

St. Thomas Court File No.: CV-21-08  
Kitchener 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  
(Respondent on Motion)

-and-

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

Respondents  
(Moving Parties)

-and-

**THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA**  
Intervener

A N D B E T W E E N:

**HER MAJESTY THE QUEEN IN ONTARIO**

Applicant  
(Respondent on Motion)

-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)

-and-

**THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA**  
Intervener

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**FACTUM OF THE ATTORNEY GENERAL OF ONTARIO**

**(Motion Returnable January 31, 2022)**

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**AND TO: THE ASSOCIATION FOR REFORMED  
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**TABLE OF CONTENTS**

PART I – OVERVIEW ..... 1

PART II – FACTS..... 2

A. Ontario’s Experts..... 2

B. The Public Health Emergency Caused by COVID-19 ..... 3

C. The Risk Factors for COVID-19 Transmission..... 6

D. In-Person Religious Gatherings Pose a Risk of COVID-19 Transmission ..... 10

E. The Gathering Limits for Religious Gatherings Were Less Restrictive Than Those for Other Gatherings ..... 12

F. The Applicants..... 15

PART III – ISSUES AND LAW ..... 19

A. Most of the Gathering Limits Did Not Infringe Freedom of Religion ..... 19

B. The Gathering Limits Do Not Infringe Freedom of Expression ..... 22

C. The Gathering Limits Do Not Infringe Freedom of Assembly ..... 24

D. The Gathering Limits Do Not Infringe Freedom of Association ..... 26

E. The Gathering Limits are Reasonably Justified Under Section 1 ..... 26

(1) Deference Should Be Shown to Ontario’s Response to a Global Pandemic ..... 26

(2) The Gathering Limits Further a Pressing and Substantial Objective ..... 29

(3) The Gathering Limits are Rationally Connected to Ontario’s Objective... 31

(4) The Gathering Limits are Minimally Impairing ..... 33

(5) The Gathering Limits’ Benefits Outweigh Any Deleterious Effects ..... 39

PART IV – ORDER REQUESTED..... 40

SCHEDULE A – AUTHORITIES CITED ..... 42

SCHEDULE B – LEGISLATION CITED..... 44

## PART I – OVERVIEW

1. COVID-19 is a highly contagious and potentially deadly respiratory disease that has caused the worst global pandemic in over a century. In Ontario alone, even with stringent public health measures, more than 10,000 people have died due to COVID-19.
2. In-person religious gatherings, like other settings where people gather together for extended periods of time, pose a risk of COVID-19 transmission. To reduce that risk, save the healthcare system from being overwhelmed, and save lives, Ontario implemented public health measures (the “Gathering Limits”) that temporarily limited the capacity of religious gatherings when necessitated by the pandemic situation.
3. The constitutionality of the different Gathering Limits that applied at different times in the pandemic must each be assessed on their own merits. Merely imposing certain costs on religious practice such as having to hold multiple services does not infringe freedom of religion or peaceful assembly. None of the Gathering Limits prevented the Moving Parties from expressing themselves or associating with their co-religionists. Ontario concedes, however, that the most stringent Gathering Limits that temporarily limited the capacity of religious gatherings to 10 people or less limited the Moving Parties’ rights to freedom of religion.
4. At the time those more stringent measures were required, however, the situation was so dire that Ontario could not safely permit any additional risk of COVID-19 transmission from in-person gatherings without putting its healthcare system and the health and safety of its citizens in jeopardy. Any Gathering Limits that did restrict the Moving Parties’ *Charter* rights therefore were justified limits under s. 1 of the *Charter*.

## PART II – FACTS

### A. Ontario's Experts

5. Ontario tendered three expert public health witnesses:

- **Dr. David McKeown** was, until he retired in November 2021, the Associate Chief Medical Officer of Health for Ontario and a certified specialist in public health and preventative medicine in Canada and the United States. He has over 35 years of experience in public health, including 12 years as Medical Officer of Health for the City of Toronto, where he led local health responses to the H1N1 pandemic, a major outbreak of Legionnaire's disease, and Canada's first West Nile Virus outbreak.<sup>1</sup>
- **Dr. Matthew Hodge** is a certified specialist in public health and preventative medicine and an emergency physician at Scarborough General Hospital. He has a Ph.D. in epidemiology and biostatistics from McGill University and a master's degree in healthcare management from Harvard University. He has over 20 years experience in public health and preventative medicine.<sup>2</sup>
- **Dr. Zain Chagla** is an infectious diseases physician and Co-Medical Director of Infection Control at St. Joseph's Healthcare in Hamilton. He has authored 16 peer-reviewed papers on COVID-19 in the areas of epidemiology, testing, serological analysis, therapeutics, infection control and vaccine efficacy.<sup>3</sup>

6. The Moving Parties argue that Dr. Hodge's expertise is "in question" and that his evidence "should be given very little weight" because his responses to questions on

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<sup>1</sup> Affidavit of Dr. David McKeown ("McKeown Affidavit"), para. 1, Ontario's Record ("OR"), Vol. 1, Tab 1, Caselines B-1-16

<sup>2</sup> Affidavit of Dr. Matthew Hodge ("Hodge Affidavit"), paras. 1-2, OR, Vol. 1, Tab 3, Caselines B-1-501

<sup>3</sup> Report of Karim Ali and Zain Chagla ("Chagla Report"), para. 2.1, OR, Vol. 2, Tab 4, Caselines B-1-735-36

one issue – the number of unreported cases of COVID-19 in the community – is allegedly “not at all consistent with other expert testimony” of Dr. Chagla.<sup>4</sup>

7. There is no merit to this argument. The fact that two experts’ evidence is not perfectly consistent does not call either’s expertise into question. Experts disagree on issues within their field of expertise all the time. This is particularly true when dealing with a novel virus like COVID-19. As Dr. Chagla noted: “There’s been a lot of discrepancy [among public health experts] and it comes from different places and different kinds of clinical experiences...[so] not everyone agrees.”<sup>5</sup>

8. Moreover, the Moving Parties’ characterization of the purported inconsistency is, at best, exaggerated. Both experts agreed that the number of unreported cases is inherently uncertain and that different experts use different data when estimating the percentage of cases captured by testing.<sup>6</sup> Two experts giving different answers on such an uncertain topic is not surprising. Nor is it evidence of a lack of knowledge, skills, or experience. There is nothing in Dr. Hodge’s answers that undermines his expertise or warrants disregarding his 20 years of public health experience.

#### **B. The Public Health Emergency Caused by COVID-19**

9. Since March 2020, Ontario has been in the midst of a public health emergency caused by COVID-19, a highly contagious and potentially deadly respiratory disease that has caused the worst global pandemic in over a century.<sup>7</sup> Over 4 million people

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<sup>4</sup> Moving Parties’ Factum, paras. 90-91, Caselines A23

<sup>5</sup> Cross-Examination of Dr. Zain Chagla (“Chagla Cross”), Moving Parties’ Record (“MPR”), Vol. 12, Tab 18 p. 88, q. 253, Caselines A6774

<sup>6</sup> Chagla Cross, pp. 12, 14, and 88-89, qq. 15, 21, and 253-258, Caselines A6698, A6700, A6774-6775; Cross-Examination of Dr. Matthew Hodge (“Hodge Cross”), pp. 25 and 29-30, qq. 48 and 61, MPR Vol. 11, Tab 16, Caselines A7859 and 7863-64

<sup>7</sup> Chagla Report, Affidavit of Karim Ali and Zain Chagla (“Chagla Affidavit”), Ex. “A”, para. 3(a), OR, Vol. 2, Tab 4, Caselines B-1-737

have died of COVID-19 worldwide.<sup>8</sup> COVID-19 has killed over 30,000 people in Canada and over 10,000 people in Ontario alone, despite the stringent public health measures Ontario and other provinces have imposed.<sup>9</sup> As the Moving Parties admit, COVID-19 has resulted in far higher rates of hospitalization and death than influenza.<sup>10</sup>

10. COVID-19 can vary widely in its symptoms and outcomes, ranging from mild or even no symptoms to very serious complications leading to hospitalization and death.<sup>11</sup> Older people, particularly those over age 60, are at much higher risk of severe illness, but people of any age can develop serious and sometimes fatal complications from the disease.<sup>12</sup> Those with certain underlying medical conditions, such as heart disease, asthma or diabetes, are particularly vulnerable to COVID-19 and face a higher risk of hospitalization and death.<sup>13</sup> Some individuals will develop long-term symptoms from a COVID-19 infection, which are still not well understood.<sup>14</sup>

11. The highly transmissible nature of COVID-19 means that, without public health interventions, the virus can experience exponential growth and spread throughout the population very quickly. Even if only a small percentage of individuals who contract COVID-19 develop serious illness, a rapid increase in cases can quickly lead to

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<sup>8</sup> These figures were current as of the June 30, 2021: see Hodge Affidavit, para. 12, Caselines B-1-505.

<sup>9</sup> Chagla Cross, Ex. "F", Caselines A6866; see also Hodge Affidavit, para. 12, Caselines B-1-505

<sup>10</sup> Moving Parties' Factum, paras. 13-14, Caselines A6; In 2018/19, despite a longer-than-usual flu season with higher-than-average hospitalization, there were only 224 reported influenza deaths in Canada.

Chagla Cross, Ex. "E", Caselines A6857

<sup>11</sup> Hodge Affidavit, para. 11, Caselines B-1-504-505

<sup>12</sup> McKeown Affidavit, Ex. "KK", Caselines B-1-457; Cross-Examination of Richard Schabas ("Schabas Cross"), p. 47, qq. 121-122, MPR, Vol. 12, Tab 17, Caselines A6590; Cross-Examination of Thomas Warren ("Warren Cross"), p. 13, qq. 41-43, OR, Transcript Brief, Vol. 1, Tab 4, Caselines B-1-3077

<sup>13</sup> Cross-Examination of David McKeown ("McKeown Cross"), p. 18, q. 61, MPR, Vol. 11, Tab. 15, Caselines A7705; Schabas Cross, Ex. 4, p. 24, Caselines A6684

<sup>14</sup> McKeown Cross, p. 115, q. 378, Caselines A7802

thousands of patients being admitted to hospitals and intensive care units (“ICUs”), which risks overwhelming the healthcare system.<sup>15</sup>

12. Without sufficient beds, equipment or staff to treat severely ill patients, patient care would be jeopardized, leading to greater morbidity and death, including for patients who do not have COVID-19.<sup>16</sup> Once overwhelmed, the healthcare system would face a prolonged recovery period, as the diversion of resources to COVID-19 patients creates a backlog of other medical procedures. In an overwhelmed healthcare system, “the harms caused by COVID-19 would be compounded with additional preventable deaths.”<sup>17</sup>

13. The infectiousness and severity of COVID-19 placed an enormous burden on Ontario’s hospital system. One of Ontario’s experts described how “individual hospitals, essentially, had their backs to the wall. ... in Scarborough, we had a day where every emergency department bed, as I recall, was occupied by a COVID-infected person requiring hospital admission.”<sup>18</sup> Another stated that “the sheer number of people that have needed to be hospitalized from this virus in the last couple of years is – is different than any other respiratory viruses in the past.”<sup>19</sup>

14. Ontario took Herculean efforts to increase ICU capacity to meet the demands COVID-19 put on the health care system by building more ICU beds, halting elective surgery, redeploying healthcare staff into critical care units, transferring patients throughout the province to balance out hospitals dealing with surges, and drafting a

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<sup>15</sup> McKeown Affidavit, paras. 75-76, Caselines B-1-45; Hodge Affidavit, para. 16, Caselines B-1-507; Chagla Cross, p. 25, q. 52, Caselines A6711

<sup>16</sup> Hodge Affidavit, para. 16, Caselines B-1-507; McKeown Affidavit, para. 75, Caselines B-1-45

