

*Courts of Justice Act*

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**RANDY HILLIER**

Applicant

-and-

**HIS MAJESTY THE KING IN RIGHT  
OF THE PROVINCE OF ONTARIO**

Respondent

---

**FACTUM OF THE APPLICANT**

---

Date: 6<sup>th</sup> day of June, 2023

**CHARTER ADVOCATES CANADA**  
529-439 University Avenue  
Toronto ON M5G 1Y8

**SAYEH HASSAN**  
LSO No. 53406E

**CHRIS FLEURY**  
LSO No. 67485L

**HENNA PARMAR**  
LSO No. 79119E

Counsel for the Applicant

## TABLE OF CONTENTS

<b>PART I - OVERVIEW</b> .....	1
<b>PART II - FACTS</b> .....	2
<b>The Legislative Framework (Background)</b> .....	2
<b>The Lockdown Regulations</b> .....	3
a) Stay-At-Home Order.....	3
b) Rules for Areas in Stage 1.....	4
<b>The Applicant Randy Hillier</b> .....	5
<b>Expert Evidence – On Behalf of the Applicant</b> .....	7
<b>Expert Evidence – On Behalf of the Respondent</b> .....	10
<b>PART III - ISSUES</b> .....	11
<b>PART IV - LAW AND ARGUMENT</b> .....	12
<b>The Lockdown Regulations Infringed the Applicant’s Right to Peaceful Assembly</b> .....	12
a) Mr. Hillier Participated in Outdoor Gatherings for a Common Purpose to Protest the Lockdown Regulations .....	15
b) The Gatherings were Peaceful .....	15
c) The Interference Caused by the Lockdown Regulations were Neither Trivial nor Insubstantial ...	16
<b>The Lockdown Regulations were not Demonstrably Justified in a Free and Democratic Society</b> ....	18
a) The Role of Deference in Section 1 Analysis .....	18
<b>The Lockdown Regulations were not Reasonable nor Demonstrably Justified</b> .....	20
a) The Objectives of the Lockdown Regulations were Pressing and Substantial .....	20
b) There is no Rational Connection Between the Severe Limitation and/or Ban on Outdoor Gatherings and Reduction in Transmission and Hospitalizations.....	21
c) The Lockdown Regulations did not Minimally Impair Section 2(c) of the <i>Charter</i> .....	24
d) The Severe Deleterious Effects of Strict Restrictions and an Outright Ban on Outdoor Protests Outweigh any Salutary Effects .....	27
i) Deleterious Impact of Lockdowns Regulations .....	27
ii) Negative effects of the Lockdown Regulations on Canada’s Democracy .....	27
iii) Social Harms of the Lockdown Regulations.....	28
<b>PART V - ORDER SOUGHT</b> .....	29
<b>CERTIFICATE OF THE APPLICANT</b> .....	31
<b>SCHEDULE A</b> .....	32
<b>SCHEDULE B</b> .....	34

## **PART I - OVERVIEW**

1. During April and May of 2021, the Government of Ontario (“Ontario”) enacted legislation and regulations which limited Ontarians’ right to peacefully assemble outdoors. This Application seeks to determine the constitutionality of two regulations in force at that time. First, Ontario’s *Stay-At-Home Order*, in force between April 7, 2021, and June 1, 2021,<sup>1</sup> required Ontarians to remain at their residence at all times, unless leaving was necessary for one or more of 29 enumerated reasons (which did not include attendance at a peaceful outdoor protest). The Applicant also challenges two iterations of the *Rules for Areas in Stage 1* (the “Rules”) which prohibited outdoor gatherings of over 5 persons between March 29, 2021, and April 16, 2021<sup>2</sup> and prohibited any person from attending a public outdoor event between April 17, 2021 and May 19, 2021.<sup>3</sup> These challenged regulations (collectively, the “Lockdown Regulations”) prevented Ontarians from engaging in political protest, including protesting Ontario’s legislative response to COVID-19.

2. The Applicant, Mr. Randy Hillier was a Member of Ontario’s Provincial Parliament (MPP) from 2007-2022. As an elected MPP, Mr. Hillier felt compelled to raise the concerns of his constituents about the harms being caused by Ontario’s COVID-19 restrictions. He did so at public protests held on April 8 and May 1, 2021. Mr. Hillier was charged for violating the Lockdown Regulations. He faces substantial fines and possible jail time if convicted at trial.

3. Mr. Hillier seeks a declaration that the Lockdown Regulations infringed section 2(c) of the *Charter* and that the infringement was not reasonable or demonstrably justified in a free and

---

<sup>1</sup> *Stay-at-home order*, [O Reg 265/21](#).

<sup>2</sup> *Rules for areas in stage 1*, [O Reg 82/20](#) (March 29, 2021- March 31, 2021).

<sup>3</sup> [O Reg 82/20](#) (April 16, 2021).

democratic society.<sup>4</sup>

## **PART II - FACTS**

### **The Legislative Framework (Background)**

4. On March 17, 2020, after COVID-19 had been declared as a pandemic, Ontario declared a province-wide emergency pursuant to section 7.0.1 of the *Emergency Management and Civil Protection Act* (“*EMCPA*”).<sup>5</sup> On March 18, 2020, Ontario issued an emergency order that placed limits on the number of people permitted to attend public events.<sup>6</sup> On March 24, 2020, the first of 76 iterations of the *Rules* ordered the closure of all “non-essential” businesses and institutions.<sup>7</sup>

5. On July 24, 2020, the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* was proclaimed into force. It terminated the provincial emergency, but continued certain emergency orders made under the *EMCPA*, including the *Rules*.

6. On November 3, 2020, Ontario released its *Keeping Ontario Safe and Open Framework* (the “*Framework*”) which refined the three-stage approach by establishing five color-coded “zones” of increasingly restrictive public health orders which Ontario could apply on a regional basis.<sup>8</sup> Public Health units were assigned to a particular zone by way of a further regulation: *Stages of Reopening*. The *Stages of Reopening* regulation assigned each of Ontario’s public health units to one of the zones and was amended when one or more regions were assigned to a different zone.<sup>9</sup>

7. On December 21, 2020, Ontario announced that effective December 26, 2020, the *Framework* would be suspended, and a more restrictive provincewide “Shutdown” would begin.

---

<sup>4</sup> In his initial Application, Mr. Hillier asserted a breach of his constitutional rights under sections 2(b), 2(c) and 2(d) of the *Charter*. The Applicant abandons his claims under section 2(b) and 2(d) of the *Charter* and asks this Court to rule solely on his freedom under section 2(c) of the *Charter*.

<sup>5</sup> *Emergency Management and Civil Protection Act*, [RSO 1990, c E9](#) [“*EMCPA*”].

<sup>6</sup> *Organized Public Events, Certain Gatherings*, [O Reg 52/20](#).

<sup>7</sup> [O Reg 82/20](#) (March 24, 2020-April 2, 2020).

<sup>8</sup> Ontario, Ministry of Health, [Keeping Ontario Safe and Open Framework](#), (Issued November 3, 2020; updated November 13, 2020).

<sup>9</sup> *Steps of Reopening*, [O Reg 363/20](#).

On January 12, 2021, Ontario declared a second province-wide state of emergency and issued O Reg 11/21 (the “*First Stay-At-Home Order*”).<sup>10</sup> The *First Stay-At-Home Order* prevented Ontarians from leaving their place of residence, effectively confining them to their property, unless leaving their residence was necessary for one of 29 enumerated purposes.<sup>11</sup>

8. The state of emergency ended on February 9, 2021. At the same time the *Rules* were amended to add a new “Shutdown Zone.”<sup>12</sup>

9. On April 3, 2021, Ontario amended the *Stages of Reopening* regulation moving all 34 public health units in Ontario into the “Shutdown Zone”<sup>13</sup>, an action which it dubbed an “emergency break.”<sup>14</sup> This imposed new restrictions on Ontarians. Most significantly for the purposes of this Application, *all* public health units would now be subject to an outdoor gathering restriction of 5 persons.<sup>15</sup>

## **The Lockdown Regulations**

### ***a) Stay-At-Home Order***

10. On April 7, 2021, Ontario declared a province-wide state of emergency<sup>16</sup> and, effective April 8, 2021, imposed the challenged *Stay-At-Home Order* that effectively prohibited outdoor protests.<sup>17</sup> The *Stay-At-Home Order* required every resident of Ontario to remain at their residence for its duration, which lasted until June 1, 2021. It only permitted citizens to leave their residence if “necessary” for one of 29 enumerated purposes deemed essential by Ontario. These 29

---

<sup>10</sup> *Stay-at-Home Order*, [O Reg 11/21](#).

<sup>11</sup> *Ibid* at s.1(1).

<sup>12</sup> *Rules for Areas in Stage 1*, [O Reg 82/20](#) (February 9, 2021).

<sup>13</sup> *Stages of Reopening*, [O Reg 363/20](#) (April 3, 2021- June 6, 2021).

<sup>14</sup> Office of the Premier, *Ontario Implements Provincewide Emergency Break*, News Release, (April 1, 2021) <<https://news.ontario.ca/en/release/60986/ontario-implements-provincewide-emergency-brake>>.

<sup>15</sup> [O Reg 82/20](#) (April 3, 2021-April 6, 2021). Those attending indoor weddings, funerals and religious gatherings enjoyed permission up to “15 percent of the capacity of the room.” Schedule 4, 1(1)(d).

<sup>16</sup> [O Reg 264/21](#).

<sup>17</sup> [O Reg 265/21](#).

exceptions were organized under the following eight categories: (1) Work, school and child care; (2) Obtaining goods and services; (3) Assisting others; (4) Health, safety and legal purposes; (5) Multiple residences and moving; (6) Travel [to outside of Ontario]; (7) Gatherings; and (8) Animals.

11. Under the “Gatherings” category, only the following were permitted:

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.<sup>18</sup>

***b) Rules for Areas in Stage 1***

12. Schedule 4 to the *Rules* addressed “Organized Public Events, Certain Gatherings in Shutdown Zone.” Section 1(1)(c) of this Schedule, in force on April 8, 2021, stated:

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

...

