of the land as part of our lending agreement. We are a church, and

Tab D – *Reply Affidavit of Dr. Richard Schabas*, July 23, 2021

Kitchener Court File No.: CV-21-00000095-0000
St. Thomas Court File No.: CV-21-08

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE ATTORNEY GENERAL OF ONTARIO

Applicant (Responding Party)

-and-

**TRINITY BIBLE CHAPEL, JACOB REAUME, WILL SCHUURMAN, DEAN
WANDERS, RANDY FREY, HARVEY FREY and DANIEL GORDON**

Respondents (Moving Parties)

A N D B E T W E E N:

HER MAJESTY THE QUEEN IN ONTARIO

Applicant (Responding Party)

-and-

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

Respondents (Moving Parties)

AFFIDAVIT OF DR. RICHARD SCHABAS
(Sworn July 23, 2021)

I, **RICHARD SCHABAS**, of the City of Toronto in the Province of Ontario, MAKE
OATH AND SAY:

a long way to explaining the dysfunctional decision-making of Ontario public health.

6. Dr. Hodge's argument that Ontario has insufficient hospital beds to deal with Covid does not stand even rudimentary scrutiny. Ontario had almost 25,000 acute care hospital beds available for use as of April 2020.¹ At no point in the pandemic have Covid patients occupied even 10% of this number.² The maximum bed census for Covid-19 (2360 beds on April 20, 2021) was far less than the extra surge capacity (4205 beds) available in April 2020. One can only hope that the Ontario government, considering its concerns about health care capacity, has further enhanced this capacity in the past year. Dr. Hodge's threat of a "health system in which every available bed is occupied by someone infected with COVID-19" should be viewed in this context.
7. Dr. Hodge compares Ontario's overall mortality rate to three other jurisdictions with higher mortality (Sweden, Brazil and Florida) and attributes the difference to Ontario's interventions. This is common practice for defenders of lockdown. The world is a very large place, and it is easy to find anecdotal examples to support both sides of any argument.
8. Ontario and Canada as a whole have had low Covid mortality compared to most European countries, the United States or South America. The reasons for this are unclear. Ontario has indeed had lower Covid mortality than some jurisdictions that have been less coercive with Covid, but it has also had much lower mortality than many jurisdictions in Europe and the United States that have used more severe coercive measures.³ We need look no further than Canada to see the paradox. British Columbia has been consistently less aggressive than Ontario with Covid control measures and yet has a mortality rate (352/million population) that is 55% lower than Ontario's (638/million population). At the present time there are no restrictions at all for religious services in British Columbia. And Quebec, which employed some of the most stringent measures of all has a death rate (1,321/million population) more than twice as high as Ontario.⁴

**Tab E - *Transcript of Cross-
Examination of Dr. Richard Schabas,***
Dec 10, 2021

The Attorney General of Ontario v. Trinity Bible Chapel et al.

RICHARD SCHABAS
on Friday, December 10, 2021



77 King Street West, Suite 2020
Toronto, Ontario M5K 1A1

neesonsreporting.com | 416.413.7755

Court File No. CV-21-00000095-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE ATTORNEY GENERAL OF ONTARIO

Applicant (Moving Party)

- and -

TRINITY BIBLE CHAPEL, JACOB REAUME, WILL SCHUURMAN,

DEAN WANDERS, RANDY FREY, HARVEY FREY and

DANIEL GORDON

Respondents (Responding Parties)

---This is the Cross-Examination of RICHARD SCHABAS,
on his affidavit dated May 29, 2021, taken remotely
through the offices of Neesons, A Veritext Company,
Suite 2020, 77 King Street West, Toronto, Ontario, on
the 10th day of December, 2021.

1 community and it will provide a substantial measure of
2 individual protection.

3 82. Q. And so if a substantial number of
4 those individuals are protected, and either don't have
5 COVID or you know are symptomatic or capable of
6 spread, they may not be symptomatic for a shorter
7 period of time, there's going to be less people you're
8 going to run into who are capable of giving you COVID;
9 would that not be true?