<sup>17</sup> Hodge Affidavit, para. 16, Caselines B-1-507

<sup>18</sup> Hodge Cross pp. 59-61, qq. 128, Caselines A7893-95

<sup>19</sup> Chagla Cross, pp. 92-93, q. 265, Caselines A6778-79



triage protocol which thankfully did not need to be implemented.<sup>20</sup> These efforts were not without their own cost and cannot be expanded without limit: surgeries were cancelled, diagnostic tests were postponed, patients were transferred far from their families and friends, and health care professionals burned out and left the profession.<sup>21</sup>

### **C. The Risk Factors for COVID-19 Transmission**

15. Because COVID-19 can spread rapidly through the population, reducing the risk of COVID-19 transmission is critical to protecting public health and preserving the healthcare system. The primary method of COVID-19 transmission is through direct contact with respiratory droplets or aerosols from an infected person. Transmission occurs predominantly as a result of close contact of 2 metres or less with an infected individual, although transmission can occur over longer distances.<sup>22</sup>

16. COVID-19 transmission is more likely when people are in close physical proximity for a prolonged period of time. The longer people gather in the same place, the more opportunity there is for potentially infectious respiratory particles to travel from one person to another. For example, there is a particularly high risk of transmission in household settings, where individuals are in close proximity for long periods and physical distancing is typically not feasible.<sup>23</sup>

17. Large gatherings present an especially high risk of COVID-19 transmission. The larger the gathering, the greater the likelihood that there will be individuals in that gathering who have COVID-19 and will transmit the virus to others. Furthermore, if

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<sup>20</sup> Chagla Report, para. 5(b), Caselines B-1-741; Chagla Cross, pp. 93-94, q. 266, Caselines A6779-80

<sup>21</sup> Hodge Cross, pp. 49-51 and 59-62, qq. 107-08 and 126-29, Caselines A7883-85, A7893-96; Chagla Cross, p. 94, q. 267, Caselines A6780

<sup>22</sup> McKeown Affidavit, para. 62, Caselines B-1-41; Hodge Affidavit, para. 18, Caselines B-1-508; Chagla Report, paras. 4(a) and (c), Caselines B-1-738-39

<sup>23</sup> McKeown Affidavit, para. 63, Caselines B-1-41; Hodge Affidavit, paras. 21 and 24, Caselines B-1-509, B-1-510-11

individuals who attend a gathering become infected, they will often transmit the virus to co-workers, customers, or other household members, including those who did not attend the gathering. As a result, large gatherings of people from different households significantly increase the risk of widespread transmission throughout the population.<sup>24</sup>

18. There is also a higher risk of transmission when individuals engage in certain behaviours that may cause respiratory particles to travel longer distances, such as coughing, sneezing, singing, talking or shouting. For example, studies show that singing has likely contributed to outbreaks of COVID-19 among church members.<sup>25</sup>

19. COVID-19 can be transmitted by people who are pre-symptomatic (i.e. have not yet developed symptoms) or asymptomatic (i.e. will never develop symptoms).<sup>26</sup>

Transmission risk is highest prior to the onset of symptoms, meaning that infected people will often unknowingly transmit the virus to others.<sup>27</sup> While younger individuals are less likely to develop severe illness, they can still transmit the virus to others, including to those who are more vulnerable to COVID-19.<sup>28</sup>

20. All of the experts in this proceeding – including the Moving Parties’ – agree with the prevailing scientific consensus that COVID-19 can be transmitted both indoors and outdoors, but the risk of transmission is higher indoors.<sup>29</sup> As Dr. McKeown noted,

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<sup>24</sup> McKeown Affidavit, para. 64, Caselines B-1-41-42; Hodge Affidavit, paras. 26 and 37, Caselines B-1-511, B-1-515-16

<sup>25</sup> McKeown Affidavit, para. 65, Caselines B-1-42; Hodge Affidavit, paras. 19 and 27, Caselines B-1-509-12; Chagla Report, paras. 4(d)-(f) and footnotes 8-9, Caselines B-1-739-43

<sup>26</sup> McKeown Affidavit, para. 66, Caselines B-1-42; Hodge Affidavit, para. 20, Caselines B-1-509

<sup>27</sup> Hodge Affidavit, para. 20, Caselines B-1-509

<sup>28</sup> McKeown Cross, pp. 115-16, q. 379, Caselines A7802-03; Warren Cross, pp. 13-14, qq. 43-44, Caselines B-1-3077-78

<sup>29</sup> McKeown Affidavit, paras. 63-64, Caselines B-1-41-42; Hodge Affidavit, para. 19, Caselines B-1-508-509; Chagla Cross, p. 44, q. 119, Caselines A6730; Warren Cross, p. 90, q. 308, Caselines B-1-3154; Schabas Cross p. 29, qq. 83-84, Caselines A7972

“outdoor activities are not risk free, they’re just lower risk than indoor activities.”<sup>30</sup>

Being outdoors reduces, but does not eliminate, the risk of transmission because it provides additional ventilation that dilutes infectious respiratory droplets in the air.

21. The Moving Parties cite the evidence of Dr. Chagla on outdoor transmission to support their argument that outdoor gatherings are “safe.”<sup>31</sup> To be clear, Dr. Chagla’s evidence is that COVID-19 *can* be transmitted outdoors, but being outdoors may “*mitigate* a lot of transmission.”<sup>32</sup> That is consistent with the evidence of Dr. McKeown and Dr. Hodge, who note that the risk of outdoor transmission is *lower* than the risk of indoor transmission, but is still possible and remains a significant risk.<sup>33</sup>

22. Furthermore, Dr. Chagla was clear that outdoor gatherings were safe only “if you put all the mitigation techniques in there.”<sup>34</sup> If, for example, individuals gathered outdoors close together, “the ventilation advantage of the outdoors is turned off by the fact that you [have]...broken down some of the barriers that lead to transmission.”<sup>35</sup> Dr. Chagla further noted that, as outdoor gatherings become larger, the ability to control the spread of COVID-19 becomes more difficult, as it is harder to ensure that people adhere to mitigation measures, like masking and physical distancing.<sup>36</sup>

23. Importantly, the risk of COVID-19 transmission in *any* setting – indoors or outdoors – is dependent on the prevalence of COVID-19 in the community. The more COVID-19 cases there are in the population, the more likely that people who attend a

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<sup>30</sup> McKeown Cross, p. 107, q. 348, Caselines A7794

<sup>31</sup> Moving Parties’ Factum, para. 11, Caselines A5

<sup>32</sup> Chagla Cross, p. 95, q. 270, Caselines A6781 [Emphasis added]

<sup>33</sup> McKeown Affidavit, paras. 63-64, Caselines B-1-41-42; Hodge Affidavit, para. 19, Caselines B-1-508-09

<sup>34</sup> Chagla Cross, p. 44, q. 120, Caselines A6730

<sup>35</sup> Chagla Cross, p. 95, q. 270, Caselines A6781

<sup>36</sup> Chagla Cross, pp. 44-45, q. 121, Caselines A6730-31

gathering will have COVID-19 and transmit it. Gatherings that pose a low risk of transmission when the community prevalence of COVID-19 is low pose a much higher risk of transmission when the community prevalence is high.<sup>37</sup>

24. Another significant risk factor is the degree of transmissibility of the virus itself, which has increased over time. Over the course of the pandemic, several variants of concern (“VOCs”) have been identified that are associated with factors such as increased transmissibility, increased virulence, and decreased effectiveness of public health measures designed to mitigate the spread of the disease. For example, the Delta variant is at least 50% more transmissible than the original COVID-19 virus.<sup>38</sup>

25. Wearing masks can help reduce, but not eliminate, the risk of COVID-19 transmission. For example, masks have been shown to be effective at reducing the spread of respiratory particles when worn by someone infected with COVID-19, but there is a high degree of variability in the effectiveness of masks depending on the mask’s design, the materials used to construct it, and how well the mask fits.<sup>39</sup>

26. Physical distancing can also help reduce spread of COVID-19, as transmission is most likely when individuals are within 2 metres. Transmission, however, can occur over longer distances, particularly when there is poor ventilation or individuals engage in behaviours more likely to generate droplets and aerosols.<sup>40</sup> The efficacy of such

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<sup>37</sup> McKeown Affidavit, para. 74, Caselines B-1-44-45; Hodge Affidavit, paras. 23 and 25, Caselines B-1-510-11

<sup>38</sup> McKeown Affidavit, paras. 77-80, Caselines B-1-45-47

<sup>39</sup> McKeown Affidavit, paras. 67-70, Caselines B-1-42-43

<sup>40</sup> McKeown Affidavit, para. 72, Caselines B-1-44

mitigation measures is “highly dependent on the degree to which participants strictly and uniformly adhere to those mandates,” which does not always occur.<sup>41</sup>

27. Many of these risk factors are not disputed by the Moving Parties’ experts. Dr. Richard Schabas agreed on cross-examination that “prolonged close contact” is “one of the fundamental ways in which COVID-19 is spread” and that “the more people who [are] present at a given venue at one time, the higher the risk of someone being there who has and can spread COVID?” Dr. Schabas also agreed that behaviours such as singing and talking loudly increase the risk of transmission and that an increase in community prevalence increases the risk of contracting COVID-19 at a gathering.<sup>42</sup>

28. The Moving Parties’ other expert witness, Dr. Thomas Warren, provided similar answers about COVID-19 transmission risk factors during his cross-examination.<sup>43</sup>

**D. In-Person Religious Gatherings Pose a Risk of COVID-19 Transmission**

29. All of the experts in this proceeding agree that religious gatherings involve several heightened risk factors for COVID-19 transmission.<sup>44</sup> Religious gatherings typically involve large gatherings of people from different households who arrive and depart at the same time and spend prolonged periods of time together in the same physical space. That is precisely the scenario that has been shown to increase the risk of COVID-19 transmission. The risk is especially high if physical distancing is not strictly observed (as happens more when attendees know each other and socialize), if the

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<sup>41</sup> McKeown Affidavit, paras. 69 and 73, Caselines B-1-43-44

<sup>42</sup> Schabas Cross, p. 28, 29-30, and 31, qq. 80, 85-86, and 89, Caselines A7971-74

<sup>43</sup> Warren Cross, p. 64-65, qq. 232-233, 306, 309, 310, and 311, Caselines B-1-3128-29 and 3154-55

<sup>44</sup> McKeown Affidavit, paras. 65 and 82-83, Caselines B-1-42 and 47-48; Hodge Affidavit, paras. 27, 41, and 45, Caselines B-1-511 and 517-19; Chagla Report, paras. 4(d) and 5(o), Caselines B-1-739 and 742; Hodge Cross, pp. 68 and 87-88, qq. 143 and 173, Caselines A7902 and 7922; McKeown Cross, p. 3311, q. 339, Caselines A7791; Schabas Cross, pp. 30-31, qq. 86-89, Caselines A7973-74; Warren Cross pp. 90-91, qq. 310-11, Caselines B-1-3154-55

services are held indoors or in poorly ventilated areas, or if masks are not worn consistently or correctly. It is also not uncommon for participants to sing or speak loudly, which further increases the risk of transmission.