(c) an organized public event or social gathering of more than 5 people that is held outdoors, including a social gathering associated with a gathering described in clause<sup>19</sup>

13. It is noteworthy that from April 8-16, 2021, the various versions of the *Rules* contained this clause and therefore contradicted the prohibition on outdoor gatherings imposed by the *Stay-At-Home Order*. In fact, the *Stay-At-Home Order* specified at section 1(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.”<sup>20</sup> Further the *EMCPA* also provides that in the event of a conflict with an order made under that Act (i.e. *The Stay-At-Home Order*), the order made under the *EMCPA* prevails unless the statute or regulation specifically

<sup>18</sup> O Reg 265/21, Schedule 1 s1(1)24-25.

<sup>19</sup> [O Reg 82/20](#) (April 8-11, 2021) at Schedule 4 s 1(1)(c).

<sup>20</sup> *Stay-At-Home Order*, O Reg 265/21 at Schedule 1 s 1(8).

provides that it is to apply despite that *Act*.<sup>21</sup> No such language appears in the challenged *Rules* or the *Re-opening Ontario Act* (“*ROA*”).

14. Beginning April 17, 2021, the *Rules* were amended again banning outdoor gatherings with the section 1(1)(c) of Schedule 4 then reading that “no person shall attend...an organized public event or social gathering that is held outdoors.” This ban on outdoor gatherings ended on May 22, 2021, by way of a further amendment to *Rules* allowing for an outdoor gathering of 5 individuals.<sup>22</sup> The *Rules* then once again conflicted with the *Stay-At-Home Order*.

15. For all time periods relevant to this Application an exception was made in section 1(1)(d) of Schedule 4 “for an indoor gathering for the purposes of a wedding, a funeral or a religious service, rite or ceremony”<sup>23</sup> with a limit of “15 percent of the capacity of the room” in place until April 19, 2021, when it was changed to require no “more than 10 people.” The National Hockey League and the American Hockey League were permitted to operate during this period.<sup>24</sup> Liquor and cannabis retailers also remained open for in store shopping.<sup>25</sup>

### **The Applicant Randy Hillier**

16. The Applicant Randy Hillier is a former MPP in the Provincial Parliament of Ontario. He was first elected in 2007 in the riding of Lanark-Frontenac-Lennox and Addington where he served until 2018 when the riding was redistributed. In 2018 he was elected in the new riding of Lanark-Frontenac-Kingston where he served until 2022 when he chose not to run for re-election in that year’s provincial Election.

---

<sup>21</sup> *EMCPA* at s 7.2(4).

<sup>22</sup> *Rules for Areas in Stage 1*, [O Reg 82/20](#) (May 22, 2021), Schedule 4 a s 1(1)(c).

<sup>23</sup> *Ibid*, schedule 4, s 1(1)(d).

<sup>24</sup> *Ibid* at Schedule 1, ss 12-13.

<sup>25</sup> *Ibid* at Schedule 1 s 8; Schedule 2, s 5 and 10.1 (3).

17. Mr. Hillier was vocal in his concern regarding Ontario's COVID-19 response beginning as early as March 17, 2020, when he wrote a public letter to the Premier and Cabinet.<sup>26</sup> Mr. Hillier initially complied with the government restrictions, limiting his travel and social interactions, closing his office, and responding to constituents by phone.<sup>27</sup>

18. As the government restrictions progressed, he continued to hear from his constituents who were concerned about the harms of the government's restrictions. The number of concerns Mr. Hillier heard about the restrictions exponentially exceeded that of any previous government policy.<sup>28</sup>

19. On April 8, 2021, Mr. Hillier attended a peaceful outdoor demonstration in Kemptville, Ontario. The protest was a response to Ontario's imposition of the *Stay-At-Home Order* the day prior. In addition to attending, Mr. Hillier spoke to those in attendance expression his own concerns regarding Ontario's legislative response to COVID-19, and echoing concerns he had heard from his constituents.<sup>29</sup>

20. As a result of his attendance, Mr. Hillier was issued a *Provincial Offences Act* summons and was charged with breaching both the *Stay-at-Home Order* and the *Rules*.<sup>30</sup> As described above, the outdoor gathering limit under the *Rules* was 5 persons at that time. The outdoor gathering limit under the *Stay-At-Home Order* was 0 persons by virtue of the fact that no person was permitted to leave their residence for the purpose of a gathering.

21. In a similar manner, Mr. Hillier attended and spoke at a peaceful outdoor demonstration that took place in Cornwall, Ontario on May 1, 2021. That demonstration was in response to the

---

<sup>26</sup> Affidavit of Randy Hillier Sworn On September 14, 2022 ["Hillier Affidavit"] at para 18, AAR, Tab 2, p.23; see also Exhibit A to Hillier Affidavit, AAR, Tab 2, at p.38.

<sup>27</sup> Hillier Affidavit at para 19.

<sup>28</sup> *Ibid* at para 21.

<sup>29</sup> *Ibid* at paras 48-49.

<sup>30</sup> *Ibid* at paras 54, AAR, Tab 2, at p.32.



extension of the *Stay-at-Home Order*.<sup>31</sup> For this attendance Mr. Hillier received a further summons and was charged again with breaching the *Stay-at-Home Order* and the *Rules*. As described above, no persons were permitted to gather outdoors at that time under the *Stay-At-Home Order* or the *Rules*.

22. Mr. Hillier attended many similar protests across Ontario in April and May of 2021. He initially estimated that he faced 25 charges as a result.<sup>32</sup> A number of the charges have since been withdrawn or stayed at the request of the respective Crown Prosecutors. As of the time of drafting this factum, in addition to the Kemptville and Cornwall charges which remain outstanding, Mr. Hillier is facing similar charges in: Smith Falls, Belleville, Peterborough, Stratford, Kitchener and Chatham. Rather than bringing 8 separate *Charter* applications in the Provincial Offences Court, Mr. Hillier has brought this single Application which will be binding on the Courts below. It is expected that the decision of this Court will resolve the *Charter* issues in each of the outstanding POA prosecutions.

23. In most of these jurisdictions, including Kemptville and Cornwall, Mr. Hillier is charged as a host or organizer under the section 10.1(1) of the *Reopening Ontario Act*. Were Mr. Hillier to be found liable under this provision, he faces a minimum fine of \$10,000 on each count. The maximum punishment on each count is a \$100,000 fine and a term of imprisonment of one year.<sup>33</sup>

#### **Expert Evidence – On Behalf of the Applicant**

24. Dr. Thomas Warren, Dr. Joel Kettner and Dr. Kevin Bardosh have been put forward by the Applicant to assist the Court as experts in this case.

---

<sup>31</sup> *Ibid* at para 50.

<sup>32</sup> Hillier affidavit at para 56.

<sup>33</sup> *Reopening Ontario Act, 2020*, [SO 2020, c 17](#) at s 10.1 (1)-(3) [“ROA”].

25. Dr. Warren is an infectious disease specialist and a medical microbiologist with Halton Healthcare. He recently completed his master's degree in Epidemiology at the London School of Hygiene and Tropical Medicine.<sup>34</sup> He is also a clinical professor at McMaster University Department of Medicine. As part of his practice, he has treated patients with respiratory illnesses, including COVID-19.<sup>35</sup> He has been qualified as an expert in a number of published COVID-19 related cases.<sup>36</sup>

26. Dr. Warren was asked by the Applicant to provide an expert opinion on rate of outdoor transmission of COVID-19. He provided evidence that risk of outdoor transmission of respiratory illnesses including COVID-19 is very low<sup>37</sup> and that COVID-19 is known to transmit primarily indoors particularly in households and other places of residence.<sup>38</sup>

27. Dr. Kettner is an epidemiologist and former Chief Medical Officer of Health of Manitoba. He holds Canadian Royal Collage Fellowship certificates in public health, preventative medicine as well as general surgery. He is a full-time associate professor in the Department of Community Health Sciences at the College of Medicine at the University of Manitoba. During his time as Manitoba's Chief Medical Officer of Health he led the province's public health responses to several outbreaks including SARS and H1N1 Influenza.<sup>39</sup> He has provided expert reports and has been accepted as an expert in 10 COVID-19 related cases.<sup>40</sup>

28. Dr. Kettner presented a report highlighting the dearth of available evidence, data and information regarding the effectiveness of outdoor gathering restrictions in reducing the spread of

---

<sup>34</sup> Transcript of Cross examination of Dr. Warren at p. 5 lines 20-25.

<sup>35</sup> *Ibid* at p. 8 lines 1-16 .

<sup>36</sup> See for example: *Ontario v Trinity Bible Chapel et al*, [2022 ONSC 1344](#); *Gateway Bible Baptist Church v Manitoba*, [2021 MBQB 218](#) [*Gateway Bible*]; *Grandel v Saskatchewan*, [2022 SKKB 209](#)["*Grandel*"]; *Beaudoin v British Columbia*, [2021 BCSC 512](#).

<sup>37</sup> Exhibit C to the Affidavit of Dr. Warren ["Warren Affidavit"], AAR, Tab 3, at p. 168-170.

<sup>38</sup> *Ibid* at p. 170.

<sup>39</sup> Exhibit A to the Affidavit of Dr. Kettner ["Kettner Affidavit"] at para 4, AAR, Tab 4, at p.187.

<sup>40</sup> Exhibit B to the Kettner Affidavit, AAR p. 225-226.

COVID-19. His evidence also addresses the lack of transparency with respect to any explanation or justification for restricting outdoor gatherings, and lack of any specific information on number or rates of transmission associated with outdoor gatherings between January 7<sup>th</sup> 2021 to June 17<sup>th</sup> 2021.<sup>41</sup>

29. After reviewing a wide range of available public health data with respect to the rate of outdoor transmission, Dr. Kettner was able to point to only one study referenced by Ontario. That study indicated that the rate of indoor transmission was up to 18.7 times higher than outdoor transmission.<sup>42</sup> Dr. Kettner also referred to a US Centres for Disease Control estimate of outdoor gatherings which were estimated to be much lower than 10% and some of the studies showing transmission was as low as 1%. This information was published by World Health Organization.<sup>43</sup>

30. Dr. Kettner used outbreak and case numbers provided by “*The Ontario Enhanced Epidemiological Survey*”<sup>44</sup> to provide an estimate of outdoor transmission. He estimated that the rate of “outbreaks” in Ontario associated with outdoor transmission was 1%, which amounts to 0.1% of total cases.<sup>45</sup> These calculations were unchallenged by Ontario during cross-examinations.