10 A. If you were with people who are
11 infected with COVID the less likely you are to run
12 into somebody who's infected with COVID, that's true.

13 83. Q. I think you actually just mentioned
14 this, but you have a higher risk of contracting
15 COVID-19 indoors than outdoors?

16 A. Oh, yeah, there's very good
17 evidence of that. The -- this goes way back to Wuhan.
18 The risk of contracting COVID-19 outdoors is -- is --
19 is quite trivial. It's a disease like any respiratory
20 virus that's primarily spread indoors.

21 84. Q. And of course, "trivial" is not
22 zero, but it is much lower than indoors.

23 A. There are very few zeros in the
24 natural world, so it's not zero.

25 85. Q. And so the more people who are

**Tab F - *Transcript of Cross-
Examination of Dr. Zain Chagla*, Dec.
14, 2021**

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO,

APPLICANT (RESPONDING PARTY),

AND

TRINITY BIBLE CHAPEL, JACOB REAUME, WILL SCHUURMAN,
DEAN WANDERS, RANDY FREY, HARVEY FREY, and DANIEL
GORDON,

RESPONDENTS (MOVING PARTIES),

AND BETWEEN

HER MAJESTY THE QUEEN IN ONTARIO,

APPLICANT (RESPONDING PARTY)

AND

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

RESPONDENTS (MOVING PARTIES)

CROSS-EXAMINATION OF
DR. ZAIN CHAGLA

TUESDAY, DECEMBER 14, 2021
10:05 A.M.

CORPORATE
NORTH YORK
802-4950 Yonge Street
North York, Ontario
M2N 6K1

TORONTO
401-1 University Avenue
Toronto, Ontario
M5J 2P1

MISSISSAUGA
401-50 Burnhamthorpe Rd W
Mississauga, Ontario
L5B 3C2

MARKHAM
101-8500 Leslie Street
Markham, Ontario
L3T 7M8

HAMILTON
1 Hunter Street E
Ground Floor
Hamilton, Ontario
L8N 3W1

TELEPHONE
416.512.2662
FACSIMILE
416.512.2664

WWW.COURTREPORTERS.CA
PCR@COURTREPORTERS.CA

APPEARANCES**ON BEHALF OF THE APPLICANT (RESPONDING PARTY),
THE ATTORNEY GENERAL OF ONTARIO & HER MAJESTY THE
QUEEN IN ONTARIO:**

JOSHUA HUNTER, MR.
DANIEL GUTTMAN, MR.
RYAN COOKSON, MR.
MAIA STEVENSON, MS.

THE ATTORNEY GENERAL OF ONTARIO

CIVIL LAW DIVISION, CONSTITUTIONAL LAW BRANCH
720 BAY STREET, 4TH FLOOR
TORONTO, ONTARIO, M7A 2S9
TELEPHONE: 416.908.7465
FACSIMILE: 416.326.4015
EMAIL: JOSHUA.HUNTER@ONTARIO.CA
DANIEL.GUTTMAN@ONTARIO.CA
RYAN.COOKSON@ONTARIO.CA
MAIA.STEVENSON@ONTARIO.CA

**ON BEHALF OF THE RESPONDENTS (MOVING PARTIES),
TRINITY BIBLE CHAPEL, JACOB REAUME, WILL SCHUURMAN,
DEAN WANDERS, RANDY FREY, HARVEY FREY, and DANIEL
GORDON, THE CHURCH OF GOD (RESTORATION) AYLMER, HENRY
HILDEBRANDT, ABRAM BERGEN, JACOB HIEBERT, PETER
HILDEBRANDT, SUSAN MUTCH, ELVIRA TOVSTIGA, and TRUDY
WIEBE:**

ROB KITTREDGE, MR.
HATIM KHEIR, MR.