30. COVID-19 transmission at religious gatherings is not just theoretical. Public Health Ontario has identified several dozen examples of COVID-19 outbreaks connected to places of worship in Ontario (59 as of June 18, 2021).<sup>45</sup> Dr. Hodge noted that, because it is often extremely difficult to identify the source of infections in any setting, that data likely significantly undercounts the actual number of outbreaks occurring at religious gatherings and the number of total cases caused by those outbreaks, especially for religious gatherings that do not keep contact details for those who attend.<sup>46</sup> Pastor Reaume admitted that it would be very difficult for Public Health to know if different COVID-19 cases were linked to Trinity Bible Chapel.<sup>47</sup>

31. While the risk of spreading COVID-19 is lower outdoors, outdoor gatherings are not risk free.<sup>48</sup> Many of the other risk factors for COVID-19 are still present. Outdoor religious gatherings still involve large groups of people from different households gathering together for long periods of time and, as Dr. Chagla noted, the larger the group, the more likely it is that the barriers that mitigate transmission outdoors will break down.<sup>49</sup> As with all gatherings, the risk of contracting COVID-19 outdoors increases as prevalence increases and as more transmissible VOCs become dominant.<sup>50</sup>

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<sup>45</sup> Hodge Affidavit, para. 28, Caselines B-1-512

<sup>46</sup> Hodge Cross, pp. 45 and 84-87, qq. 98 and 170-72, Caselines A7879 and 7918-21

<sup>47</sup> Cross-Examination of Jacob Reaume ("Reaume Cross"), pp. 27-28, qq. 81-87, MPR, Vol. 12, Tab 20, Caselines A7021-22

<sup>48</sup> McKeown Cross, p. 107, q. 348, Caselines A7794

<sup>49</sup> Chagla Cross, pp. 44-45, q. 121, Caselines A6730-31

<sup>50</sup> McKeown Affidavit, para. 74 and 77-80, Caselines B-1-44-47; Hodge Affidavit, paras. 23 and 25, Caselines B-1-510-11

**E. The Gathering Limits for Religious Gatherings Were Less Restrictive Than Those for Other Gatherings**

32. As the pandemic situation changed, Ontario has varied the stringency of the Gathering Limits. Throughout, religious gatherings have been permitted at the same or higher (often much higher) numbers than other gatherings. Ontario's approach to the pandemic has been informed by public health data and public health professionals. Ontario's priorities in deciding which measures to impose have included limiting the transmission of COVID-19, avoiding closures while reducing the risk of transmission, keeping schools and childcare open, maintaining health care and public health system capacity, protecting vulnerable populations, and providing additional support to those disproportionately affected by the pandemic.<sup>51</sup>

33. A detailed description of the various stages of Ontario's pandemic responses is set out in the affidavits of Dr. McKeown.<sup>52</sup> The strictest Gathering Limits were in place during the three declared provincial states of emergency.<sup>53</sup> Originally, the Gathering Limits applied on a province-wide basis. Since July 2020, however, they have been applied on a regional basis depending on the COVID-19 situation in each particular Public Health Unit ("PHU"). As the COVID-19 situation worsened or improved, different PHUs were moved to different levels of restrictions.<sup>54</sup>

34. The Gathering Limits that applied to religious and other gatherings throughout the pandemic in the Southwestern PHU (formally known as the Oxford Elgin St.

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<sup>51</sup> McKeown Affidavit, paras. 13-14, Caselines B-1-20

<sup>52</sup> McKeown Affidavit, paras. 4 to 54, Caselines B-1-17-38; Supplementary Affidavit of David McKeown, paras. 3-13, OR, Vol. 1, Tab 2, Caselines B-1-486-89

<sup>53</sup> [RSO 1990, c. E.9](#); [O.Reg. 50/20](#); [O.Reg. 7/21](#); [O.Reg. 264/21](#)

<sup>54</sup> McKeown Affidavit, paras. 8-13, Caselines B-1-18-20; see also the versions of [O.Reg. 363/20](#)

Thomas PHU) where the Aylmer Church of God is located and the Waterloo PHU where Trinity Bible Chapel is located are set out in compendia Ontario has prepared.<sup>55</sup>

35. Depending on the state of the pandemic at various times, different kinds of Gathering Limits were imposed on in-person religious gatherings:

<b>Indoor Religious Gatherings</b>	<b>Outdoor Religious Gatherings</b>
Capacity limits of 10 people or fewer.	Capacity limits of 10 people or fewer.
Capacity limit of 50 people.	Capacity limit of 50 people.
Capacity limits of 15%, 25%, 30%, or 50% of each room.	Capacity limit of 100 people.
Capacity limit of the number of people who can maintain 2 m distancing.	Capacity limit of the number of people who can maintain 2 m distancing.
No capacity limit but requirement to maintain 2 m distancing.	No capacity limit but requirement to maintain 2 m distancing.
No capacity limit if all attendees at a particular service provide proof of vaccination.	No capacity limit.

36. As well, during the second and third states of emergency when the pandemic situation was at its worst, both the Southwestern PHU and the Waterloo PHU were subject to stay-at-home orders that required all individuals to remain in their place of residence unless leaving for certain specified purposes. Attending religious gatherings was a specified purpose; attending a social gathering (except for individuals living alone gathering with one other household) or organized public event was not.<sup>56</sup>

37. During these states of emergency, COVID-19 cases and hospitalization were climbing rapidly, which placed an enormous burden on Ontario's healthcare system as hospitals and ICUs approached full capacity.<sup>57</sup> That is why indoor and outdoor religious gatherings were temporarily limited to a maximum of 10 people. As Dr. McKeown

<sup>55</sup> Compendium of Gathering Limits in Southwestern PHU ("Southwestern Compendium"); Compendium of Gathering Limits in Waterloo PHU ("Waterloo Compendium")

<sup>56</sup> [O.Reg. 11/21](#), Sch. 1, s. 1(1), items 24-25, and (7)-(8); [O.Reg. 265/21](#), Sch. 1, s. 1(1), items 24-25, and (7)-(8)

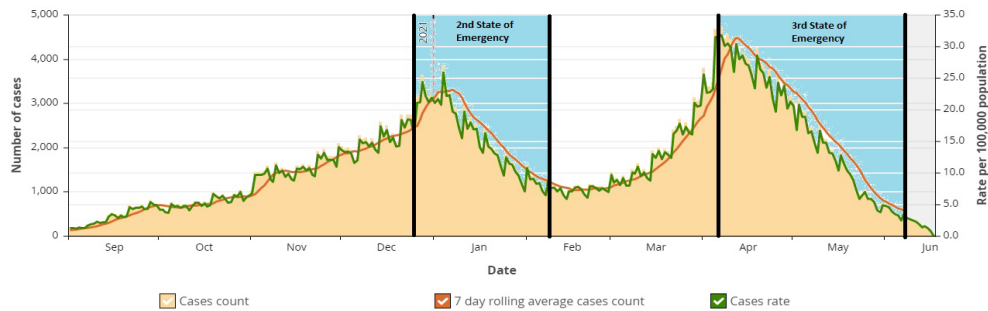
<sup>57</sup> McKeown Affidavit, paras. 36-37 and 93, Caselines B-1-29-30 and 53



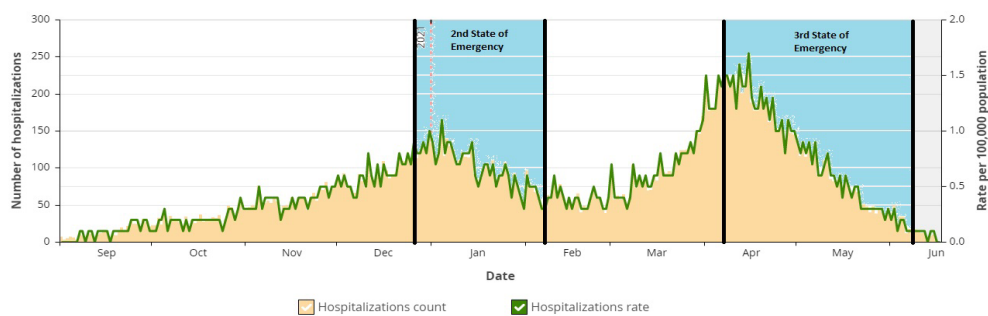
noted, “[t]he time periods with the lowest (or strictest) capacity limits corresponded to the time periods when the rate of COVID-19 transmission in the Ontario population and the burden on the Ontario healthcare system were at their highest levels.”<sup>58</sup>

38. The strict public health measures implemented by Ontario during the states of emergency had a significant impact on decreasing the transmission of COVID-19 across the province and reducing the strain on its healthcare system. They quickly led to cases and hospitalizations levelling off and starting to decline.<sup>59</sup>

COVID-19 daily case counts and rates by episode date in Ontario - September 1, 2020 to June 17, 2021



COVID-19 daily hospitalization counts and rates by episode date in Ontario - September 1, 2020 to June 17, 2021



39. Today, religious gatherings remain permitted at 50% capacity indoors and with no capacity limit outdoors, provided physical distancing is maintained.<sup>60</sup> On January 20, 2022, Ontario announced how the Gathering Limits will be loosened if conditions continue to improve. On February 21, 2022, indoor religious gatherings without proof

<sup>58</sup> McKeown Affidavit, para. 93, Caselines B-1-53

<sup>59</sup> McKeown Affidavit, paras. 55-59, Caselines B-1-38-40

<sup>60</sup> [O.Reg. 263/20](#), Sch. 3, ss. 4-5

of vaccination will be limited only to the number of people that can maintain physical distancing. On March 14, 2022, all capacity limits on religious services will be lifted.<sup>61</sup>

40. Throughout the pandemic, churches have been able to hold services online. Since May 16, 2020, churches have also had the option of holding drive-in services with unlimited numbers of people so long as each household remains in their vehicle.<sup>62</sup>

#### **F. The Applicants**

##### Trinity Bible Chapel:

41. Trinity Bible Chapel is a church in Waterloo.<sup>63</sup> It has a sanctuary with a capacity of 575 people and a gymnasium with a capacity of 250 people. It offers online services to its parishioners so they can worship from home if they choose to do so.<sup>64</sup>

42. Trinity Bible Chapel teaches and its leaders believe that “when government edicts contradict God’s commands, Christians must obey God over government.”<sup>65</sup> Pastor Reaume believes that people are entitled to make their own health decisions without government compulsion and that the government should not be able to regulate whether people smoke at the office or make it a crime to drive while impaired.<sup>66</sup>

43. As demonstrated by ample photo and video evidence, Pastor Reaume and the elders and congregants of Trinity Bible Chapel have repeatedly refused to comply with public health regulations designed to stop the spread of COVID-19, including by:

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<sup>61</sup> Ontario, [News Release](#) (January 20, 2022)

<sup>62</sup> See e.g. [O.Reg. 52/20](#), s. 1(4) [repealed and replaced by O.Reg. 364/20]; [O.Reg. 82/20](#), Sch. 4, s. 4; [O.Reg. 263/20](#), Sch. 3, s. 6; [O.Reg. 364/20](#), Sch. 3, s. 5 [repealed when outdoor limits were removed]

<sup>63</sup> Affidavit of Shayna Levine-Poch, OR, Vol. 2, Tab 6C, Caselines B-1-849; Affidavit of David Heuchert, para. 5, OR, Vol. 9, Tab 16(1), Caselines B-1-2023

<sup>64</sup> Affidavit of Shayna Levine-Poch, Exs. “H” and “K,” OR, Vol. 2, Tab 6H, Caselines B-1-892 and 904

<sup>65</sup> Affidavit of Jacob Reaume (“Reaume Affidavit”), paras. 93-97, MPR, Vol. 1, Tab 7, Caselines A8663-64

<sup>66</sup> Reaume Cross, pp. 19-23, qq. 60-66, Caselines A7013-17

- Holding large indoor and outdoor gatherings that vastly exceeded the Gathering Limits in force at the time;<sup>67</sup>
- Refusing to wear masks or enforce physical distancing requirements between households;<sup>68</sup>
- Refusing to keep contact details because “We do not believe it is wise to keep a record of those that choose to exercise civil disobedience with us”;<sup>69</sup>
- Parking RVs in front of its entrance and erecting fencing and tarps to obscure its parking lot and the number of people attending.<sup>70</sup>