31. Dr. Bardosh is a medical anthropologist, a field focused on the study of social, cultural, economic and political factors that affect health and medicine. He is also an implementation scientist with expertise in infectious disease and public health. During the COVID-19 pandemic he has been involved with research on lockdown and vaccine policies and has written and published multiple academic articles in these areas.<sup>46</sup> He was asked to provide an expert opinion

---

<sup>41</sup> Exhibit C to Kettner Affidavit, AAR p. 231-232, 235, 237-238.

<sup>42</sup> *Ibid* at p. 240.

<sup>43</sup> *Ibid* at p. 239.

<sup>44</sup> *Ibid* at p.245,

<sup>45</sup> *Ibid* at p. 246.

<sup>46</sup> Exhibit A to the Affidavit of Dr. Bardosh affirmed September 14, 2022 [“Bardosh Affidavit”] at para 3 and 12, AAR, Tab 5.

on the physical, mental and socioeconomic harms of COVID-19 restrictions. He provided a report based on review of 150 peer reviewed Canadian studies.<sup>47</sup>

32. Through a comprehensive review of the relevant literature, Dr. Bardosh details the significant adverse effects that Ontario's COVID-19 response has had on children and other vulnerable populations<sup>48</sup> as well as significant impact on physical health and the economy<sup>49</sup>. These impacts were either anticipated or entirely predictable consequences of locking Ontarians in their houses for an extended period. He further found that COVID-19 restrictions created confusion and deteriorated trust in the government<sup>50</sup> and that they negatively affected civil society and democratic accountability.<sup>51</sup>

#### **Expert Evidence – On Behalf of the Respondent**

33. Ontario seeks to admit the evidence of Dr. David McKeown as a participant expert and Dr. Matthew Hodge as an expert. Dr. McKeown was the Associate Chief Medical Officer of Health during the relevant period. In his affidavit and during cross examination, Dr. McKeown agreed to the following:

- At no time was Ontario attempting to eliminate COVID-19 entirely.<sup>52</sup>
- Indoor transmission is more likely than outdoor transmission.<sup>53</sup>
- He was unable to provide any estimate of the rate of outdoor transmission.<sup>54</sup>

---

<sup>47</sup> Exhibit C to Bardosh Affidavit, AAR p. 276.

<sup>48</sup> Affidavit of Dr. McKeown affirmed November 22, 2022, at para 69 [McKeown Affidavit].

<sup>49</sup> Exhibit C to Bardosh Affidavit

<sup>50</sup> *Ibid* at p.295.

<sup>51</sup> *Ibid* at 296-297.

<sup>52</sup> Transcript of the Cross Examination of Dr. McKeown p.26 lines 13-14 and 23-24.

<sup>53</sup> *Ibid* p. 27 lines 6-10.

<sup>54</sup> *Ibid* p. 27 lines 15-25.

- “Large gatherings”, whether indoors or outdoors, present a risk of COVID-19 transmission.<sup>55</sup> He was unable to provide a definition for a “large gathering”.<sup>56</sup>
- It would have been possible to make estimates of transmission in gatherings of different sizes.<sup>57</sup> No such estimates have been provided to the Court.
- He was unable to provide any information with respect to the impact a 5-person gathering limit or an outright ban on outdoor gatherings had on minimizing COVID-19 transmission and associated hospitalization rate.<sup>58</sup>

34. Ontario also seeks to admit the evidence of Dr. Matthew Hodge. Dr. Hodge is a medical doctor who practices in the areas of public health & preventive medicine and emergency medicine in Ontario. In his affidavit and during cross examination, Dr. Hodge agreed to the following:

- There will be negative long-term development and health outcomes that will be attributed to Ontario’s legislative response to the COVID-19 pandemic.<sup>59</sup>
- The outdoor environment makes the virus less able to persist or survive.<sup>60</sup>
- Through modelling estimates of rates of transmission in different size groups could be calculated.<sup>61</sup>

### **PART III - ISSUES**

35. This Application raises the following issues:

- A. Do the Lockdown Regulations violate section 2(c) of the *Charter*?
- B. If the Lockdown Regulations violate section 2(c), is the violation a reasonable limit

---

<sup>55</sup> McKeown affidavit at para 13.

<sup>56</sup> Transcript of the cross examination of Dr. McKeown at p 28 lines 15-20, p. 29 lines 1-3, 7-16, p. 30 lines 4-9.

<sup>57</sup> Transcript of the Cross Examination of Dr. McKeown p. 36 lines 9-15.

<sup>58</sup> *Ibid* p. 40 lines 16-25 p. 42 lines 7-9 p. 44 lines 6-15.

<sup>59</sup> *Ibid* at p.18 lines 8-11.

<sup>60</sup> *Ibid* at P. 38 lines 22-23.

<sup>61</sup> *Ibid* at p. 48 lines 1-6.

under section 1 of the *Charter*?

## **PART IV - LAW AND ARGUMENT**

### **The Lockdown Regulations Infringed the Applicant’s Right to Peaceful Assembly**

39. Canadian jurisprudence holds that the freedom of peaceful assembly under section 2 (c) of the *Charter*:

- “is by definition a group activity incapable of individual performance”<sup>62</sup>;
- “[is] geared toward protecting a physical gathering together of people”<sup>63</sup>;
- “[is] the concourse or meeting together of a considerable number of persons at the same place”<sup>64</sup>;
- “is the right to join together in a physical manifestation”<sup>65</sup>;
- includes the right to participate in peaceful demonstrations, protests, parades, meetings, picketing and other assemblies<sup>66</sup>;
- protects the right to demonstrate on public streets<sup>67</sup>;
- is “speech in action”<sup>68</sup>;
- “[is] one that furthers the other fundamental freedoms.... It protects the right of citizens to gather to express views concerning matters related to the functioning of a civil society”<sup>69</sup>; and
- “protects rights fundamental to Canada’s liberal democratic society.”<sup>70</sup>

40. Caselaw further holds that freedom of assembly does not:

- protect riots and gatherings that seriously disturb the peace<sup>71</sup>;

---

<sup>62</sup> *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015 SCC 1](#) at para 64 [“*Mounted Police*”].

<sup>63</sup> *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [\[1994\] 2 FC 406](#) at p. 435-436, [1994 CanLII 3453 \(FCA\)](#), (Linden J.A. (dissenting in part)).

<sup>64</sup> *Fraser and N.S. (Attorney-General)* 1986 CanLII 3977 (NS SC) at para 30

<sup>65</sup> *Ibid* at para 31

<sup>66</sup> *Ontario (Attorney-General) v. Dieleman* at para 700, [1994 CanLII 7509 \(ON SC\)](#) [“*Dieleman*”]; *Fraser v. Nova Scotia (A.G.)*, [1986 CanLII 3977](#) at paras 29-36.

<sup>67</sup> *Garbeau v. Montréal*, [2015 OCCC 5246](#).

<sup>68</sup> *Dieleman* at para 700.

<sup>69</sup> *Koehler v. Newfoundland and Labrador*, [2021 NLSC 95](#) at para 46.

<sup>70</sup> *Mounted Police* at para 48.

<sup>71</sup> *R. v. Lecompte*, [2000 CanLII 8782](#) (QC CA).

- protect permanent encampments in public spaces by homeless persons<sup>72</sup>;
- include the right to physically impede or blockade lawful activities<sup>73</sup>; or
- protect a particular venue for assembly.<sup>74</sup>

41. In one of the lengthier considerations of section 2(c), Justice Adams of the Ontario Superior Court cites Tarnopolsky and Beaudoin eds., *Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) with approval:

[700] ... freedom of assembly is identified with freedom of expression in these terms:

Freedom of assembly has been defined as “concerned with the public expression of opinion by spoken word and by demonstration”. The definition is as revealing as it is accurate. It not only locates freedom of assembly in the pantheon of freedom of expression from which it springs, but identifies its distinguishable, or one might say “demonstrable” dimension as well.

[701] The authors go on to describe this latter dimension in these terms at pp. 142-8:

Aside from the general justifications for freedom of expression, there are specific underpinnings to the right of free assembly. There are three distinct functions of assembly: a merely communicative function, a pressure function and an openly coercive function. The essence of all three functions is the intention to put forth a point of view. Distinctions are based on the intensity of the desire to be heard.

If we do indeed have a right to speak, and to be heard, the right to assemble may be the only way of ensuring the advocacy of the right to speak. Mr. Justice Berger notes that:

“Assemblies, parades and gatherings are often the only means that those without access to the media may have to bring their grievance to the attention of the public.”

Groups without the money to advertise often find it necessary to demonstrate. If their right to demonstrate is denied, the group must languish in a communicative vacuum. Demonstrations guarantee media exposure and in Western society, access to the media is essential to the communication of a point of view, and to the fulfillment of group interests.

In addition to this group fulfillment rationale for freedom of assembly, there are

---

<sup>72</sup> *(Abbotsford (City) v. Shantz*, [2015 BCSC 1909](#), in this case, however, the measures were found to infringe section 7 of the *Charter*.

<sup>73</sup> *Guelph (City) v. Soltys*, 2009 CarswellOnt 4759, [\[2009\] O.J. No. 3369](#) (ONSC) at para 26.

<sup>74</sup> *Attorney General of Ontario v. 2192 Dufferin Street*, [2019 ONSC 615](#) at para 54.

socially instrumentalist justifications:

“Whenever the demonstrators are complaining of a bona fide wrong, society’s interests will be advanced if their grievance is brought to public attention and relief is granted.”