LAW OFFICES OF ROB KITTREDGE

1200 BLOOR STREET WEST
TORONTO, ONTARIO, M6H 1N2
TELEPHONE: 416.625.2293
FACSIMILE: 647.931.5263
EMAIL: RKITTREDGE@JCCF.CA

ALSO APPEARING:

SEAN KISSICK, MR., OBSERVER

1 that are asymptomatic could have COVID-19, but not be
2 captured in these numbers.

3 14. Q. We have expert testimony in this case to the
4 effect that 90 per cent of COVID-19 cases in Ontario
5 are confirmed by testing and are included in the
6 provinces confirmed case count.

7 In other words, daily confirmed case
8 statistics at this point capture all but about ten per
9 cent of the cases in the general population.

10 Do you disagree with that assessment?

11 A. I would disagree with that. I mean if you
12 look at the seroprevalence data prevalence surveys,
13 you know, across the region, we're talking about, you
14 know, I think the last Canada seroprevalence data
15 prevalence survey was ten to 15 per cent of the
16 population that had described antibodies. And this is
17 around wave 3 from what I recall.

18 So, you know, it would be less than what
19 would be described here. And certainly, in my
20 clinical experience, again, you know, there are people
21 that are diagnosed with COVID-19, where there's a
22 cluster at home that have it, that have not been
23 diagnosed and -- and it's only because one has ended
24 up in hospital that we've figured out that there's
25 more cases behind them in that sense.

1 So, I would suspect, you know, there is a
2 discrepancy well more than ten per cent here, in terms
3 of the number of cases that have actually occurred in
4 Ontario.

5 15. Q. And based on your experience what --
6 approximately what percentage of the total number of
7 cases do you believe are captured by testing?

8 A. Yeah, I mean it varies based on where we are
9 in the waves. If there's a lot of cases in the
10 community, then it likely means there's a lot more
11 people that are undiagnosed in the community in that
12 sense. And if there's very little transmission in the
13 community, there's more chance of capturing those
14 cases.

15 But again, you know, somewhere between one
16 to two, to one to three would probably be a rough
17 estimate of the number of cases that are represented
18 by positives as compared to what likely the burdens
19 are in the community.

20 16. Q. So, you're saying that there's likely three
21 cases that are not captured by testing for every one
22 case that is?

23 A. Yeah, and that's considered pretty good in
24 Ontario. I mean globally it's even worse than that.
25 But having more access to testing, more people are --

1 can get testing in Ontario.

2 17. Q. So, you'd say rather than 90 per cent of
3 cases being caught, you'd say 25 per cent of cases are
4 caught.

5 A. Yes, I mean somewhere between 25 and 50 per
6 cent. Again, it varies based on where we are. So,
7 you know, for example at the worst of the third wave,
8 we probably would suggest there were, you know, lots
9 of people that were being captured because testing was
10 hard to come by. And so, all of those measures would
11 be there.

12 And, you know, at the best of our kind of
13 post lockdown periods we're probably capturing, you
14 know, in the 60, 70 per cent range. But it averages
15 out, I think, to 25 to 50 per cent.

16 18. Q. Okay. So, that's a pretty big difference,
17 90 per cent to 25 per cent. Would you agree that
18 understanding rates of testing versus overall rates of
19 infection in the population, at least in approximate
20 terms, is fundamental to understanding and assessing
21 the severity of the COVID-19 pandemic?

22 A. Yeah, absolutely.

23 19. Q. Would you doubt that COVID expertise of an
24 infectious disease doctor who believes that testing
25 captures 90 per cent of cases?

1 A. Yeah, I mean, I think, again, from real
2 world experience it's not -- we're not capturing every
3 case. So, you're not even close to 90 per cent. You
4 know, they're a lot of people who do not get tested.
5 And it is the reality of the situation.

6 20. Q. Okay. Dr. Matthew Hodge was the expert who
7 provided this testimony. Do you know Dr. Hodge?