44. These actions created a risk for further transmission of COVID-19 at critical times when Waterloo Region was experiencing high numbers of new confirmed cases, including variants of concern, each day.<sup>71</sup> As a result of their public refusal to follow the Gathering Limits even when enjoined to do so by Sweeny RSJ, the church, Pastor Reaume, and church elders were twice found in contempt of court. At one point, the doors of the church had to be locked to prevent them from continuing to flout the law.<sup>72</sup>

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<sup>67</sup> Endorsement of Sweeny RSJ, paras. 18-19, OR, Vol. 10, Tab 19B, Caselines B-1-2227; Endorsement of Sweeny RSJ, paras. 18 and 21, OR, Vol. 10, Tab 19D, Caselines B-1-2232; Affidavit of Shayna Levine-Poch, paras. 25-28, OR, Vol. 4, Tab 9(2), Caselines B-1-1174-75; Affidavit of Maia Stevenson, paras. 3-20, OR, Vol. 5, Tab 10(3), Caselines B-1-1351-55; Affidavit of Shayna Levine-Poch, paras. 39-51, OR, Vol. 6, Tab 12(2), Caselines B-1-1514-17; Endorsement of Sweeny RSJ, paras. 9-10, OR, Vol. 8, Tab 14(18), Caselines B-1-1978

<sup>68</sup> Reaume Cross, pp. 24-26, qq. 69-78 and Ex. 1, Caselines A7018-20

<sup>69</sup> Affidavit of Shayna Levine-Poch, Exs. “H” and “K,” OR, Vol. 2, Tabs 6H and K, Caselines B-1-892 904

<sup>70</sup> Affidavit of Dominic Mitges, para. 4 and Ex. “A”, OR, Vol. 8, Tab 14(3), Caselines B-1-1781 and 1785-94; Affidavit of Katelyn Richardson, para. 4 and Ex. “A”, OR, Vol. 8, Tab 14(4), Caselines B-1-1803 and 1807; Affidavit of Andrew Sooknandan, para. 3 and Ex. “A”, OR, Vol. 8, Tab 14(5), Caselines B-1-1825 and 1829-30

<sup>71</sup> Affidavit of Hsiu-Li Wang, paras. 4, 9, and 11, OR, Vol. 4, Tab 8(7), Caselines B-1-1142-44; Affidavit of Hsiu-Li Wang, paras. 5, 8, and 10, OR, Vol. 8, Tab 14(10), Caselines B-1-1934-36

<sup>72</sup> Endorsement of Sweeny RSJ, paras. 18-27, OR, Vol. 10, Tab 19B, Caselines B-1-2227-28; Endorsement of Krawchenko J, OR, Vol. 10, Tab 18(4), Caselines B-1-2208; Order of Krawchenko J, para. 1, OR, Vol. 10, Tab 19H, Caselines B-1-2252

Aylmer Church of God:

45. The Church of God (Restoration) Aylmer (the “Aylmer Church”) is a church in Aylmer.<sup>73</sup> Pastor Hildebrandt was not aware of the capacity of the church auditorium but it only takes up a portion of the building.<sup>74</sup> The Aylmer Church’s beliefs do not prohibit the wearing of masks, having social distancing between households at a service, or keeping contact information.<sup>75</sup> It streams its services on Facebook.

46. Pastor Hildebrandt is an animated speaker who speaks loudly and shouts in his sermons that can last 30 to 45 minutes each Sunday. At times, he even spits so much that he needs to wipe his mouth on a napkin while he preaches.<sup>76</sup> Pastor Hildebrandt believes that COVID is a conspiracy made up by Klaus Schwab, Prince Charles, Bill Gates, and others. He refers to quarantine hotels as “concentration camps” and fellow townspeople concerned about the Aylmer Church’s contravention of public health measures as “Stasi [the former East German secret police] informants.”<sup>77</sup>

47. As demonstrated by ample photo and video evidence, Pastor Hildebrandt and the elders and congregants of the Aylmer Church have repeatedly refused to comply with public health regulations designed to stop the spread of COVID-19, including by:

- Encouraging over 100 people to get out of their cars, hug and shake hands, go inside, and sing, all without wearing masks;<sup>78</sup>

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<sup>73</sup> Affidavit of Krystene Robinson, Ex. C, OR, Vol. 10, Tab 20(3), Caselines B-1-2322

<sup>74</sup> Cross-Examination of Henry Hildebrandt (“Hildebrandt Cross”), pp. 9-10, qq. 16-18, MPR, Vol. 12, Tab 21, Caselines A7055-56

<sup>75</sup> Hildebrandt Cross, pp. 14-15, qq. 38-40, Caselines A7060-61

<sup>76</sup> Hildebrandt Cross, pp. 16-17, qq. 46-47 and 50-53, Caselines A7062-63

<sup>77</sup> Affidavit of Henry Hildebrandt (“Hildebrandt Affidavit”) para. 15, MPR, Vol. 3, Tab 9, Caselines A6492; Hildebrandt Cross, pp. 28-30, qq. 116-27, Caselines A7074-76

<sup>78</sup> Hildebrandt Cross, pp. 17-22, qq. 55-80, Caselines A7063-68; Affidavit of Krystene Robinson, para. 18 and Ex. “P”, OR, Vol. 10, Tab 20(3) and Vol. 11, Tab 21(3), Caselines B-1-2307 2470. See also Affidavit

- Holding large indoor gatherings with choirs singing and Pastor Hildebrandt encouraging large numbers of people to crowd together without masks;<sup>79</sup>
- Holding large outdoor gatherings with choirs singing and Pastor Hildebrandt encouraging large numbers of people to crowd together without masks.<sup>80</sup>

48. These actions created a risk for further transmission of COVID-19 at critical times when Aylmer was experiencing high numbers of new confirmed cases each day.<sup>81</sup> As a result of their public refusal to follow the Gathering Limits even when enjoined to do so by Thomas RSJ, the church, Pastor Hildebrandt, and church elders were found in contempt of court on three separate occasions. At one point, the doors of the church even had to be locked to prevent them from continuing to flout the law.<sup>82</sup>

49. To avoid having to pay the contempt fines, the Aylmer Church fraudulently conveyed its building and land to a sister church in Lethbridge. The conveyance was set aside under the *Fraudulent Conveyances Act*.<sup>83</sup>

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of Stanley Ndibe, paras. 12-21 and Ex. "I", OR, Vol. 11, Tab 22(2) and Vol. 12, Tab 23(2), Caselines B-1-2571-73 and 2633

<sup>79</sup> Hildebrandt Cross, p. 23, qq. 84-87, Caselines A7069; Affidavit of Krystene Robinson, para. 21 and Ex. "S", OR, Vol. 10, Tab 20(3) and Vol. 11, Tab 21(3), Caselines B-1-2308-91; Affidavit of Stanley Ndibe, paras. 23-32 and Exs. "K" and "L", OR, Vol. 11, Tab 22(2) and Vol. 12, Tab 23(2), Caselines B-1-2573-75 and 2636-39

<sup>80</sup> Hildebrandt Cross, pp. 25-28, qq. 97-115, Caselines A7071; Affidavit of Kevin Coudenys, paras. 2-9 and 16-21 and Exs. "A" and "B", OR, Vol. 12, Tab 25(2), Caselines B-1-2742-52; Affidavit of Stanley Ndibe, paras. 2-18 and Exs. "A-C", OR, Vol. 12, Tab 26(5), Caselines B-1-2784-93; Affidavit of Dan Wikkerink, paras. 4-7 and Ex. "A", OR, Vol. 12, Tab 27(2), Caselines ; B-1-2812-13 and 2816-17; Supplementary Affidavit of Stanley Ndibe, paras. 3-11 and Ex. "D", OR, Vol. 12, Tab 27(3), Caselines B-1-2820-22 and 2824; Affidavit of Terrell Benoit, paras. 3-12 and Ex. "A", OR, Vol. 12, Tab 28(1), Caselines B-1-2844-46 and 2849-53; Affidavit of Lucas Youmans, paras. 2-7 and Ex. "A", OR, Vol. 12, Tab 28(3), Caselines B-1-2859-61 and 2864

<sup>81</sup> Affidavit of Dr. Joyce Lock, paras. 4 and 11-12, OR, Vol. 10, Tab 20(2), Caselines B-1-2276 and 2278

<sup>82</sup> Endorsement of Thomas RSJ, paras. 20-27 and 31-43, OR, Vol. 12, Tab 29G, Caselines B-1-2925-29; Endorsement of Thomas RSJ, OR, Vol. 12, Tab 29H, Caselines B-1-2931; Endorsement of Thomas RSJ, paras. 1-4 and 10-13, OR, Vol. 12, Tab 29K, Caselines B-1-2937 and 2938

<sup>83</sup> Endorsement of Thomas RSJ, paras. 19-27, OR, Vol. 12, Tab 30D, Caselines B-1-2961-62

### PART III – ISSUES AND LAW

50. The Moving Parties allege that all the Gathering Limits infringed *Charter*, ss. 2(a) to (d). Ontario submits that the vast majority of the Gathering Limits did not infringe any *Charter* rights. In any event, the Gathering Limits were justified under *Charter*, s. 1 in light of the need to reduce COVID-19 transmission caused by religious gathering to preserve hospital and ICU capacity and save lives.

51. The Moving Parties have abandoned other grounds they initially raised: s. 15 of the *Charter*, s. 176 of the *Criminal Code*, and ss. 7.0.2(1), (2) and (3) of the *EMCPA*.<sup>84</sup>

#### **A. Most of the Gathering Limits Did Not Infringe Freedom of Religion**

52. To demonstrate an infringement of freedom of religion, the Moving Parties must show that each Gathering Limit that applied to them at a particular time burdened or interfered with their ability to act in accordance with their sincerely held religious or conscientious beliefs “in a manner that is more than trivial or insubstantial.”<sup>85</sup>

53. Ontario accepts that the Moving Parties sincerely believe they must gather in person to worship. Ontario also accepts that limiting religious gatherings to ten people or less infringes s. 2(a). For much of the pandemic, however, the Gathering Limits allowed for larger in-person religious gatherings with certain capacity limits or even with no capacity limits at all. Those Gathering Limits did not interfere with religious freedom in a manner that is more than trivial or insubstantial.

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<sup>84</sup> Notice of Motion, MPR, Vol. 1, Tab 2, Caselines A8600; Notice of Motion, MPR, Vol. 2, Tab 4, Caselines A8618

<sup>85</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 at [paras. 56-59](#); *R v Jones*, [1986] 2 SCR 284 at [308, 313-315](#); *R v Edward Books and Art Ltd.*, [1986] 2 SCR 713 at [759](#) [*Edward Books*]; *Coles Book Stores Ltd v Ontario*, (1991), 6 OR (3d) 673 (Gen Div)

54. In *Hutterian Brethren*, McLachlin CJ, citing *Edward Books*, explained what it means for a burden on religious freedom to be more than trivial and insubstantial:

The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practicing or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial...<sup>86</sup>

55. The Moving Parties were permitted to hold large indoor religious gatherings for much of the pandemic, even when other indoor gatherings were severely limited or prohibited. For example, both churches were able to hold indoor religious gatherings at 30% capacity from June 12 to December 25, 2020 and from February 16 to April 2, 2021. From July 16, 2021 to January 4, 2022, the only restriction on the size of indoor gatherings was that there had to be enough room for everyone to physically distance. Today, both churches remain free to hold large indoor gatherings at 50% of capacity while other indoor gatherings are limited to 5 people.<sup>87</sup>

56. By holding multiple gatherings, the churches' usual attendance could still have been accommodated. There is no evidence that the Moving Parties' religious beliefs require their services be attended by a minimum number of people. While holding multiple gatherings as opposed to one may be less convenient or costly, it did not "reasonably or actually threaten" the Moving Parties' religious belief or practice.<sup>88</sup>

57. Requiring different households to physically distance even more clearly does not threaten religious beliefs or their practice. Although Pastor Reaume claims he doesn't

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<sup>86</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at [paras. 32-34](#) [Emphasis in original]

<sup>87</sup> Southwestern Compendium, Tabs 3-5, 7-9, and 17-20; Waterloo Compendium, Tabs 3-5, 8-9, and 18-22

<sup>88</sup> *Edward Books*, *supra* at [759](#)

“want to be a cult leader” by “telling people where they can and cannot stand,” there is no evidence that limiting the size of a particular gathering to the number that could physically distance violated anyone’s religious beliefs.<sup>89</sup> Pastor Hildebrandt expressly admits that his religious beliefs do not prohibit requiring social distancing.<sup>90</sup>

58. More stringent 15% or 25% capacity limits on indoor gatherings were only in place for a few weeks (April 3 to 18 and June 11 to July 15, 2021).<sup>91</sup> Throughout this time, the churches could have continued to hold multiple, smaller indoor gatherings. They could, and in fact did, hold virtual services or drive-in services. And they were allowed to hold outdoor gatherings of any size limited only by physical distancing.