Moreover, by allowing free assemblies, governmental authorities are able to measure both the identity of feeling with regard to an issue and the “extent of grass-root support for a specific point of view.”<sup>75</sup>

42. Section 2(c) has not received an authoritative interpretation from the Supreme Court of Canada. Perhaps as a result of the strong expressive component of many peaceful assemblies, courts have often opted to subsume its analysis within section 2(b).<sup>76</sup> Treating a peaceful assembly merely as expression, however, risks failing to give proper consideration and weight to the importance of the right to assemble itself, which can cause further error when considering whether infringements of the freedom of peaceful assembly are proportionate and justified.

43. In the case at bar, the freedom of peaceful assembly is the only *Charter* claim being advanced. If assemblies such as public demonstrations are to “receive robust constitutional protection, an independent jurisprudential approach to freedom of peaceful assembly is needed.”<sup>77</sup>

The Applicant submits that this Court should adopt the following straightforward test which has been proposed in legal scholarship for considering a section 2(c) infringement:

First, the claimant must have sought to participate in a gathering of two or more people for a common purpose; second, this gathering must have been peaceful (i.e., non-violent) in nature; and third interference with this gathering must have been neither trivial nor insubstantial.<sup>78</sup>

---

<sup>75</sup> *Dieleman* at paras 700-701, quoting Tarnopolsky and Beaudoin eds., *Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982), at 138 & 142-148.

<sup>76</sup> *Figueiras v. Toronto Police Services Board*, [2015 ONCA 208](#), at paras. 77-78; *R v. Behrens*, 2001 CarswellOnt 5785, [2001] O.J. No. 245 (ONSC) at paras. 26, 91 and 104; *British Columbia Teachers’ Federation v. British Columbia Public School Employees’ Assn.*, [2009 BCCA 39](#) at para. 39.

<sup>77</sup> Kisinger, “Restricting Freedom of Peaceful Assembly” at p. 20 citing Basil S Alexander, “Exploring a More Independent Freedom of Peaceful Assembly in Canada” (2018) 8:1 *Western J Leg Studies* 1 at p. 2.

<sup>78</sup> Kisinger, “Restricting Freedom of Peaceful Assembly” at p.22.



44. The proposed test aligns with sections 2(a), 2(b), and 2(d) of the *Charter*, promoting coherence in the analysis of fundamental freedoms.<sup>79</sup> It stays true to the language of the right and advances the overarching principle of interpreting *Charter* rights broadly, while allowing for reasonable limitations under section 1.

***a) Mr. Hillier Participated in Outdoor Gatherings for a Common Purpose to Protest the Lockdown Regulations***

45. It should be uncontroversial that on both April 8, 2021 and May 1, 2021 Mr. Hillier attended outdoor protests together with other citizens in Kemptville and Cornwall respectively. The Respondent Ontario has charged Mr. Hillier for doing so.

46. Mr. Hillier's stated purpose of attending both protests was to "stand up against restrictive measures implemented by the Ontario government, where Ontarians were prohibited from leaving their residences except for what the government deemed essential purposes, and to put a stop to the harms that were being felt across the broad spectrum of society."<sup>80</sup>

47. The timing of Kemptville protest is also of note when considering the gathering's common purpose. The Kemptville gathering occurred on April 8, 2021, the day following the announcement of the *Stay-At-Home Order*.

***b) The Gatherings were Peaceful***

48. Mr. Hillier has characterized both gatherings as being entirely peaceful.<sup>81</sup> Ontario has led no evidence to suggest otherwise.

---

<sup>79</sup> See: *Alberta v. Hutterian Brethern of Wilson Colony* [2009 SCC 27](#) at para 32; *Irwin Toy v Quebec*, [\[1989\] 1 SCR 927](#); *Mounted Police* at para 72.

<sup>80</sup> Hillier affidavit at para 51.

<sup>81</sup> *Ibid* at paras 49-51, AAR at p. 31-32; Transcript of Cross Examination of Dr. McKeown p. 51 lines 18-25

***c) The Interference Caused by the Lockdown Regulations were Neither Trivial nor Insubstantial***

49. The gathering restrictions as they pertain to both *Rules* and the *Second Stay-At-Home Order* at the time of each gathering is summarized below:

Gathering at Issue	Rules for Areas in Stage 1 (O Reg 82/20, Schedule 4)	The Second Stay-at-Home Order (O Reg 265/21)
Kemptville (April 8, 2021)	5	0
Cornwall (May 1, 2021)	0	0

50. At the time of the May 1, 2021 Cornwall protest, every health unit in Ontario was in a “Shutdown Zone”<sup>82</sup> for the purposes of the *Rules*. At that time Schedule 4 of the Regulation (Organized Public Events, Certain Gatherings in Shutdown Zone) stated that “no person shall attend .... an organized public event or social gathering that is held outdoors.”<sup>83</sup> The effect of this provision on the Applicant with regards to the gatherings at issue is fundamentally the same as the effect of the *Stay-At-Home Order*, in the sense that both effectively prohibited peaceful gatherings.

51. While the effect on peaceful protest was the same, it is worth noting that the structure of the *Stay-At-Home Order* is fundamentally different from the *Rules*. The *Stay-At-Home Order* was structured like a conditional sentence order (commonly referred to as “house arrest”). The starting point of the *Stay-At-Home Order* is that every Ontarian “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...”<sup>84</sup> From April 7, 2021 – June 1, 2021, Ontario in essence placed every Ontario citizen on house arrest.

<sup>82</sup> *Stages of Reopening*, [O Reg 363/20](#) (April 3, 2021-June 6, 2021), at Schedule 1 s 1(1).

<sup>83</sup> [O Reg 82/20](#) (April 17-April 18, 2021) at schedule 4 s 1(1)(c).

<sup>84</sup> *Stay-At-Home Order*, [O Reg 265/21](#), at schedule 1 s 1(1).

52. The *Stay-at-Home Order* was made pursuant to the emergency powers granted to the Premier under the *Emergency Management and Civil Protection Act*. It is noteworthy that the Act specifically states:

The purpose of making orders under this section is to promote the public good by protecting the health, safety and welfare of the people of Ontario in times of declared emergencies in a manner that is subject to the *Canadian Charter of Rights and Freedoms* [emphasis added].<sup>85</sup>

53. By its very definition, it is fundamentally impossible to exercise one's freedom of peaceful assembly without physically gathering. It should be uncontroversial that a regulation which prevents Ontarians from gathering entirely is neither a trivial nor an insubstantial restriction. Additionally, the penalties that the Applicant is facing on a potential conviction, namely \$100,000 fine and 1 year imprisonment, are non-trivial and substantial.

54. In British Columbia, Chief Justice Hinkson addressed specifically the prohibitory effect public health orders there had on public protests. He declared that the order unjustifiably infringed the petitioner's section 2(c) right to freedom of peaceful assembly.<sup>86</sup>

55. As noted above, Schedule 4 of the *Rules* was amended between the April 8 and May 1 gatherings. At the time of the April 8 gathering in Kemptville, Schedule 4 stated: "no person shall attend....an organized public event or social gathering of more than 5 people that is held outdoors..."<sup>87</sup> The Applicant also asserts that this restriction of gatherings to 5 persons is neither a trivial nor an insubstantial interference. Again, this restriction is at odds with the *Stay-At-Home Order* in force at the time. Where Mr. Hillier is charged with breaching both regulations, he seeks an additional determination of whether Schedule 4 of the *Rules* complied with the *Charter* at the time of the April 8 gathering in Kemptville.

---

<sup>85</sup> *EMCPA* at s 7.0.2(1).

<sup>86</sup> [Beaudoin v. British Columbia, 2021 BCSC 512](#) at paras 174, 251.

<sup>87</sup> [O Reg 82/20](#) at Schedule 4 s 1(1)(c).

56. A limitation of gatherings to five persons is almost as offensive to the *Charter* principles as a total ban. It is noteworthy that the purpose of Mr. Hillier's attendance at the protests was to protest the legislative actions of Ontario, an opinion which was not popular at that time. Although usually discussed in the context of section 2(b), the Supreme Court of Canada has long held that protecting unpopular and minority views is a central *Charter* value:

Permitting an effective voice for unpopular and minority views - views political parties may not embrace - is essential to deliberative democracy. The goal should be to bring the views of all citizens into the political arena for consideration, be they accepted or rejected at the end of the day.<sup>88</sup>

57. An outdoor gathering of 5 people or less is unlikely to garner any public or media attention, nor would it allow marginalized Ontarians to leverage their voice and express their grievances against government actions. Limiting gatherings to 5 persons is neither a trivial nor an insubstantial interference. Quite the opposite: it strikes at the heart of the values that section 2(c) was meant to protect.

### **The Lockdown Regulations were not Demonstrably Justified in a Free and Democratic Society**

#### ***a) The Role of Deference in Section 1 Analysis***

58. Where a *Charter* infringement arises from a law of general application, the reviewing court must apply a section 1 *Oakes*<sup>89</sup> test analysis. Laws of general application affect the general public, as opposed to being limited to the rights of the applicants before the court.<sup>90</sup>

59. When undertaking a section 1 *Oakes* test analysis, the Court's deference to the legislature's decisions must always reflect the two guiding principles of justification: the impugned measure must be shown to be consistent with democratic values, and it must be necessary in order to

---

<sup>88</sup> *Harper v Canada (Attorney General)*, [2004 SCC 33](#) at para 14.

<sup>89</sup> *R v Oakes*, [\[1986\] 1 SCR 103](#). See also *Dore v Barreau du Quebec*, [2012 SCC 12](#) at para 36.