8 A. Not personally.

9 21. Q. Dr. Hodge was the co-lead for epidemiology
10 and surveillance activities within the incident
11 management system structure of the health protection
12 division of the PHO, from November 2020 until April
13 9th, 2021.

14 Does it seem possible to you that someone
15 with Dr. Hodge's experience actually believes that
16 testing captures 90 per cent of cases in the
17 community?

18 A. Ah, I mean, I presume he looks at a data set
19 that's different than what I have access to.
20 Obviously, he may see different things than I do.
21 But, you know, again as an on-the-ground clinician,
22 you -- there are groups that I know that are
23 uncaptured by testing. And we're seeing many of them
24 every day.

25 22. Q. So, would you agree that claiming that 90

1 per cent of cases in the general population are
2 captured by testing, is a false statement?

3 A. Yeah, I would -- I would suspect looking at
4 seroprevalence data prevalence data it's much less
5 than that.

6 23. Q. So, Dr. Hodge was -- was wrong on this
7 point?

8 A. Again, for my opinion, I think we're not
9 capturing as many people with testing as we think we
10 are. And, again, the data from looking at blood
11 donors, and that type of thing, would suggest that
12 it's low -- I mean it's not -- there are more people
13 identified in those types of surveys than we have in
14 terms of cases.

15 24. Q. So, Dr. Hodge was wrong on this particular
16 point?

17 A. I mean for my opinion, yeah, I don't we
18 captured 90 per cent of cases. I don't think we --
19 under even 50 per cent.

20 25. Q. And not just a little bit wrong, but very
21 wrong.

22 A. Yeah, and again, that -- that goes back to
23 behaviour and testing. But, yes, I don't think we
24 capture 90 per cent of cases by any means.

25 26. Q. Okay. I'd like to direct your attention

1 why outdoor playgrounds were considered bad to begin
2 with, especially once we realized this wasn't a fomite
3 disease.

4 84. Q. So, would you agree that by July 8th, 2020,
5 it was commonly known that COVID-19 isn't a fomite
6 disease?

7 A. Yeah, that it didn't play a large role in
8 transmission, especially in the community.

9 MR. KITTREDGE: So, I'll stop
10 sharing that. And Josh, I am just going to mark all
11 of these tweets that I am going to show at the end of
12 the cross-examination. So, they'll come as a
13 collection unless you have any objection to that?

14 MR. HUNTER: That's fine, unless
15 of course there's any we find objectionable, which
16 we'll let you know at the time.

17 MR. KITTREDGE: Sure, okay.
18 (WHEREUPON Exhibit B : Collection of tweets from Dr.
19 Zain Chagla.)

20 BY MR. KITTREDGE:

21 85. Q. The SARS-coV-2 virus is generally
22 transmitted by respiratory droplets and aerosols
23 expelled by an infected person; is that correct?

24 A. Correct.

25 86. Q. And transmission is much, much more likely

1 indoors than outdoors, is that correct?

2 A. Correct.

3 87. Q. In fact, at least 99.9 per cent of cases are
4 the result of indoor transmission, isn't that true?

5 A. Yeah, I -- I know there was one study out of
6 Ireland that suggested that 1 in 100,000 was outdoors
7 versus indoors.

8 88. Q. Right.

9 A. So ---

10 89. Q. Well, that's a ---

11 A. Yeah.

12 90. Q. That's a very small number. And why do you
13 think that is?

14 A. Ah, I mean the outdoors has the -- you know,
15 as we talk about ventilation as a particular mechanism
16 for mitigating COVID spread, the more air that's
17 exchanged, the more the air that's diluted basically
18 means less of particularly those small aerosols that
19 are hanging out in the air. And, you know, the
20 outdoors is essentially pure air dilution, in the
21 sense that you're exchanging air every second of the
22 day basically.

23 91. Q. Right. I am going to -- I have sent a
24 couple of documents to you via Josh.

25 A. Yeah.

1 92. Q. And I'd like you to open the document called
2 Why we Need to Change the Narrative on Outdoor
3 Transmission thestar.pdf.