59. The Gathering Limits permitted large outdoor religious gatherings to take place throughout most of the pandemic, even when other outdoor gatherings were limited to much smaller numbers. From July 17 to December 25, 2020 and February 16 to March 28, 2021, both churches could hold outdoor services with 100 people present.<sup>92</sup> As discussed above, there is no evidence they could not have held multiple 100-person outdoor services to accommodate their usual attendance at those times.

60. From March 29 to April 18 and June 11 to October 24, 2021, both churches could hold outdoor gatherings of any size so long as there was enough space for physical distancing. From October 25, 2021 to January 4, 2022, there was no limit at all on the size of outdoor religious gatherings. Both churches can continue to hold outdoor

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<sup>89</sup> Reaume Cross, pp. 32-33, q. 90, Caselines A7026-27

<sup>90</sup> Hildebrandt Cross, pp. 14-15, q. 39, Caselines A7060-61

<sup>91</sup> Southwestern Compendium, Tabs 10-11 and 15; Waterloo Compendium, Tabs 10-11 and 15-16

<sup>92</sup> Southwestern Compendium, Tabs 4-5 and 7-8; Waterloo Compendium, Tabs 4-6 and 8



gatherings of any size today, so long as physical distancing is maintained, even though other outdoor social gatherings are restricted to only 10 people.<sup>93</sup>

61. There is no evidence that the Moving Parties' religious beliefs required them to hold religious gatherings indoors and not outdoors. In fact, both churches conducted religious services outdoors for extended periods of time throughout the pandemic.<sup>94</sup>

62. Except therefore, for the brief periods where the pandemic situation was so grave that Ontario had to limit religious gatherings to the minimum number that would allow some religions to hold services (even online services) at all, the Moving Parties have failed to establish that the Gathering Limits amounted to a non-trivial, substantial interference with their freedom of religion that infringed s. 2(a) of the *Charter*.

**B. The Gathering Limits Do Not Infringe Freedom of Expression**

63. Section 2(b) of the *Charter* protects activities that aim to convey meaning or that have expressive content. Freedom of expression is infringed only where the purpose or effect of the impugned governmental action is to “control attempts to convey meaning through that activity.” Content-neutral restrictions do not have the purpose of infringing s. 2(b): “Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee.” Although content-neutral restrictions can have the effect of limiting expression can also infringe s. 2(b), “the burden is on the plaintiff to demonstrate that such an effect occurred.”<sup>95</sup>

64. Ontario accepts that religious services contain expressive content and convey meaning. However, the Gathering Limits do not “control attempts to convey meaning”

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<sup>93</sup> Southwestern Compendium, Tab 9-11 and 15-21; Waterloo Compendium, Tab 9-11 and 15-22

<sup>94</sup> Reaume Affidavit, para. 9, Caselines A9663; Hildebrandt Affidavit, paras. 9-12 and 21-22, Caselines A6490-91 and 6493-94

<sup>95</sup> *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at [968-972](#) and [975-976](#)

inherent in religious services or gatherings, in either purpose or effect. The Moving Parties have not pleaded, nor is there anything in the record to suggest, that the purpose of the Gathering Limits was to control or restrict attempts to convey meaning of any nature. Rather, Ontario's purpose was and continues to be aimed solely at the "harmful physical consequences" of physical gatherings in terms of COVID-19 transmission and burden on the healthcare system. Accordingly, the burden is on the Moving Parties to demonstrate that the effect of the Gathering Limits is to restrict freedom of expression.

65. The Moving Parties have not met this burden. In *Coles Books*, a law which placed limitations on businesses open on Sundays and holidays was not found to constitute a *prima facie* infringement of s. 2(b) despite a finding that selling books has expressive content and conveys meaning.<sup>96</sup> *Coles* could not meet its burden at the second step of the s. 2(b) analysis because the law was content-neutral in both purpose and effect: it regulated stores "regardless of the content of their expressive activity."<sup>97</sup>

66. The Gathering Limits impose content-neutral, time-limited, flexible limits on the *size* of religious gatherings. Throughout the pandemic, the Gathering Limits have never prohibited religious gatherings, preaching, prayer or song, merely limited their size.

67. In fact, the record (see paras. 41 to 49 above) demonstrates that the Moving Parties have continued to gather throughout the pandemic for religious services, whether in person, virtually, through drive-in services, through staggered in-person services, or a combination of these means. "The freedom of expression guaranteed by s. 2(b) of the *Charter* does not guarantee any particular means of expression..." and the s.

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<sup>96</sup> *Coles Books*, *supra* at [39](#)

<sup>97</sup> *Coles Books*, *supra* at [60](#)

2(b) jurisprudence does not indicate that the guarantee of free expression includes the freedom to convey meaning to a certain number of people at precisely the same time.<sup>98</sup>

68. To the extent that the Moving Parties claim that freedom of expression protects their ability to engage in religious discourse in the same physical space at the same time, their claim is a re-packaging of their s. 2(a) claim. In *Trinity Western*, Trinity Western advanced ss. 2(a), (b), (d) and 15 claims against the Law Society's refusal to accredit the university's faculty of law but the majority of the Supreme Court held:

The factual matrix underpinning a *Charter* claim in respect of any of these protections is largely indistinguishable.... In our view, the religious freedom claim is sufficient to account for the expressive, associational, and equality rights of TWU's community members in the analysis.<sup>99</sup>

This reasoning applies to the Moving Parties' claims under *Charter* ss. 2(b) to (d). As in *Trinity Western*, those claims should be dismissed.

### **C. The Gathering Limits Do Not Infringe Freedom of Assembly**

69. Section 2(c) of the *Charter* guarantees the freedom of peaceful assembly. While there is relatively little jurisprudence interpreting s. 2(c), the existing caselaw reveals that s. 2(c) protects group activities that are inherently (i) collective; and (ii) public.<sup>100</sup>

Section 2(c) also contains internal limits: freedom of peaceful assembly guarantees access to and use of **public** spaces and buildings subject to reasonable regulations governing the use of those places and **having regard to public health and safety**.<sup>101</sup>

<sup>98</sup> *Baier v Alberta*, 2007 SCC 31 at [para 23](#), citing *Native Women's Assn. of Canada v Canada*, [1994] 3 S.C.R. 627 at [656](#)

<sup>99</sup> *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at [paras 76-78](#).

<sup>100</sup> *Beaudoin v British Columbia*, 2021 BCSC 512 at [para 173](#) citing *Mounted Police Assn. of Ontario v Canada (AG)*, 2015 SCC 1 at [para 64](#); *Gateway Bible Baptist Church et al. v Manitoba et al.*, 2021 MBQB 219 at [para 213](#) citing *Hussain v Toronto (City)*, 2016 ONSC 3504 at [paras 38 and 44](#)

<sup>101</sup> *Hussain*, *supra* at [paras 38 and 44](#)

70. The vast majority of claims under s. 2(c) have arisen in the context of peaceful protests or demonstration on public property.<sup>102</sup> The Moving Parties provide no authority demonstrating that freedom of peaceful assembly should be extended to protect unrestricted access to and use of private spaces (churches) in the context of a global pandemic. They have made no attempt to specify whether s. 2(c) allegedly protects the right to gather in-person even where virtual gatherings remain available, or what size of in-person religious gathering s. 2(c) allegedly protects.<sup>103</sup>

71. Where claims made under freedom of assembly are better addressed under another fundamental freedom, the alleged infringement is often resolved under the more appropriate fundamental freedom. This is especially the case where the claimant has raised freedom of peaceful assembly but has failed to particularize the claim.<sup>104</sup>

72. In *Gateway Bible*, a recent *Charter* challenge to the religious gathering limits Manitoba implemented in response to COVID-19, the Court of Queen’s Bench agreed with Manitoba that the applicant’s s. 2(c) claim was “better addressed directly under the freedom of religion.”<sup>105</sup> Similarly, the Moving Parties’ s. 2(c) claim is better addressed within the s. 2(a) analysis and therefore should be dismissed as a separate claim.

73. In the alternative, even if the right to peaceful assembly is engaged, that right was only infringed when the Gathering Limits limited religious gatherings to 10 people or fewer, for the reasons set out at paragraphs 53-62 above.

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<sup>102</sup> See e.g. *BCGEU v British Columbia (AG)*, [1988] 2 SCR 214; *Figueiras v Toronto (City) Police Services Board*, 2015 ONCA 208; *Ontario (AG) v Dieleman*, (1994), 117 DLR (4th) 449 (Ont. Gen. Div.); *R v Semple*, 2004 ONCJ 55; *Batty v Toronto (City)*, 2011 ONSC 6862; *Smiley v Ottawa (City)*, 2012 ONCJ 479

<sup>103</sup> Moving Parties’ Factum, paras. 51-52, Caselines A15

<sup>104</sup> *BCGEU*, *supra* at 243; *Figueiras* at para 78 and *Gateway Bible* at para 213 citing *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, 2009 BCCA 39 at para 39, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 160 and [2009] S.C.C.A. No. 161

<sup>105</sup> *Gateway Bible*, *supra* at para 213

**D. The Gathering Limits Do Not Infringe Freedom of Association**

74. The Supreme Court has held that “it remains essential to distinguish between the associational aspect of the activity and the activity itself.”<sup>106</sup> Section 2(d) protects the former but not the latter, even if the activity is a foundational or essential purpose of the association.<sup>107</sup> The only exceptions to date have been in the field of labour relations.<sup>108</sup>

75. The Moving Parties claim that the Gathering Limits prevent them from congregating together in worship relates to their freedom of religion. Freedom of association protects the freedom to establish, belong to and maintain an association.<sup>109</sup> Throughout the COVID-19 pandemic, the Moving Parties have never been prevented from doing so. The Moving Parties’ s. 2(d) claim should therefore be dismissed.

**E. The Gathering Limits are Reasonably Justified Under Section 1**

**(1) Deference Should Be Shown to Ontario’s Response to a Global Pandemic**

76. All of the Gathering Limits are justified under s. 1 of the *Charter*. They are necessary to achieve Ontario’s objective of reducing COVID-19 transmission at in-person religious gatherings to preserve hospital and ICU capacity and save lives.