<sup>90</sup> *Alberta v Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#) at para 23.

maintain public order and the general well-being of citizens.<sup>91</sup>

60. The level of judicial deference, if any, that should be provided to government actors is a contextual question.<sup>92</sup> In general, the more fundamental the interest that is impaired by the government's actions, the less deference a court should be prepared to afford the government.<sup>93</sup> The safeguarding of values integral to a free and democratic society has also been recognized as a relevant factor in determining the appropriate level of deference.<sup>94</sup>

61. In *Frank v. Canada*<sup>95</sup> the Supreme Court of Canada held that “[d]eference may be appropriate in the case of a complex regulatory response or a decision involving competing social and political policies, but it is not the appropriate posture for a court reviewing an absolute prohibition of a core democratic right.”<sup>96</sup> The Court went on to say:

The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but ensuring that the legislature's proffered justification is supported by logic and common sense” (para. 9). In the case at bar, citizens are subject to an absolute denial of their *Charter* right to vote

after crossing the five-year non-residence threshold. Accordingly, a stringent standard of justification must be applied to the AGC's proffered justification.<sup>97</sup>

62. While complexity may call for a level of judicial deference, this alone cannot be a justification for a breach of a *Charter* right.<sup>98</sup> Where the government must decide in light of conflicting scientific evidence and scarce resources, the government is still responsible for making a reasonable decision in light of available evidence. The Supreme Court of Canada has stated that, “to carry judicial deference to the point of accepting Parliament's view simply on the basis that the

---

<sup>91</sup> *Chaoulli v Quebec (Attorney General)*, [2005 SCC 35](#) at para 93.

<sup>92</sup> *M. v. H.*, [\[1999\] 2 SCR 3](#) at para 295.

<sup>93</sup> *Ibid* at para 305.

<sup>94</sup> *Ibid* at para 317

<sup>95</sup> [2019 SCC 1](#), [*Frank*].

<sup>96</sup> *Ibid* at para 43.

<sup>97</sup> *Ibid* at para 44.

<sup>98</sup> *M. v H.* at para 311.

problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded”.<sup>99</sup>

63. In the context of Ontario’s legislative response to COVID-19 and section 2(a) of the *Charter*, the Ontario Superior Court articulated the deference standard as follows:

The judicial lens is one governed by deference, not blind or absolute deference, but a thoughtful deference that recognizes the complexity of the problem presented to public officials, and the challenges associated with crafting a solution.<sup>100</sup>

**The Lockdown Regulations were not Reasonable nor Demonstrably Justified**

64. Ontario is required to meet an evidentiary burden of “cogent and persuasive evidence” in establishing: a pressing and substantial objective, a rational connection, minimal impairment, and balancing of salutary vs. deleterious effects.<sup>101</sup>

65. The standard of proof is preponderance of probability and this test “must be applied rigorously.”<sup>102</sup> Chief Justice Dickson held that “[w]here evidence is required in order to prove the constituent elements of a section 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.”<sup>103</sup> Black’s Law Dictionary defines “cogent” as “compelling or convincing.”<sup>104</sup>

**a) The Objectives of the Lockdown Regulations were Pressing and Substantial**

66. The objectives of *The Stay-at-Home Order* and the *Rules* were to reduce transmission, hospitalization and ICU admission through a wide range of measures including strict limits on

---

<sup>99</sup> *RJR-Macdonald Inc. v Canada (Attorney General)*, [1995] 3 S.C.R. 199.

<sup>100</sup> *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at para 6.

<sup>101</sup> *Oakes* at p.138.

<sup>102</sup> *Ibid* at p. 137.

<sup>103</sup> *Ibid* at p. 138.

<sup>104</sup> Bryan A. Garner, ed., *Black’s Law Dictionary*, 11th ed. (Thompson West, 2019), sub verbo “cogent”.

gathering, and at times a complete ban on peaceful outdoor assembly.<sup>105</sup> The Applicant concedes that this is a pressing and substantial objective in the context of the *Oakes* Analysis.

**b) There is no Rational Connection Between the Severe Limitation and/or Ban on Outdoor Gatherings and Reduction in Transmission and Hospitalizations**

67. Measures which limit citizens' constitutional rights must be carefully designed to achieve their objective.<sup>106</sup> Further, governments should adduce evidence as to why less intrusive and equally effective measures were not chosen.<sup>107</sup>

68. The onus is on Ontario to provide evidence that limiting outdoor gatherings would measurably decrease transmission, alleviate the burden on the healthcare system, and result in lower hospitalizations and deaths. This is not a case where causal relationship is incapable of scientific measurement. In fact, Ontario's expert, Dr. Hodge, provided evidence that estimates of rates of transmission in different size groups could be calculated using statistical models.<sup>108</sup> Ontario has provided no such evidence.

69. Ontario has failed to identify a single transmission of COVID-19 that occurred at an outdoor protest. Dr. McKeown stated that the only outdoor gathering resulting in the spread of COVID-19 that he could refer to was a "bush party." He remembered hearing about the "bush party" but was not able to provide any details about it, including whether a potential indoor component existed.<sup>109</sup> Dr. McKeown was asked for an undertaking to provide more information about the bush party. A press release was provided. The press release points to an outbreak of 21 confirmed cases and goes on to state: "The sources of transmission are identified as individuals

---

<sup>105</sup> McKeown Affidavit at paras 46, 47, 56, 59, 63.

<sup>106</sup> *Oakes* at p. 139.

<sup>107</sup> *Thomson Newspapers v Canada (Attorney General)*, [1998] 1 SCR 877 at paras 118-119; *RJR MacDonald, supra*, at para 160; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, at paras 69, 76, 86.

<sup>108</sup> Transcript of Cross Examination of Dr. Hodge, at p. 48 lines 1-6.

<sup>109</sup> Transcript of Cross Examination of Dr. McKeown, p. 49, lines 18-25 and p. 50 lines 5-11.

not following provincial emergency brake orders by visiting others when symptomatic as well as large social gatherings and ‘bush parties’”.<sup>110</sup> The date of publication for alert was April 15, 2021, after the *Stay-at-Home Order* was implemented.<sup>111</sup> It is totally unclear on the evidence to what extent, if any, the bush party resulted in *any* of the 21 confirmed cases.

70. Dr. McKeown also referred to evidence that high levels of out-of-home mobility led to increase in the spread of COVID-19 and that low levels of out-of-home mobility were needed to control COVID-19 through spring of 2021.<sup>112</sup> It should be noted that he is referring to high levels of mobility, not a situation where there are restrictions of 0-5 persons on outdoor gathering. Further the study he refers to for his proposition states: “More detailed mobility data suggest that dine-in restaurants, take-out services (likely representing risk for workers more than customers), gyms and cafés are particularly important drivers of SARS-CoV-2 incidence in the United States.”<sup>113</sup> There is no reference in that study to outdoor gatherings.

71. When questioned about whether he was aware of any transmissions that occurred following the day long Toronto Trinity Bellwood Park gathering of thousands of people,<sup>114</sup> Dr. McKeown confirmed that he was not aware of any.<sup>115</sup>

72. Public Health Ontario posted 35 reviews of COVID-19 Public Health Measures between January 7 2021 and June 17 2021.<sup>116</sup> This evidence would have been available to public health decision makers both prior and during the enactment of the measures. However, none of these

---

<sup>110</sup> Answers to undertakings, item 3. see Dr. Ian Arra “COVID-19 Community Outbreak in Eastern Grey County” *Grey Bruce Health Unit* April 15, 2021, <<https://web.archive.org/web/20210415201114/https://www.publichealthgreybruce.on.ca/About-Us/News-Releases/ArticleID/816/COVID-19-Community-Outbreak-in-Eastern-Grey-County>>

<sup>111</sup> Answers to undertakings, item 3.

<sup>112</sup> McKeown Affidavit at para 52.

<sup>113</sup> Exhibit AA to McKeown affidavit.

<sup>114</sup> Exhibit C to Kettner Affidavit, AAR, Tab 4, at p. 238.

<sup>115</sup> Transcript of Cross Examination of Dr. McKeown at p. 48 lines 4-25.

<sup>116</sup> Exhibit C to Kettner Affidavit, AAR at p. 235.



reviews included any data, information, evidence, analysis or rationale regarding the risks of transmission associated with outdoor public gatherings or the effectiveness of measures to restrict outdoor gatherings with respect to rate of transmission.<sup>117</sup>

73. The only other evidence provided by Ontario on the known rate of outdoor transmission is a footnote contained in Dr. Hodge's affidavit citing a study which concludes that the odds of indoor transmission are very high compared to outdoors (*18.7 times higher*).<sup>118</sup>

74. The Applicant's experts have opined on the rate of outdoor transmission. Dr. Warren has provided evidence that "[l]arge outdoor gatherings of a relatively short duration such as professional soccer and football matches do not result in an increased risk of COVID-19."<sup>119</sup> He also provided evidence about multi-day outdoor events, stating that "...multi-day outdoor events such as music festivals should not be considered outdoor events because there are overnight components that occur indoors, and (as shown above) the risk of SARS-CoV-2 transmission is much higher indoors."<sup>120</sup>

75. Lastly Dr. Warren provided a study which showed only two cases involving outdoor transmission out of 7324 cases. The study stated that the reasons for the very low risk of outdoor transmission is that outdoor concentration of the exhaled droplets can safely assumed to be zero in almost all situations.<sup>121</sup>

76. Dr. Kettner was able to use outbreak and case numbers provided by "*The Ontario Enhanced Epidemiological Survey*"<sup>122</sup> to provide an estimate of transmission associated with outdoor transmission specifically. The rate of "outbreaks" associated with outdoor transmission was 1%,

---

<sup>117</sup> *Ibid.*

<sup>118</sup> Footnote 29 of Dr. Hodge Affidavit.

<sup>119</sup> Exhibit C to Warren Affidavit, AAR, Tab 3 at p. 170.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid* at p. 169.

<sup>122</sup> Exhibit C to the Affidavit of Dr. Kettner at p. 245.

which amounts to 0.1% of total cases.<sup>123</sup> These calculations were unchallenged by Ontario during cross-examinations.

77. The available evidence suggests that outdoor gathering restrictions did little if anything to reduce the spread of COVID-19, and thereby reduce the burden on the healthcare system. The onus is on Ontario to provide evidence on this point. If the probability of transmission was high enough to justify severe restrictions and outright banning of outdoor protests, one would expect at least some evidence of the frequency of COVID-19 transmission outdoors.

**c) The Lockdown Regulations did not Minimally Impair Section 2(c) of the Charter**

78. In considering whether a *Charter* infringement is minimally impairing, the Court will need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions.<sup>124</sup> Typically, outright bans will be difficult to prove as minimally impairing.<sup>125</sup>

79. In cross examination Dr. McKeown agreed that Ontario did not adopt a “COVID-19 zero policy.”<sup>126</sup> A reasonable inference can be made that some risk of COVID-19 transmission was acceptable to Ontario.