4 A. Just give me one second here.

5 93. Q. Sure.

6 A. Let me -- sorry, literally every five
7 seconds there's an email, so I have to ---

8 94. Q. I am familiar with the feeling.

9 A. Yeah, yeah, okay. So, this is an article
10 that myself that Dr. Chakrabarti and Heidi Tworek
11 wrote in April of 2021.

12 95. Q. Great. Can you read the date of the -- the
13 date it was published for me, please?

14 A. Yeah, April 12th, 2021.

15 96. Q. All right. And can you read the first
16 highlighted sentence fragment there?

17 A. Outdoor activity is generally safe whether
18 there are ten cases a day or 10,000, even with
19 variants of concern.

20 97. Q. And that was your opinion at the time you
21 wrote this?

22 A. Yeah.

23 98. Q. And is that your opinion now?

24 A. Yeah, still with that mitigated outdoor
25 transmission is safe in that sense.

1 99. Q. All right, and can you scroll down a little
2 bit and read the second highlighted sentence fragment?

3 A. Being, ah -- being outdoors is much safer
4 and may prevent transmission indoors.

5 100. Q. And when you say it may prevent transmission
6 indoors, what do you mean by that?

7 A. Yeah, I mean I think the context of that
8 article was in April when outdoor activity was largely
9 being discouraged a little bit, or people were talking
10 much more about the risk of outdoor transmission.

11 And, you know, counterfactual was, you know,
12 if you're not giving people the ability to interact in
13 a safe manner, and doing it outdoors versus indoors,
14 you may be pushing them indoors. Which is the
15 opposite of what we would want to do. We would want
16 people to embrace, you know, mitigation outdoors as
17 compared to indoors. And be able to use that
18 appropriately.

19 101. Q. So, restrictions on outdoor gatherings could
20 have the effect of increasing COVID transmission;
21 would you agree with that?

22 A. Yeah, I mean especially in April when --
23 when things were so restricted. Again, the opinion of
24 that article was really that, you know, we -- we
25 should allow for outdoor activity a little bit more

1 freely to really use that as our mitigation technique.
2 102. Q. Some outdoor activities, like for example
3 using playground equipment might be more risky if
4 fomites were a significant COVID transmission factor,
5 would you agree with that?

6 A. Yes. If it was a real, real concern, then
7 certainly playgrounds would have been an issue. But
8 clearly it wasn't with this.

9 103. Q. But as we discussed it's been well known
10 that fomites weren't an issue since at least July of
11 2020; is that correct?

12 A. Absolutely. And again, outdoor equipment
13 has other issue -- even viral infections on outdoor
14 equipment, there's UV lights, there's temperature
15 issues, and so it's not as simple even as saying --
16 even if there was fomite infect -- fomite issues that
17 outdoor play equipment would be even then a
18 significant cause.

19 104. Q. Right. Would you agree that NPI's which
20 limited outdoor activities and gatherings did little
21 or nothing to control the spread of COVID-19?

22 A. I think there may have some justification
23 for ones that involved significant capacity. So, when
24 you have lots of people that were enclosed is very
25 small outdoor spaces, there may have still been a risk

1 of transmission there. But certainly, you know,
2 outdoor activities where people could appropriately
3 physical distance, probably were reasonable to do
4 throughout the pandemic.

5 105. Q. Would you agree that NPI's which limited
6 outdoor activities and gatherings may have, in fact,
7 had the opposite effect, that is to say that might
8 have contributed to the spread of COVID-19?

9 A. Yeah, I mean I think being liberal about the
10 outdoors was -- was certainly a -- a messaging issue.
11 And again, this is justification for that article.
12 There were many jurisdictions that kept an outdoor
13 facing presence and actually encouraged it.