77. This Court should afford substantial deference to measures adopted by public officials to combat the ongoing and evolving COVID-19 public health emergency. As the Supreme Court held in *Hutterian*, a case in which a law that the claimants sincerely believed violated one of the Ten Commandments was found to be justified to prevent

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<sup>106</sup> *Canadian Egg Marketing Agency v Richardson*, [1998] 3 S.C.R. 157 at [para 111](#)

<sup>107</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at [paras 125-126](#); *Canadian Egg*, *supra* at [paras 105](#) and [111](#)

<sup>108</sup> Freedom of association claims can be brought in other areas, but they are usually unsuccessful. See e.g. *Working Families Ontario v Ontario*, [2021 ONSC 4076](#); *Black v Law Society of Alberta*, [\[1989\] 1 SCR 591](#); *R v Skinner*, [\[1990\] 1 SCR 1235](#); *Harper*, *supra*; *Canadian Egg*, *supra*

<sup>109</sup> *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [1990] 2 SCR 367 at [402](#), Sopinka J

driver’s license fraud, greater deference must be shown to a law that “is part of a complex regulatory scheme and is aimed at an emerging and challenging problem.”<sup>110</sup>

78. Even greater deference is owed where a discrete group of claimants seeks to invalidate health measures designed to protect the public at large. As the Court of Appeal held in *Williams*, “the public officials charged with the responsibility for imposing and lifting [public health] measures must weigh and balance the advantages and disadvantages and strive to act in a manner that best meets the overall interests of the public at large” rather than any particular “narrow class of individuals.”<sup>111</sup> Where individual rights compete with the public good and the health and lives of others, it is more likely that a restriction on rights will be proportionate to its objective.<sup>112</sup>

79. In upholding religious gathering restrictions, the Manitoba Court of Queen’s Bench stated that “courts should be wary of second guessing those who are managing a pandemic on the basis of their democratic responsibility or their properly delegated authority, particularly when there may be divergent opinions or schools of scientific thought.”<sup>113</sup> There is “a requisite judicial humility that comes from acknowledging that courts do not have the specialized expertise to causally second guess the decisions of public health officials, which decisions are otherwise supported in the evidence.”<sup>114</sup>

80. As the Newfoundland and Labrador Supreme Court recently held in upholding COVID-19 travel restrictions:

[I]t is not an abdication of the court’s responsibility to afford [public

<sup>110</sup> *Hutterian*, *supra* at [paras. 37](#) and [56](#); *Quebec v A*, 2013 SCC 5 at [para. 439](#), McLachlin CJ concurring

<sup>111</sup> *Williams v Ontario*, 2009 ONCA 378 at [para. 31](#); *Abarquez v Ontario*, 2009 ONCA 374 at [para. 49](#); *Beaudoin*, *supra* at [para. 244](#)

<sup>112</sup> *Carter v Canada (AG)*, 2015 SCC 5 at [paras. 94-96](#); see also *Gateway Bible*, *supra* at [para. 279](#)

<sup>113</sup> *Gateway Bible*, *supra* at [paras. 281](#) and [291-292](#); *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 at [paras. 457-58](#)

<sup>114</sup> *Gateway Bible*, *supra* at [para. 292](#)

health officials] an appropriate measure of deference in recognition of (1) the expertise of [their] office and (2) the sudden emergence of COVID-19 as a novel and deadly disease. It is also not an abdication of responsibility to give due recognition to the fact that [public health officials] ... face a formidable challenge under difficult circumstances.<sup>115</sup>

81. In justifying the impugned measures, Ontario need only meet its evidentiary obligation on the civil standard of proof, not the standard of scientific certainty that the Moving Parties and their experts propose.<sup>116</sup> As the Newfoundland court held in *Taylor*, governments must act “early and effectively” to address public health risks even when the science is unsettled. The COVID-19 pandemic has involved “emergent and rapidly evolving situations” in which “the time available for seeking out and analyzing evidence shrinks...[and] the margin for error may be narrow.” Accepting that government decisions taken on the basis of imperfect information should not be undermined later with the benefit of hindsight reflects the “precautionary principle,” which permits public health officials to take action to prevent anticipated harm even if there is not yet total scientific consensus on all issues.<sup>117</sup>

82. The public health response to COVID-19 has required Ontario to make difficult choices to balance risks and benefits that disproportionately impact different sectors of Ontario’s diverse population, including seniors and others with elevated health risks, all within the context of evolving research and knowledge about COVID-19 and a virus that has continued to evolve to produce new more transmissible VOCs. Ontario took

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<sup>115</sup> *Taylor*, *supra* at [paras. 456-59](#) and [463-64](#)

<sup>116</sup> *RJR-MacDonald Inc. v. Canada (AG)*, [1995] 3 SCR 199 at [para. 137](#), quoted in *Harper*, *supra* at [para. 78](#)

<sup>117</sup> *Taylor*, *supra* at [paras. 59-60](#) and [411](#)

precautionary measures to protect its vulnerable populations rather than simply accept, as the Moving Parties would have it, that “death is a constant companion to life.”<sup>118</sup>

83. While reasonable experts may disagree on the details of COVID-19 transmission and the relative effectiveness of certain public health measures, it is not the court’s role in the s. 1 analysis to “settle scientific disputes or to choose among divergent opinions of physicians on certain subjects.”<sup>119</sup> As the Moving Parties concede, Ontario need only demonstrate that its actions fall within “a range of reasonable alternatives.”<sup>120</sup>

**(2) The Gathering Limits Further a Pressing and Substantial Objective**

84. The Gathering Limits further the pressing and substantial objective of reducing the risk of COVID-19 transmission at in-person religious gatherings to reduce the burden on the healthcare system, protect vulnerable populations, and prevent deaths.

85. The protection of public health “has long been acknowledged” as a pressing and substantial objective, and “in the context of this COVID-19 pandemic, that objective has never been more obvious.”<sup>121</sup> Multiple courts across Canada have already held that “containing the spread of the Virus and the protection of public health is a legitimate objective that can support limits on *Charter* rights under s. 1”:

An outbreak of a communicable disease is an example of a crisis in which the state is obliged to take measures that affect the autonomy of individuals and of communities within civil society. The constitutional importance of combating the COVID-19 pandemic has been stated by courts across the country.<sup>122</sup>

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<sup>118</sup> Moving Parties’ Factum, para. 13, Caselines A6

<sup>119</sup> *Beaudoin*, supra at [paras. 120-21](#); *Lapointe v. Hôpital Le Gardeur*, [1992] 1 SCR 351 at [paras. 31-32](#)

<sup>120</sup> *Hutterian*, supra at [para. 37](#); *RJR-MacDonald*, supra at [para. 160](#)

<sup>121</sup> *Gateway Bible*, supra at [para. 295](#)

<sup>122</sup> *Beaudoin*, supra at [paras. 224](#) and [228](#); See also *Gateway Bible*, supra at [para. 295](#); *Taylor*, supra at [paras. 426](#) and [437](#)



86. The Moving Parties suggest that the measures limiting indoor religious gatherings have a different objective than the measures limiting outdoor religious gatherings.<sup>123</sup> They go on to suggest that the objective of “reducing outdoor transmission” is not pressing and substantial.<sup>124</sup> This Court should reject the Moving Parties’ artificial parsing of the government’s objective.<sup>125</sup>

87. The Gathering Limits’ objective is to limit COVID-19 transmission at **both** indoor and outdoor religious gatherings to reduce the resulting burden on the healthcare system, protect vulnerable populations, and prevent deaths. A person with COVID-19 can transmit the virus to others or become seriously ill or die whether they contracted the virus indoors or outdoors. This objective is clearly pressing and substantial.

88. This Court should also reject the Moving Parties’ suggestion that reducing the burden on the healthcare system is of “secondary” importance. This is not correct. Both Dr. McKeown and Dr. Hodge provided evidence that reducing the burden on the healthcare system was a crucial factor underlying the religious gathering restrictions.<sup>126</sup> In any event, even if protecting the healthcare system is a “secondary” objective, the Supreme Court has held that government measures may deal with both a primary goal and with more specific collateral concerns.<sup>127</sup> The Gathering Limits are designed to achieve multiple goals, each of which are pressing and substantial.

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<sup>123</sup> Moving Parties’ Factum, para. 61, Caselines A18

<sup>124</sup> Moving Parties’ Factum, paras. 62-65, Caselines A18

<sup>125</sup> *Frank v. Canada (AG)*, 2019 SCC 1 at [para. 46](#)

<sup>126</sup> Hodge Affidavit, para. 51, Caselines B-1-520-521; Hodge Cross, pp. 59-61, q. 128, Caselines A7893-7895; McKeown Affidavit, paras. 74-75, Caselines B-1-44-45

<sup>127</sup> *Hutterian*, *supra* at [para. 44](#); *Frank*, *supra* at [paras. 46-48](#)

**(3) The Gathering Limits are Rationally Connected to Ontario’s Objective**

89. The Gathering Limits are rationally connected to Ontario’s objective. Limiting interactions between large groups of people congregating at a religious gathering limits the transmission of COVID-19 at those gatherings and the resulting further transmission of COVID-19 in the community. In turn, reducing transmission alleviates the resulting burden on the healthcare system, protects vulnerable individuals, and prevents deaths.

90. The rational connection step of the *Oakes* analysis is “not particularly onerous.”<sup>128</sup> Ontario need only establish that “it is reasonable to suppose that the limit may further the goal, not that it will do so.”<sup>129</sup> Where there is an “absence of determinative scientific evidence,” the court may rely on “logic, reason and some social science evidence in the course of the justification analysis.”<sup>130</sup>

91. As the Moving Parties’ own expert admitted, the science of COVID-19 “has often been complex and uncertain” and is “constantly evolving.” As well, “public health practitioners often don’t have the luxury of waiting for science to solidify before they recommend action” because, if “public health measures are taken too slowly disease may spread and you may need even more stringent measures to regain control.”<sup>131</sup>

92. In this context, “the response does not admit of surgical precision” and the precautionary principle warrants public health officials taking protective action before there is scientific consensus (which may never appear).<sup>132</sup> Ontario courts have accepted

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<sup>128</sup> *Little Sisters Book and Art Emporium v. Canada*, 2000 SCC 69 at [para. 228](#); *Canada (AG) v JTI-Macdonald Corp.*, 2007 SCC 30 at [para. 40](#); *CMDS v. CPSO*, 2019 ONCA 393 at [paras. 156-157](#)

<sup>129</sup> *Hutterian*, *supra* at [para. 48](#); see also *Beaudoin*, *supra* at [para. 229](#)

<sup>130</sup> *Harper*, *supra* at [para. 78](#); see also *R v Michaud*, 2015 ONCA 585 at [para. 102](#); *RJR-Macdonald*, *supra* at [para. 66](#)

<sup>131</sup> Schabas Cross, p. 11, qq. 26-31, Caselines A7954.