80. Ontario has not provided evidence regarding whether less restrictive measures were considered, and if so, why those measures were rejected. Rather, there are many examples of other exceptions and less restrictive measures being imposed for other groups and activities; some constitutionally protected and some not.

---

<sup>123</sup> *Ibid* at p. 246.

<sup>124</sup> *Oakes* at p. 138.

<sup>125</sup> see *RJR-MacDonald Inc, supra*; *Ramsden v Peterborough (City of)*, [1993] 2 SCR 1084 at p. 1105-1106; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 103; *UFCW, Local 1518 v Kmart*, [1999] 2 SCR 1083 at paras 65-66; *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 183.

<sup>126</sup> Transcript of Cross-Examination of Dr. McKeown at p. 26, lines 22-23.

81. For example, the *Stay-At-Home Order* listed exceptions for individuals participating in “a religious service, rite or ceremony” and for individuals “exercising an Aboriginal or treaty right”.<sup>127</sup> It is unclear on the evidentiary record why *these* constitutionally protected rights received at least some consideration, while the right to peacefully assemble seemingly did not.

82. At that relevant time the *Rules* permitted many exceptions to gathering limits. For example, shopping at outdoor garden centers and plant nurseries and indoor greenhouses, which could operate at 25% capacity was permitted.<sup>128</sup> In what was perhaps the most shocking exception permitted under the *Rules*, the National Hockey League and the American Hockey League each had their own exemptions under Schedule 1, allowing defined participants to gather in hotels, indoor and outdoor facilities, businesses and places in those hotels and facilities, and restaurants and bars, under special plans for those leagues.<sup>129</sup> Liquor and cannabis retailers also remained open for *instore* shopping during this period.<sup>130</sup>

83. Ontario Courts have previously opined on restrictive gathering limits in the context of COVID-19 and section 2(a) freedoms. In *Trinity Bible Chapel Pomerance J.* opined on the availability of alternate methods to deliver religious services and the fact that those measures did not amount to a *complete ban* which impacted the Court’s section 1 analysis:

...

[155] Finally, it is important to note that, throughout the pandemic, religious gathering limits were carefully tailored to reflect evolving circumstances, new scientific evidence, and changing levels of risk. Ontario never completely banned religious gatherings. Even when risk was at its highest, and public health at its most precarious, religious institutions were permitted to have upwards of ten persons together, to facilitate virtual or drive-in services.

...

---

<sup>127</sup> O Reg 265/21 at Schedule 1, s.1(1)18. and 24.

<sup>128</sup> [O Reg 82/20](#) at Schedule 2, ss 9.1-9.2.

<sup>129</sup> *Rules for Areas in Stage 1*, [O Reg 82/20](#), at Schedule 1 s 12-13.

<sup>130</sup> *Ibid* at Schedule 1 s 8; Schedule 2, ss 5 and 10(3).

[167]... Yet, it remains the fact that, despite the claimants' characterization as such, there was never a complete ban on religious gatherings or religious activity. It was always open to the churches to deliver services to congregants, albeit in a less than optimal fashion. Gathering limits imposed a significant burden on religious activity, but they did not prevent it from occurring.<sup>131</sup>

84. Courts in Saskatchewan and Manitoba have also opined on the availability of other avenues to exercise the right to outdoor peaceful assembly and the impact of imposing limitations versus a complete ban on this fundamental *Charter* right. In *Grandel*, a Saskatchewan case challenging COVID-19 restrictions on outdoor gatherings, Justice Konkin stated:

[110] In addition, at no point was public protest prohibited. As long as there was physical distancing at protests, there was nothing hindering the applicants from organizing and participating in multiple outdoor gatherings of 10 persons or less, concurrently or consecutively.

[112] In a different perspective, Sask did not opt for the most draconian measure to combat the pandemic, such as complete lockdowns for extended periods.<sup>132</sup>

85. In *Gateway Bible*, Chief Justice Joyal also touched on the fact that while the public health orders in Manitoba restricted gatherings they did not prevent gatherings all together:

[326] Manitoba acknowledges that the impugned PHOs restrict the ability to worship in person, which Manitoba also acknowledges is of significance to the applicants. Although the orders also limit gatherings to small groups outside of one's private residence, they do not prevent gathering altogether. The PHOs still made it possible to meet with family and friends in small groups.<sup>133</sup>

86. In all three cases cited above, COVID-19 public health orders that limited outdoor gatherings were challenged, and while the courts found that the limitations were justified, they were all alive to the fact that those measures did not result in an outright ban for outdoor peaceful gatherings.

---

<sup>131</sup> *Trinity Bible, supra* at paras 113, 155, 167.

<sup>132</sup> *Grandel, supra* at paras 110, 112.

<sup>133</sup> *Gateway Bible, supra* at para 326.

87. The only other province that banned outdoor protests was British Columbia. After a challenge to the prohibition on outdoor protests was commenced and three weeks prior to the hearing, the Provincial Health Officer reversed the prohibition on outdoor protest in BC, stating in a February 10, 2021 order:

I am not prohibiting outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy, subject to my expectation that persons organizing or attending such an assembly will take the steps and put in place the measures recommended in the guidelines posted on my website in order to limit the risk of transmission of COVID-19.<sup>134</sup>

88. At the hearing, counsel for British Columbia conceded, not only that the prohibition on outdoor protests violated the freedom of peaceful assembly protected by section 2(c) of the *Charter*, but further expressly consented to a declaration from the Court striking down the prior prohibitions on outdoor protests, rendering them “of no force and effect.”<sup>135</sup>

**d) The Severe Deleterious Effects of Strict Restrictions and an Outright Ban on Outdoor Protests Outweigh any Salutary Effects**

**i) Deleterious Impact of Lockdowns Regulations**

89. While Ontario cannot provide any evidence of the impact that banning outdoor gatherings reduced the transmission of COVID-19 or hospitalization rates, the Applicant’s expert Dr. Bardosh highlights the alarming social harms of Lockdown Regulations.

**ii) Negative effects of the Lockdown Regulations on Canada’s Democracy**

90. Dr. Bardosh’s report states that pandemic restrictions furthered public distrust among specific social groups and especially among those with lower socio-economic status. Reasons for this distrust included inconsistency, downplaying of uncertainty, overconfident recommendations and a lack of transparency.<sup>136</sup> The available studies also suggest that pandemic measures eroded

<sup>134</sup> See *Beaudoin v. British Columbia (Attorney General)*, [2022 BCCA 427](#) at para 99.

<sup>135</sup> *Beaudoin v. British Columbia*, [2021 BCSC 512](#) at para 147, affirmed in [2022 BCCA 427](#).

<sup>136</sup> Exhibit C to Bardosh Affidavit, AAR at p. 295-296.

the robustness of civil society and democratic accountability in Canada.<sup>137</sup> For example, one study showed that family members of isolated elderly people attempted to raise public support in 2020 to address the substandard care at long term care facilities but that concerns about peaceful assembly rules during the pandemic inhibited civic action.<sup>138</sup>

91. In a free and democratic society, the government has a responsibility to hear the grievances of those who were negatively impacted by its actions, and in this case its public health legislation. As stated by Dr Bardosh, “in general, democratic and citizen participation is seen as an essential part of ensuring that public health policy is proportionate, ethical and achieves positive population health outcomes.”<sup>139</sup> The severe restrictions and outright ban on outdoor peaceful assembly prevented Ontarians from exercising their *Charter* protected right to peaceful assembly and voicing their grievances about those policies. Dr. Bardosh cites an Ontario study that found a substantial reduction in the public’s perception of the effectiveness of government to address the pandemic, from 88% in April 2020 to only 23% in April 2021.<sup>140</sup>

92. The evidence highlights “that pandemic restrictions have exasperated a divide in trust in Canada that runs along socioeconomic lines and was compounded by the stress and uncertainty associated with changing mandatory government rules over time.” Trust in the government during this time was significantly correlated to socioeconomic status.<sup>141</sup>

### **iii) Social Harms of the Lockdown Regulations**

93. Dr. Bardosh’s report reviewed 150 academic peer reviewed studies on social harms or unintended consequences of COVID-19 restrictions in Canada.<sup>142</sup> Studies done as early as

---

<sup>137</sup> *Ibid* at p. 296-298.

<sup>138</sup> *Ibid* at p.297, n 140

<sup>139</sup> *Ibid* at p.299.

<sup>140</sup> Exhibit C to the Affidavit of Dr. Bardosh, AAR at p.298.

<sup>141</sup> *Ibid* at p.297.

<sup>142</sup> *Ibid* at p.276.

March/April of 2020 found that home quarantine was associated with increased psychological distress including panic, depression and emotional disturbances.<sup>143</sup> A nationally representative survey also found that the prevalence of suicide ideation was 4% in spring of 2021 much higher than the 2.7% baseline in 2019.<sup>144</sup> There was also evidence that emergency department visits for acute mental health issues in children and adolescents in Ontario increased by 41-62% starting in February of 2021.<sup>145</sup>

94. The Applicant has provided extensive evidence on the social harms resulting from lockdowns including limitations and bans on peaceful assembly. These very real harms to Ontarians were precisely what Mr. Hillier was attempting to bring to light by assembling peacefully with other Ontarians.

95. The Lockdown Regulations had egregious and unprecedented deleterious effects on the right to peaceful assembly without yielding any discernable benefit established by the evidence.

#### **PART V - ORDER SOUGHT**

96. The Applicant seeks declaratory relief as follows:

- a. A Declaration pursuant to section 52(1) of the *Constitution Act* that section 1(1) of Schedule 1 of the Ontario Regulation 265/21 (*Stay-at-Home-Order*) unjustifiably infringed freedom of assembly guaranteed under section 2(c) of the *Charter* and therefore was of no force and effect.
- b. A Declaration pursuant to section 52(1) of the *Constitution Act* that section 1(1)(c) of Schedule 4 of Ontario Regulation 82/20 (*Rules for Areas in Stage 1*) and any related amendments established under the *Reopening Ontario Act* unjustifiably

---

<sup>143</sup> *Ibid* at p.278, n 1-3.