14 And, yeah, it -- if people can be given the
15 instructions on how to do an outdoor gathering
16 appropriately, and be able to do it appropriately, you
17 know, it -- it could certainly help with mitigating
18 some of the human needs for, you know, a gathering or
19 being with others.

20 106. Q. Right. And yet during the pandemic the
21 province has issued quite a few public health orders
22 which limited outdoor activities and gatherings,
23 right?

24 A. Yeah, there have been capacity limits
25 outdoors throughout the pandemic. There's been

1 certain activities that haven't been allowed. There's
2 been the need for masking when people have been close
3 contact outdoors. There's been shutdowns of outdoor
4 facilities like ski, parks, that type of thing.

5 107. Q. And there have been limitations on
6 attendance at outdoor religious services, isn't that
7 correct?

8 A. Yes, there have been gathering limits,
9 essentially for all outdoor activities, but including
10 religious gatherings.

11 108. Q. Right. And in fact, in late April 2021,
12 just about a week after the publication of this
13 article, the province issued public health orders that
14 severely limited outdoor gatherings and activities.
15 Isn't that right?

16 A. I don't know exactly. My timelines are
17 always a bit messed up. I know there was a -- a
18 moment where they really limited things like
19 playgrounds and that type of thing, in April, I don't
20 know the exact dates, but I think it was around the
21 time of this article.

22 109. Q. Right. And in -- in amongst those
23 restrictions, a number of outdoor activities were
24 banned, for example camping on Crown Land and in
25 provincial parks was banned; is that correct?

1 A. I be -- yeah, I remember that, yes.

2 110. Q. Golf courses were closed?

3 A. Yeah, I remember that.

4 111. Q. Pickle -- pickleball courts, whatever they
5 may be were closed ---

6 A. Closed, yes, exactly.

7 112. Q. Do you believe that these measures were
8 effective ways to control the spread of COVID-19?

9 A. No, I mean I think we could have given
10 people guidance in terms of what camping means in the
11 COVID-19 pandemic, i.e., you shouldn't be in a tent
12 together and you can distance yourself when you're
13 hanging out together outdoors, and that would largely
14 reduce the vast majority of risk.

15 And similarly, for, you know, a golf course
16 what the expectations are that people stay outdoors
17 for their golfing activity, that they distance while
18 they're on the course, that type of thing. So, yeah,
19 I -- I don't think, you know, large shutdowns of the
20 outdoors without guidance were necessarily reasonable
21 in that context.

22 113. Q. And do you think that these measures were
23 justified from a public health perspective?

24 A. I think there could have been a lot more
25 work. And we've seen in other jurisdictions that

1 outdoor gatherings were mitigated as compared to
2 closed. And again, that they -- you know, as you said
3 in that article, the worry was that if you start
4 restricting the outdoors more that you may,
5 unfortunately, push people indoors which is exactly
6 what we don't want.

7 So, I think there was an opportunity there
8 to try to enhance outdoors.

9 MR. KITTREDGE: Right, and I think
10 I may have overlooked marking that Toronto Star
11 article as an exhibit. Can I -- can the reporter
12 confirm whether I did that or not?

13 THE REPORTER: Counsel, the -- I've
14 listed your Exhibit A as a Public Health Ontario
15 summary from December 12th, 2021. B I've just put
16 loosely as collection of twitter screenshots, I am
17 assuming there is more to come.

18 MR. KITTREDGE: Yes.

19 THE REPORTER: You did not mark --
20 list or suggest a listing of another exhibit after
21 that.

22 MR. KITTREDGE: Great. Okay.
23 Let's -- this document that we -- that we identifies
24 as Toronto Star article by Dr. Chagla and others,
25 published on April 12th, 2021, I'd like to make that

1 as Exhibit, what would that be C?

2 THE REPORTER: That would indeed be
3 C, yes.

4 MR. KITTREDGE: All right, to the
5 Affidavit. And let's call it Toronto Star, Why We
6 Need to Change the Narrative on Outdoor Transmission.
7 Counsel, do you have any objection to
8 that?