<sup>132</sup> *Taylor*, *supra* at [paras. 410-411](#).

that too many COVID-19 cases can overwhelm medical resources and lead to multiple illnesses and death, and that steps taken to reduce that risk are not arbitrary.<sup>133</sup>

93. In the present case, there is substantial evidence that limiting in-person gatherings reduces the risk of COVID-19 transmission. All experts agree that large gatherings present a risk of COVID-19 transmission, whether indoors<sup>134</sup> or outdoors.<sup>135</sup> Even if experts disagree about the relative risk of outdoor transmission, Ontario need not wait for a definitive scientific answer before taking action to protect the public.<sup>136</sup>

94. All the experts also agree that the risk of COVID-19 transmission at gatherings is elevated when community prevalence is high.<sup>137</sup> Several experts gave evidence that when community risk is elevated, even lower risk activities such as outdoor gatherings can contribute to pressures on the health system as even a few more chances for transmission can quickly lead to increased numbers of hospitalizations.<sup>138</sup>

95. Contrary to the Moving Parties' suggestion, there is evidence regarding the specific risks posed by in-person religious gatherings.<sup>139</sup> As set out at para 29 above, all of the experts in this proceeding agree that in-person religious gatherings involve several heightened risk factors for COVID-19 transmission. The Gathering Limits are

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<sup>133</sup> *Schuyler Farms Ltd. v. Nesathurai*, 2020 ONSC 4711 at [para. 101](#); *Sprague v. Ontario*, 2020 ONSC 2335 at [para. 48](#)

<sup>134</sup> Chagla Report, para. 3(j), Caselines B-1-738; Schabas Cross, p. 29-30, q. 85, Caselines A7972-7973; McKeown Affidavit, para. 64, Caselines B-1-64-65; Warren Cross, p. 90, q. 309, Caselines B-1-3154; Hodge Affidavit, para. 19, Caselines B-1-508-509

<sup>135</sup> Chagla Cross, pp. 95-96, q. 270, Caselines A6781-6782; Schabas Cross, pp. 29-31, qq. 83-88, Caselines A7972-7974; McKeown Cross, p. 108, qq. 351-353, Caselines A7795; Warren Cross, p. 90, q. 309, Caselines B-1-3154; Hodge Affidavit, para. 19, Caselines B-1-508-509

<sup>136</sup> *Harper*, *supra* at [para. 78](#); *Michaud*, *supra* at [para. 102](#); *RJR-Macdonald*, *supra* at [para. 66](#)

<sup>137</sup> Chagla Report, para. 4(j), Caselines B-1-739; Schabas Cross, p. 28, q. 80, Caselines A7971; McKeown Affidavit, para. 74, Caselines B-1-44-45; Warren Cross, p. 89, q. 306, Caselines B-1-3153; Hodge Affidavit, para. 19, Caselines B-1-508-509

<sup>138</sup> Hodge Affidavit, para. 23, Caselines B-1-510; Chagla Report, para. 5(c), Caselines B-1-741.

<sup>139</sup> Moving Parties' Factum, para. 70, Caselines A19

rationally connected to reducing the risk of COVID-19 transmission at religious gatherings to protect the healthcare system and prevent deaths.

**(4) The Gathering Limits are Minimally Impairing**

96. The Gathering Limits have minimally impaired the Moving Parties’ rights. At this step of the *Oakes* analysis, the test is *not* whether the government has chosen the least restrictive possible measure. Instead, the question is whether the measure falls within a range of reasonable alternatives. The Supreme Court has held that “courts will not find [a law] overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.”<sup>140</sup> Nor is Ontario required, in the name of minimal impairment, to “choose the least ambitious means to protect vulnerable groups.”<sup>141</sup> The Moving Parties agree that this is the relevant test.<sup>142</sup>

97. Deference is required when reviewing measures designed to address “complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.” As the Supreme Court held in *JTI-Macdonald*:

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

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<sup>140</sup> *Frank*, *supra* at [para. 66](#); *Hutterian*, *supra* at [paras. 37](#); *RJR-Macdonald*, *supra* at [para. 160](#); *JTI-Macdonald*, *supra* at [para. 43](#); see also *Newfoundland v NAPE*, 2004 SCC 66 at [para. 96](#)

<sup>141</sup> *Irwin Toy*, *supra* at [999](#); *CMDS*, *supra* at [para. 154](#); *Affleck v. Ontario*, 2021 ONSC 1108 at [para. 98](#); *JTI-Macdonald*, *supra* at [para. 43](#)

<sup>142</sup> Moving Parties’ Factum, para. 71, Caselines A20

chosen one of several reasonable alternatives.<sup>143</sup>

98. In the COVID-19 context, the Divisional Court has held that it is “not the Court’s role” to engage in “a re-weighing of the complex and often difficult factors, considerations and choices that must be evaluated by [authorities] during a pandemic.”<sup>144</sup> Ontario should be afforded a substantial margin of appreciation in determining what measures were necessary to combat the pandemic given the potentially catastrophic results of being insufficiently cautious.

99. Ontario has never completely banned religious gatherings. The Gathering Limits have been carefully tailored throughout the pandemic to reflect evolving circumstances, new scientific evidence, and changing risk. Even at the most severe periods of risk, religious institutions were permitted to have sufficient congregants to attend to facilitate virtual or drive-in services. The ten-person limit on gatherings was geographically-tailored and time-limited, applying to only those regions where the virus was most acute and only for so long as the risk factors that required the restrictions persisted.

100. The Moving Parties argue that the Gathering Limits were not minimally impairing because, at times, the limits on outdoor and indoor gatherings were the same even though the risk of transmission is lower outdoors. This argument ignores the fact that this was only the case for temporary periods when cases and hospitalizations were climbing drastically and there was a significant risk of overburdening the healthcare

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<sup>143</sup> *Hutterian*, *supra* at [para. 53](#); *JTI-Macdonald*, *supra* at [para. 43](#); see also *NAPE*, *supra* at [para. 96](#)

<sup>144</sup> *Sprague*, *supra* at [para. 45](#); see also *The Fit Effect v Brant County Board of Health*, 2021 ONSC 3651 at [para. 88](#)

system. During those periods, any COVID-19 transmission at any gathering, whether indoors or outdoors, risked pushing hospitals and ICUs beyond their capacity.<sup>145</sup>

101. These most stringent limits on religious gatherings were in place for a period of eight weeks from April 19, 2021 to June 10, 2021.<sup>146</sup> In April 2021, Ontario was in the midst of a third wave of COVID-19; by mid-April there were more COVID-19 patients hospitalized and in ICUs than at any time since the start of the pandemic.<sup>147</sup> Less than 3% of the Ontario population was fully vaccinated and only 17% of the population had received a first dose of vaccine.<sup>148</sup> Strict limits on all gatherings were needed to reduce rising pressures on the integrity of Ontario's healthcare system.<sup>149</sup>

102. The only other time that outdoor and indoor religious gathering limits were the same was at the start of the pandemic, when the science regarding indoor versus outdoor transmission was still unclear. Throughout the pandemic, scientific understanding of the virus, risk factors for transmission, severity of illness and death, efficacy of vaccinations and variants of concern have constantly evolved and improved. Ontario has had to make difficult public health decisions with imperfect and changing information.<sup>150</sup> As noted by Dr. McKeown, "Ontario attempted to use the best information available at the time about the transmissibility of COVID-19, which was also subject to change as research about the virus is being updated regularly."<sup>151</sup>

103. As scientific understanding regarding outdoor transmission improved, more evidence became available to show that outdoor activities posed a lower risk of

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<sup>145</sup> McKeown Affidavit, paras. 94-95, Caselines, B-1-53-54

<sup>146</sup> Southwestern Compendium, Tabs 12 to 14; Waterloo Compendium, Tabs 12 to 14

<sup>147</sup> McKeown Affidavit, paras. 27, 30, 36-38, Caselines B-1-26-30

<sup>148</sup> McKeown Affidavit, para. 42, Caselines B-1-32

<sup>149</sup> McKeown Affidavit, paras. 92-95, Caselines B-1-52-54

<sup>150</sup> Hodge Affidavit, para. 7, Caselines B-1-503.

<sup>151</sup> McKeown Affidavit, para. 61, Caselines B-1-40

transmission in some circumstances (e.g. with appropriate physical distancing in completely open-air settings).<sup>152</sup> In accordance with the emerging consensus that outdoor gatherings held a lower risk of COVID-19 transmission, the Gathering Limits since June 11, 2021 have permitted outdoor religious gatherings without any capacity limits (other than at times a requirement to physically distance).

104. The Moving Parties argue that the Gathering Limits are not minimally impairing because they imposed a “fixed attendance limit” rather than taking into account available outdoor space and alternative mitigation measures.<sup>153</sup> This argument should be rejected for three reasons. First, for much of the pandemic, the government *did* impose a flexible measure: outdoor services had no fixed capacity limit and indoor capacity limits were based on a percentage of any particular room’s capacity limit.

105. Second, unlike an indoor space where it is clear where the boundaries of the space are and where there are often *Ontario Building Code* or *Fire Code* capacity limits already calculated, it is more difficult to calculate the “capacity” of an outdoor space. Setting a fixed capacity limit of 100 people avoided such difficulties while still allowing for large gatherings to take place when the situation permitted.<sup>154</sup>

106. Third, there is ample evidence that alternative mitigation measures, such as masking and physical distancing, are inadequate to prevent COVID-19 transmission at religious gatherings, especially when the level of community transmission is high.<sup>155</sup>

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<sup>152</sup> Chagla Cross, pp. 35, 37, 38-39, 95-96, qq. 91, 100, 104, and 270, Caselines A6721, A6723, A6724-6725, A6781-82

<sup>153</sup> Moving Parties’ Factum, para. 75, Caselines A20

<sup>154</sup> McKeown Cross, pp. 89-91, qq. 300-03, Caselines A7776-78; Hodge Cross, p. 67, q. 141, Caselines A7901-02

<sup>155</sup> McKeown Affidavit, para. 86, Caselines B-1-48-49; Hodge Affidavit, paras. 42-43, Caselines B-1-518

Imperfect adherence with masking and physical distancing requirements is a risk whenever individuals gather together, especially individuals who know each other.<sup>156</sup>

- The efficacy of masking requirements is highly dependent on all participants strictly and uniformly adhering to the requirement. Where even one infected participant improperly wears a mask, the fact that others at the gathering are wearing masks is unlikely to provide sufficient protection against transmission.<sup>157</sup>
- While transmission is most likely to occur through close contact of two metres or less, transmission over longer distances can occur in areas with poor ventilation and/or with behaviours such as singing or talking loudly.<sup>158</sup>
- Where the prevalence of COVID-19 (including VOCs) in the community is high, the corresponding pressure on Ontario’s hospital and ICU capacity means that even isolated incidents of non-compliance can have grave public health consequences.<sup>159</sup>

107. The photo and video evidence from the Moving Parties’ own gatherings (see paragraphs 43 to 47 above) demonstrate that imperfect adherence is a real risk.

108. The less-effective alternatives proposed by the Moving Parties must therefore be rejected because “instead of asking what is minimally required to realize the legislative goal, [they ask] the government to significantly compromise it.”<sup>160</sup>

109. With respect to indoor religious gatherings, the Moving Parties argue that the fixed-person limits on indoor gatherings were not minimally impairing because

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<sup>156</sup> McKeown Affidavit, para. 83, Caselines B-1-47-48; Hodge Affidavit, paras. 42-43, Caselines B-1-518

<sup>157</sup> McKeown Affidavit, para. 69, Caselines B-1-43

<sup>158</sup> McKeown Affidavit, para. 72, Caselines B-1-44

<sup>159</sup> McKeown Affidavit, para. 85, Caselines B-1-48; Hodge Affidavit, paras. 43, Caselines B-1-518

<sup>160</sup> *Hutterian*, *supra* at [para. 60](#)



religious gatherings were subject to more restrictive measures compared to other settings, such as retail.<sup>161</sup> This argument should also be rejected.

110. The assertion that religious gatherings were singled out for more restrictive treatment is incorrect. Throughout the pandemic, the Gathering Limits, even during the highest risk periods, were no more stringent than the limits on other gatherings with comparable risk. On the contrary, they were usually far less restrictive.<sup>162</sup>

111. In any event, “comparing the restrictions that apply in one circumstance to those that apply in another is not a useful or appropriate exercise.”<sup>163</sup> In implementing various public health measures, Ontario assessed each setting in terms of its own risk and “had to weigh and balance a myriad of competing interests and endeavour to arrive at a position that best satisfied the interests of the public at large.”<sup>164</sup> As in *Williams*:

When assessing how best to deal with the [COVID-19] outbreak, Ontario was required to address the interests of the public at large rather than focus on the particular interests of the plaintiff or other individuals in her situation.<sup>165</sup>

112. If any comparison is to be made, “[t]here needs to be a comparison of comparables.”<sup>166</sup> The limits in place in one setting are not necessarily appropriate in others. There are particular risks associated with gatherings, including religious gatherings.<sup>167</sup> This risk differs from the risk of retail spaces and others where people tend to pass strangers transiently. As the outbreak data shows, when COVID-19 outbreaks occur in association with religious gatherings, more cases are identified than

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<sup>161</sup> Moving Parties’ Factum, paras. 76-85, Caselines A21-22

<sup>162</sup> McKeown Affidavit, para. 96, Caselines B-1-54; Southwestern Compendium; Waterloo Compendium

<sup>163</sup> McKeown Affidavit, para. 99, Caselines B-1-55

<sup>164</sup> *Abarquez*, *supra* at [para. 25](#)

<sup>165</sup> *Williams*, *supra* at [para. 31](#)

<sup>166</sup> *Beaudoin*, *supra* at [para. 229](#)

<sup>167</sup> McKeown Affidavit, paras. 102-104, Caselines B-1-56-57

from outbreaks in other non-institutional, non-workplace settings.<sup>168</sup> Ontario was entitled to address the risks of COVID-19 transmission that religious gatherings pose.