<sup>144</sup> *Ibid* at n 8.

<sup>145</sup> *Ibid* at p.279, n 16.

infringe the freedom of peaceful assembly guaranteed under section 2(c) of the *Charter* and therefore was of no force and effect.

- c. Further or in the alternative, a Declaration pursuant to section 24(1) of the *Charter* that the Ontario Regulation 265/21 (*Stay-at-Home-Order*) unjustifiably infringed the Applicant's freedom of assembly guaranteed by section 2(c) of the *Charter*.
- d. Further or in the alternative, a Declaration pursuant to section 24(1) of the *Charter* that Ontario Regulation 82/20 (*Rules for Areas in Stage 1*) unjustifiably infringed the Applicant's freedom of assembly guaranteed by section 2(c) of the *Charter*.

All of which is respectfully submitted this 6 day of June, 2023



---

**CHARTER ADVOCATES CANADA**  
**Per: Sayeh Hassan (LSO No. 53406E)**

**Chris Fleury (LSO No. 67485L)**

**Henna Parmar (LSO No. 79119E)**

**Counsel for the Applicant**



*Courts of Justice Act*

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**RANDY HILLIER**

Applicant

-and-

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

Respondent

---

**CERTIFICATE OF THE APPLICANT**

---

The Applicant estimates that 4 hours will be required for oral argument, not including reply.



---

**CHARTER ADVOCATES CANADA  
Per: Sayeh Hassan (LSO No. 53406E)  
Counsel for the Applicant  
June 6, 2023**

## SCHEDULE A

	<b>Case Law</b>
1	<a href="#">114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)</a> , 2001 SCC 40
2	<a href="#">Alberta v Hutterian Brethren of Wilson Colony</a> , 2009 SCC 37
3	<a href="#">Alliance des Professeurs de Montreal v A.G. Quebec</a> , 1985 CanLII 3058 (QCCA)
4	<a href="#">Beaudoin v. British Columbia</a> , 2021 BCSC 512
5	<a href="#">British Columbia Teachers' Federation v. British Columbia Public School Employees' Assn.</a> , 2009 BCCA 39
6	<a href="#">Corbiere v Canada (Minister of Indian and Northern Affairs)</a> , [1999] 2 SCR 203
7	<a href="#">Chaoulli v Quebec (Attorney General)</a> , 2005 SCC 35
8	<a href="#">Dore v Barreau du Quebec</a> , 2012 SCC 12
9	<a href="#">Dunmore v Ontario (Attorney General)</a> , 2001 SCC 94
10	<a href="#">Figueiras v. Toronto Police Services Board</a> , 2015 ONCA 208
11	<a href="#">Frank v. Canada (Attorney General)</a> 2019 SCC 1
12	<a href="#">Gateway Bible Baptist Church et al. v Manitoba et al.</a> , 2021 MBQB 219
13	<a href="#">Grandel v Saskatchewan</a> , 2022 SKKB 209 (CanLII).
14	<a href="#">Harper v Canada (Attorney General)</a> 2004 SCC 33
15	<a href="#">Irwin Toy Ltd. V. Quebec</a> [1989] 1 SCR 927
16	<a href="#">Koehler v. Newfoundland and Labrador</a> , 2021 NLSC 95
17	<a href="#">M. v H.</a> , [1999] 2 S.C.R. 3
18	<a href="#">Mounted Police Association of Ontario v. Canada (Attorney General)</a> , 2015 SCC 1
19	<a href="#">Ontario (Attorney-General) v. Dieleman</a> , 1994 CanLII 7509 (ON SC)
20	<a href="#">Ontario v. Trinity Bible Chapel et al.</a> , 2022 ONSC 1344
21	<a href="#">Ontario Nurses Association v. Eatonville/Henley Place</a> , 2020 ONSC 2467.
22	<a href="#">R v Oakes</a> , [1986] 1 S.C.R. 103
23	<a href="#">Re Manitoba Language Rights</a> , [1985] 1 SCR 721
24	<a href="#">RJR-Macdonald Inc. v Canada (Attorney General)</a> , [1995] 3 S.C.R. 199
25	<a href="#">Roach v. Canada (Minister of State for Multiculturalism and Citizenship)</a> , [1994] 2 FC 406, 1994 CanLII 3453 (FCA)
26	<a href="#">Stewart v. Toronto (Police Services Board)</a> , 2020 ONCA 25
27	<a href="#">Spencer v. Canada (Health)</a> , 2021 FC 621
28	<a href="#">Taylor v. Newfoundland and Labrador</a> , 2020 NLSC 125
29	<a href="#">Thomson Newspapers Co. v. Canada (Attorney General)</a> [1998] 1 SCR 877
30	<a href="#">UFCW, Local 1518 v Kmart</a> , [1999] 2 SCR 1083
	<b>Legislation/Regulations</b>
31	<a href="#">Canadian Charter of Rights and Freedoms, s 2 (c), Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11</a>
32	<a href="#">Emergency Management and Civil Protection Act, R.S.O. 1990, c.E.9</a>
33	<a href="#">OReg 82/20</a> ,
34	<a href="#">OReg 363/20</a>
35	<a href="#">OReg 265/21</a>
	<b>Secondary Sources</b>
36	Alexander, Basil S, " <a href="#">Exploring a More Independent Freedom of Peaceful Assembly in Canada, 2018</a> "
37	Flood, Colleen.M., et al, <a href="#">Reconciling Civil Liberties and Public Health in the Response to COVID-19</a> , (Royal Society of Canada, 2020)

38	Garner, Bryan A., ed., <i>Black's Law Dictionary</i> , 11th ed. (Thompson West, 2019).
39	Kinsinger, Kristopher, E.G., " <a href="#">Restricting Freedom of Peaceful Assembly</a> "
40	Paccioco, David M., " <a href="#">Unplugging Jukebox Testimony in an Adversarial System</a> ", (2009) 34 Queen's LJ 565

## SCHEDULE B

### Reopening Ontario (A Flexible Response to COVID-19) Act, 2020

#### ONTARIO REGULATION 363/20

*formerly under Emergency Management and Civil Protection Act*

#### STAGES OF REOPENING

**Historical version for the period April 3, 2021 to June 6, 2021.**

Last amendment: [240/21](#).

Legislative History: [420/20](#), [426/20](#), [444/20](#), [573/20](#), [577/20](#), [640/20](#) (but see [647/20](#)), [646/20](#), [647/20](#), [657/20](#), [684/20](#), [706/20](#), [737/20](#), [774/20](#), [780/20](#), [99/21](#), [116/21](#), [128/21](#), [145/21](#), [161/21](#), [176/21](#), [190/21](#), [195/21](#), [215/21](#), [220/21](#), [224/21](#), [225/21](#), [240/21](#).

***This is the English version of a bilingual regulation.***

#### Stages

1. (1) The areas listed in Schedule 1 are in Stage 1 of reopening.
- (2) The areas listed in Schedule 2 are in Stage 2 of reopening.
- (3) The areas listed in Schedule 3 are in Stage 3 of reopening.
2. REVOKED: O. Reg. 426/20, s. 1.

#### Interpretation

3. In this Order,

“health unit” means a health unit as defined in the *Health Protection and Promotion Act*.

#### SCHEDULE 1 STAGE 1 AREAS

#### Shutdown Zone of Stage 1

1. The following areas are in the Shutdown Zone of Stage 1:
  1. Brant County Health Unit.
  2. Chatham-Kent Health Unit.
  3. City of Hamilton Health Unit.
  4. City of Ottawa Health Unit.
  5. City of Toronto Health Unit.
  6. The District of Algoma Health Unit.
  7. Durham Regional Health Unit.
  8. The Eastern Ontario Health Unit.
  9. Grey Bruce Health Unit.
  10. Haldimand-Norfolk Health Unit.
  11. Haliburton, Kawartha, Pine Ridge District Health Unit.
  12. Halton Regional Health Unit.
  13. Hastings and Prince Edward Counties Health Unit.
  14. Huron Perth Health Unit.

15. Kingston, Frontenac and Lennox and Addington Health Unit.
16. Lambton Health Unit.
17. Leeds, Grenville and Lanark District Health Unit.
18. Middlesex-London Health Unit.
19. Niagara Regional Area Health Unit.
20. North Bay Parry Sound District Health Unit.
21. Northwestern Health Unit.
22. Oxford Elgin St. Thomas Health Unit.
23. Peel Regional Health Unit.
24. Peterborough County — City Health Unit.
25. Porcupine Health Unit.
26. Renfrew County and District Health Unit.
27. Simcoe Muskoka District Health Unit.
28. Sudbury and District Health Unit.
29. Thunder Bay District Health Unit.
30. Timiskaming Health Unit.
31. Waterloo Health Unit.
32. Wellington-Dufferin-Guelph Health Unit.
33. Windsor-Essex County Health Unit.
34. York Regional Health Unit.

**Grey Zone of Stage 1**

2. No areas are in the Grey Zone of Stage 1.

O. Reg. 240/21, s. 1

**SCHEDULE 2  
STAGE 2 AREAS**

**Red Zone of Stage 2**

1. No areas are in the Red Zone of Stage 2.

O. Reg. 240/21, s. 1

**SCHEDULE 3  
STAGE 3 AREAS**

**Green Zone of Stage 3**

1. No areas are in the Green Zone of Stage 3.

**Yellow Zone of Stage 3**

2. No areas are in the Yellow Zone of Stage 3.

**Orange Zone of Stage 3**

3. No areas are in the Orange Zone of Stage 3.

O. Reg. 240/21, s. 1

## Emergency Management and Civil Protection Act

### ONTARIO REGULATION 264/21

#### DECLARATION OF EMERGENCY

Historical version for the period April 7, 2021 to June 8, 2021.

No amendments.