9 MR. HUNTER: No.
10 (WHEREUPON Exhibit C : Toronto Star article April
11 12th, 2021.)

12 BY MR. KITTREDGE:

13 114. Q. All right, sorry about that Dr. Chagla, a
14 little absentmindedness on my part.

15 So, the orders that were put in place in
16 April of this year, 2021, also limited attendance at
17 outdoor religious gatherings to just ten people,
18 didn't they?

19 A. Ah, I don't have the orders off the top of
20 my head, but I believe there were gathering limits for
21 outdoors for outdoor religious gatherings. I don't
22 remember the exact numbers.

23 115. Q. Right. But does -- do you remember the
24 limit being something in the neighbourhood of ten
25 people. Does that sound ---

1 A. Yeah ---

2 116. Q. --- fair ---

3 A. --- I believe so. I believe so, yes.

4 117. Q. Yes. And that was on outdoor gatherings,
5 just to be clear.

6 A. Yes.

7 118. Q. And that limit was in effect until sometime
8 in June, wasn't it?

9 A. Yeah, I believe in June it was taken to 25.
10 So, yeah, I guess that was the baseline.

11 119. Q. Right. Attending an outdoor religious
12 service is generally safe whether there are ten COVID
13 cases a day or 10,000, isn't it?

14 A. Yeah, as long as people use their mitigation
15 techniques in terms of distancing appropriately, it
16 could be considered safe. Not zero risk, but
17 certainly much decreased risk from indoor gatherings
18 for sure.

19 120. Q. But you would characterize it as safe?

20 A. Yeah, I would -- you know, the -- I think if
21 you put all the mitigation techniques in there, then -
22 - then it would be considered safe from -- from that
23 standpoint.

24 121. Q. Okay. Do you think restricting attendance
25 at outdoor religious gatherings was an effective way

1 to control the spread of COVID?

2 A. I would say that as numbers go up, of people
3 at an event, the ability to make sure that mitigation
4 techniques are appropriate and audited and enforced,
5 gets harder and harder.

6 So, you know, if you could do it perfectly.
7 You know, make sure everyone's distanced, no one's
8 interacting. There's not much, you know, direct
9 contact from person-to-person, then, you know, you
10 could make those events work. But from a practical
11 standpoint, the more people that are out there, the
12 more chance that that you then breakdown some of those
13 barriers that help mitigate outdoor transmission.

14 122. Q. Right. It's not very hard to find enough
15 space to adequately distance ten people, is it?

16 A. No, I mean I think we can probably find that
17 in a parking lot or a park, or something along those
18 lines.

19 123. Q. I mean it's not very difficult for that
20 matter to find space to adequate -- adequately
21 distance 25 people or 50 people.

22 A. Yeah, no, I agree. Again, you just have to
23 have the space. And you have to have the audits, and
24 kind of the tools to make sure that people are doing
25 appropriately and correct it, if not.

1 124. Q. Right. And those restrictions on attendance
2 at outdoor religious gatherings may have actually
3 contributed to the spread of COVID, wouldn't you
4 agree?

5 A. I mean I obviously don't know what happened
6 as people wanted to congregate religiously, whether or
7 not they did it virtually or in their own homes, or
8 otherwise. But certainly, you know, for things like
9 social gatherings, I think, you know, there was always
10 a worry for all of us that people didn't use the
11 outdoors and then came indoors and kind of just didn't
12 need their tools anymore, because they didn't find
13 anyway to do them appropriately.

14 125. Q. So, it is possible that the religious
15 gathering restrictions on outdoor gatherings
16 contributed to the spread of COVID?

17 A. Yeah, if people came indoors to do their
18 gatherings, you know, against the provincial rules,
19 then -- then, you know, technically that would be a
20 high-risk scenario.

21 126. Q. Right. I am once again going to share my
22 screen with another in the series. Can you see that
23 image?

24 A. Ah, yeah.

25 127. Q. And do you recognize that image?