**(5) The Gathering Limits’ Benefits Outweigh Any Deleterious Effects**

113. The Gathering Limits’ benefits outweigh any deleterious impacts they may have had on the Moving Parties.<sup>169</sup> The measures resulted in substantial benefits by reducing COVID-19 transmission, relieving pressure on the healthcare system, and saving lives.

114. The final stage of the *Oakes* analysis “allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitations.”<sup>170</sup>

As *Hutterian* teaches, “the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs.”<sup>171</sup>

115. In combatting a deadly pandemic, religious freedom may have to be limited:

The potential to harm one’s neighbours provides a reasonable basis for limiting the freedom to manifest one’s beliefs, opinions and conscience. In other words, freedom of religion for example, must be exercised with due respect for the rights of others and subject to such limitations as are necessary to protect public safety, order and health, and the fundamental rights and freedoms of others.<sup>172</sup>

116. In assessing the benefits of the Gathering Limits, the court must consider not just the risk of any single religious gathering, but the public health implications of allowing many such gatherings across the province, particularly when the COVID-19 situation was most severe and hospital and ICU capacity were nearing their limits.

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<sup>168</sup> Hodge Affidavit, para. 29, Caselines B-1-512-13

<sup>169</sup> *Hutterian*, supra at [paras. 77-78](#)

<sup>170</sup> *Hutterian*, supra at [para. 77](#)

<sup>171</sup> *Hutterian*, supra at [para. 90](#)

<sup>172</sup> *Gateway Bible*, supra at [paras. 325](#) and [327](#); see also *Amselem*, supra at [para. 178](#); *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at [para. 26](#)

117. Throughout the pandemic, the Gathering Limits served to reduce COVID-19 transmission at religious gatherings. This in turn reduced the further spread of COVID-19 in the community. As a result, the Gathering Limits helped prevent COVID-19 from overwhelming the healthcare system, so that hospital and ICU beds (and the highly-trained and difficult-to-replace medical professionals needed to run them) remained available to treat COVID-19 and non-COVID-19 patients alike.

118. While Ontario accepts that the Gathering Limits at times had a negative impact on the Moving Parties' ability to hold in-person services, that impact was limited and temporary, lasting "for only as long as necessary to regain control over community transmission and alleviate the intense strain on the hospitals and ICUs."<sup>173</sup> Any impact was mitigated by the continued ability of the Moving Parties to offer online and drive-in services (both of which they did) and the fact that the Gathering Limits were loosened once cases dropped and hospital and ICU capacity was less threatened.

119. The impugned restrictions are therefore a proportionate response to the extraordinary public health crisis posed by the ongoing COVID-19 pandemic. To the degree they infringe *Charter* rights, they were justified limits under s. 1 of the *Charter*.

#### **PART IV – ORDER REQUESTED**

120. Ontario asks that this motion be dismissed.

121. In the alternative, the Moving Parties' attempt to conflate all of the Gathering Limits together must be rejected. Courts granting constitutional remedies must "define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution." If only part of a statute or provision violates the

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<sup>173</sup> *Gateway Baptist, supra* at [para. 328](#)

Constitution, “it is common sense that only the offending portion should be declared to be of no force and effect, and the rest should be spared.”<sup>174</sup>

122. The Gathering Limits that were in place before January 26, 2022 are no longer in force and cannot be struck down under s. 52 of the *Constitution Act, 1982*. At most, if any of those Gathering Limits are found to have unjustifiably infringed the Moving Parties’ *Charter* rights, the court may make an order under *Charter* s. 24(1) declaring that the Moving Parties’ rights were so infringed.

123. The Moving Parties have not taken issue with the current Gathering Limits. Even if they had and they were found to be unconstitutional (which they should not be), the appropriate remedy would be a suspended declaration of invalidity for a period of thirty days. In *G v Ontario*, the Supreme Court affirmed that suspended declarations of invalidity are appropriate where the risk to public safety is sufficiently high.<sup>175</sup>

124. An immediate declaration of invalidity could result in large in-person religious gatherings across Ontario, leading to a cascade of COVID-19 infections and hospitalizations when the province can least afford it. This is precisely the type of case where a compelling public interest – limiting the spread of COVID-19 and the resulting pressures on hospital and ICU capacity – justifies a suspended declaration of invalidity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 26TH DAY OF  
JANUARY, 2022

  
Josh Hunter

  
Ryan Cookson

  
Andrea Bolieiro

  
Maia Stevenson

<sup>174</sup> *Schachter v. Canada*, [1992] 2 SCR 679 at [696-97](#)

<sup>175</sup> *Ontario (AG) v G*, 2020 SCC 38 at paras. [117-39](#) and [178](#)

**SCHEDULE A – AUTHORITIES CITED**

1. *Abarquez v Ontario*, [2009 ONCA 374](#)
2. *Affleck v. Ontario*, [2021 ONSC 1108](#)
3. *Alberta v Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#)
4. *Baier v Alberta*, [2007 SCC 31](#)
5. *Batty v Toronto (City)*, [2011 ONSC 6862](#)
6. *BCGEU v British Columbia (AG)*, [\[1988\] 2 SCR 214](#)
7. *Beaudoin v British Columbia*, [2021 BCSC 512](#)
8. *Black v Law Society of Alberta*, [\[1989\] 1 SCR 591](#)
9. *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, [2009 BCCA 39](#)
10. *Canada (AG) v JTI-Macdonald Corp.*, [2007 SCC 30](#)
11. *Canadian Egg Marketing Agency v Richardson*, [\[1998\] 3 SCR 157](#)
12. *Carter v Canada (AG)*, [2015 SCC 5](#)
13. *Coles Book Stores Ltd v Ontario*, [\[1992\] OJ No 124](#) (Gen Div)
14. *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, [2019 ONCA 393](#)
15. *Figueiras v Toronto (City) Police Services Board*, [2015 ONCA 208](#)
16. *Frank v. Canada (AG)*, [2019 SCC 1](#)
17. *Gateway Bible Baptist Church et al. v Manitoba et al.*, [2021 MBQB 219](#)
18. *Harper v Canada (Attorney General)*, [2004 SCC 33](#)
19. *Hussain v Toronto (City)*, [2016 ONSC 3504](#)
20. *Irwin Toy Ltd. v Quebec (Attorney General)*, [\[1989\] 1 SCR 927](#)
21. *Lapointe v. Hôpital Le Gardeur*, [\[1992\] 1 SCR 351](#)
22. *Law Society of British Columbia v Trinity Western University*, [2018 SCC 32](#)
23. *Little Sisters Book and Art Emporium v. Canada*, [2000 SCC 69](#)

24. *Mounted Police Assn. of Ontario v Canada (AG)*, [2015 SCC 1](#)
25. *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006 SCC 6](#)
26. *Native Women's Assn. of Canada v Canada*, [\[1994\] 3 SCR 627](#)
27. *Newfoundland v NAPE*, [2004 SCC 66](#)
28. *Ontario (AG) v Dieleman*, [\(1994\), 117 DLR \(4th\) 449](#) (Ont. Gen. Div.)
29. *Ontario (AG) v G*, [2020 SCC 38](#)
30. *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [\[1990\] 2 SCR 367](#)
31. *R v Edward Books and Art Ltd.*, [\[1986\] 2 SCR 713](#)
32. *R v Jones*, [\[1986\] 2 SCR 284](#)
33. *R v Semple*, [2004 ONCJ 55](#)
34. *R v Skinner*, [\[1990\] 1 SCR 1235](#)
35. *RJR-MacDonald Inc. v. Canada (AG)*, [\[1995\] 3 SCR 199](#)
36. *Schachter v Canada*, [\[1992\] 2 SCR 679](#)
37. *Schuyler Farms Ltd. v. Nesathurai*, [2020 ONSC 4711](#)
38. *Smiley v Ottawa (City)*, [2012 ONCJ 479](#)
39. *Sprague v. Ontario*, [2020 ONSC 2335](#)
40. *Syndicat Northcrest v Amselem*, [2004 SCC 47](#)
41. *Taylor v Newfoundland and Labrador*, [2020 NLSC 125](#)
42. *The Fit Effect v Brant County Board of Health*, [2021 ONSC 3651](#)
43. *Williams v Ontario*, [2009 ONCA 378](#)
44. *Working Families Ontario v Ontario*, [2021 ONSC 4076](#)

## SCHEDULE B – LEGISLATION CITED

O. Reg. 11/21 (Stay-At-Home Order) at Sch. 1, s. 1(1), items 24 & 25, and (7)-(8), under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9

### SCHEDULE 1

#### **Requirement to remain in residence**

1. (1) Every individual shall remain in their place of residence at all times unless leaving their place of residence is necessary for one or more of the following purposes:

[...]

#### **Gatherings**

24. Attending a gathering for the purpose of a wedding, a funeral or a religious service, rite or ceremony that is permitted under the Stage 1 Order or making necessary arrangements for the purpose of such a gathering.

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

[...]

(7) For greater certainty, nothing in this Order permits an individual to gather with other individuals if the gathering is not permitted under the Stage 1 Order.

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

O. Reg. 265/21 (Stay-At-Home Order) at Sch. 1, s. 1(1), items 24 & 25, and (7)-(8), under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9

SCHEDULE 1

**Requirement to remain in residence**

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

[...]

**Gatherings**

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

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

[...]

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

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



O. Reg. 82/20 (Rules for Areas in Shutdown Zone and at Step 1) at Sch. 4, s. 4, under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17

**Gathering in motor vehicles for religious service, rite or ceremony**

4. (1) This section applies with respect to gatherings for the purposes of a wedding, funeral, religious service, rite or ceremony if the persons attending the gathering, other than those conducting the service, rite or ceremony, do so in a motor vehicle.

(2) Clause 1 (1) (d) does not apply to a person who attends a gathering to which this section applies if the person follows all of the following precautions that apply to the person:

1. Each person attending the gathering, other than the persons conducting the service, rite or ceremony, must remain within a motor vehicle that is designed to be closed to the elements, except,
  - i. where necessary to use a washroom, or
  - ii. as may otherwise be necessary for the purposes of health and safety.
2. The driver of a motor vehicle must ensure that it is positioned at least two metres away from other motor vehicles.
3. A person who ordinarily uses a non-motorized vehicle because of their religious belief and who attends the gathering must remain within their non-motorized vehicle except where necessary to use a washroom or as may otherwise be required for health and safety, and paragraph 2 applies with necessary modifications.

ONTARIO (AG) v. TRINITY BIBLE CHAPEL et al.  
ONTARIO v. THE CHURCH OF GOD (RESTORATION) AYLMER et al.

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

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**


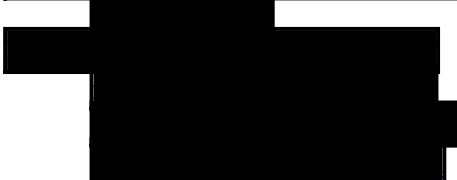
Proceedings commenced at St. Thomas

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(Motion Returnable  
January 31, 2022)**

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