*This is the English version of a bilingual regulation.*

WHEREAS COVID-19 constitutes a danger of major proportions that could result in serious harm to persons;

AND WHEREAS the criteria set out in subsection 7.0.1 (3) of the Act have been satisfied;

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

## Emergency Management and Civil Protection Act

### ONTARIO REGULATION 265/21

#### STAY-AT-HOME ORDER

Note: This Order was revoked on June 2, 2021. (Sec: O. Reg. 25/21, Sched. 1, s. 1)

No amendments.

*This is the English version of a bilingual regulation.*

#### Terms of Order

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

#### Application

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

#### SCHEDULE 1

#### Requirement to remain in residence

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

#### Work, school and child care

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

#### Obtaining goods and services

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

#### Assisting others

12. Delivering goods or providing care or other support or assistance to an individual who requires support or assistance, or receiving such support or assistance, including,
  - i. providing care for an individual in a congregate care setting, and
  - ii. accompanying an individual who requires assistance leaving their residence for any purpose permitted under this Order.
13. Taking a child to the child's parent or guardian or to the parent or guardian's residence.

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

**Health, safety and legal purposes**

15. Doing anything that is necessary to respond to or avoid an imminent risk to the health or safety of an individual, including,
  - i. protecting oneself or others from domestic violence,
  - ii. leaving or assisting someone in leaving unsafe living conditions, and
  - iii. seeking emergency assistance.
16. Exercising, including,
  - i. walking or moving around outdoors using an assistive mobility device, or
  - ii. using an outdoor recreational amenity that is permitted to be open.
17. Attending a place as required by law or in relation to the administration of justice.
18. Exercising an Aboriginal or treaty right as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

**Multiple residences and moving**

19. Travelling to another residence of the individual if,
  - i. the individual intends to be at the residence for less than 24 hours and is attending for one of the purposes set out in this Order, or
  - ii. the individual intends to reside at the residence for at least 14 days.
20. Travelling between the homes of parents, guardians or caregivers, if the individual is under their care.
21. Making arrangements to purchase or sell a residence or to begin or end a residential lease.
22. Moving residences.

**Travel**

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

**Gatherings**

24. Attending a gathering for the purpose of a wedding, a funeral or a religious service, rite or ceremony that is permitted by law or making necessary arrangements for the purpose of such a gathering.
25. If the individual lives alone, gathering with the members of a single household.

**Animals**

26. Obtaining goods or services that are necessary for the health or safety of an animal, including obtaining veterinary services.
  27. Obtaining animal food or supplies.
  28. Doing anything that is necessary to respond to or avoid an imminent risk to the health or safety of an animal, including protecting an animal from suffering abuse.
  29. Walking or otherwise exercising an animal.
- (2) Despite subsection (1), no person shall attend a business or place that is required by law to be closed, except to the extent that temporary access to the closed business or place is permitted by law.
- (3) This Order does not apply to individuals who are homeless.
- (4) If this Order allows an individual to leave their residence to go to a place, it also authorizes them to return to their residence from that place.
- (5) The requirement in subsection (1) to remain at an individual's residence does not prevent the individual from accessing outdoor parts of their residence, such as a backyard, or accessing indoor or outdoor common areas of the communal residences in which they reside that are open, including lobbies.
- (6) For greater certainty, nothing in this Order permits a business or place to be open if it is required by law to be closed.



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

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

## **Reopening Ontario (A Flexible Response to COVID-19) Act, 2020**

### **ONTARIO REGULATION 82/20**

*formerly under Emergency Management and Civil Protection Act*

#### **RULES FOR AREAS IN STAGE 1**

**Historical version for the period April 7, 2021 to April 7, 2021.**

Last amendment: [267/21](#).

#### SCHEDULE 4

#### ORGANIZED PUBLIC EVENTS, CERTAIN GATHERINGS IN SHUTDOWN ZONE

##### Gatherings, Stage 1 areas

1. (1) Subject to sections 2 to 4, no person shall attend,
  - (a) an organized public event that is held indoors;
  - (b) a social gathering that is held indoors, including a social gathering associated with a gathering described in clause (d);
  - (c) an organized public event or social gathering of more than 5 people that is held outdoors, including a social gathering associated with a gathering described in clause (d); or
  - (d) an indoor gathering for the purposes of a wedding, a funeral or a religious service, rite or ceremony where the number of persons occupying any particular room in a building or structure while attending the gathering exceeds 15 percent of the capacity of the room.
- (2) A person attending an organized public event, social gathering or a gathering for the purposes of a wedding, a funeral or a religious service, rite or ceremony shall comply with public health guidance on physical distancing.
- (3) For greater certainty, subsections (1) and (2) apply with respect to an organized public event, social gathering or a gathering for the purposes of a wedding, a funeral or a religious service, rite or ceremony, even if it is held at a private dwelling.
- (4) For greater certainty, the number of persons who may attend an outdoor gathering for the purpose of a wedding, a funeral or a religious service, rite or ceremony is limited to the number that can comply with the guidance referred to in subsection (2).

## Reopening Ontario (A Flexible Response to COVID-19) Act, 2020

### ONTARIO REGULATION 82/20

*formerly under Emergency Management and Civil Protection Act*

#### RULES FOR AREAS IN STAGE 1

Historical version for the period April 17, 2021 to April 18, 2021.

##### SCHEDULE 4

##### ORGANIZED PUBLIC EVENTS, CERTAIN GATHERINGS IN SHUTDOWN ZONE

###### Gatherings, Stage 1 areas

1. (1) Subject to sections 2 to 4, no person shall attend,
  - (a) an organized public event that is held indoors;
  - (b) a social gathering that is held indoors, including a social gathering associated with a gathering described in clause (d);
  - (c) an organized public event or social gathering that is held outdoors, including a social gathering associated with a gathering described in clause (d); or
  - (d) an indoor gathering for the purposes of a wedding, a funeral or a religious service, rite or ceremony where the number of persons occupying any particular room in a building or structure while attending the gathering exceeds 15 percent of the capacity of the room.

**Note: On April 19, 2021, clause 1 (1) (d) of Schedule 4 to the Regulation is revoked and the following substituted: (See: O. Reg. 297/21, s. 3 (1))**

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

(2) A person attending an organized public event, social gathering or a gathering for the purposes of a wedding, a funeral or a religious service, rite or ceremony shall comply with public health guidance on physical distancing.

(3) For greater certainty, subsections (1) and (2) apply with respect to an organized public event, social gathering or a gathering for the purposes of a wedding, a funeral or a religious service, rite or ceremony, even if it is held at a private dwelling.

(4) For greater certainty, the number of persons who may attend an outdoor gathering for the purpose of a wedding, a funeral or a religious service, rite or ceremony is limited to the number that can comply with the guidance referred to in subsection (2).

**Note: On April 19, 2021, subsection 1 (4) of Schedule 4 to the Regulation is revoked. (See: O. Reg. 297/21, s. 3 (2))**

## Reopening Ontario (A Flexible Response to COVID-19) Act, 2020

### ONTARIO REGULATION 82/20

*formerly under Emergency Management and Civil Protection Act*

#### **RULES FOR AREAS IN STAGE 1**

**Historical version for the period April 17, 2021 to April 18, 2021.**

Last amendment: [299/21](#).

Legislative History: [119/20](#), [136/20](#), [153/20](#), [196/20](#), [200/20](#), [203/20](#), [219/20](#), [223/20](#), [238/20](#), [255/20](#), [262/20](#), [280/20](#), [300/20](#), [303/20](#), [350/20](#), [413/20](#), [654/20](#), [685/20](#), [707/20](#), [708/20](#), [738/20](#), [779/20](#) (as am. by [789/20](#) and [10/21](#)), [789/20](#), [3/21](#), [6/21](#), [10/21](#) (as am. by [21/21](#) and [56/21](#)), [14/21](#), [21/21](#), [26/21](#); [36/21](#), [37/21](#), [38/21](#), [39/21](#), [40/21](#), [50/21](#), [56/21](#), [57/21](#), [96/21](#), [100/21](#), [103/21](#), [117/21](#), [126/21](#), [144/21](#), [162/21](#), [189/21](#), [216/21](#), [221/21](#), [239/21](#), [267/21](#), [278/21](#), [295/21](#), [296/21](#), [297/21](#), [299/21](#).

*This is the English version of a bilingual regulation.*

#### **9.1** Outdoor garden centres and plant nurseries that meet the following conditions:

1. They must limit the number of persons in the place of business so that the total number of persons in the place of business at any one time does not exceed 25 per cent capacity, as determined in accordance with subsection 3 (3) of Schedule 1.
2. They must open no earlier than 7 a.m. and close no later than 8 p.m. and must not deliver goods to patrons outside of the hours of 6 a.m. to 9 p.m.

#### **9.2** Indoor greenhouses that engage in retail sales to the public that meet the following conditions:

1. They must limit the number of persons in the place of business so that the total number of persons in the place of business at any one time does not exceed 25 per cent capacity, as determined in accordance with subsection 3 (3) of Schedule 1.
2. They must open no earlier than 7 a.m. and close no later than 8 p.m. and must not deliver goods to patrons outside of the hours of 6 a.m. to 9 p.m.

## Reopening Ontario (A Flexible Response to COVID-19) Act, 2020

### ONTARIO REGULATION 82/20

*formerly under Emergency Management and Civil Protection Act*

#### RULES FOR AREAS IN STAGE 1

Historical version for the period April 17, 2021 to April 18, 2021.

#### SHUTDOWN ZONE

##### SCHEDULE 1

#### GENERAL RULES FOR SHUTDOWN ZONE

#### NHL

11. (1) In this section,

“NHL” means the National Hockey League; (“LNH”)

“NHL participant” means a person who has been specified as a member of a participant group in the professional sports plan for the NHL; (“participant de la LNH”)

“professional sports plan for the NHL” means the document titled “2020-21 NHL Season COVID-19 Protocol” and any attachments to it approved by the Office of the Chief Medical Officer of Health. (“plan de sports professionnels applicable à la LNH”)

(2) The Office of the Chief Medical Officer of Health may approve a professional sports plan for the NHL.

(3) The professional sports plan for the NHL shall list,

(a) the businesses and places that may be used by NHL participants, which may include,

(i) hotels,

(ii) facilities for indoor or outdoor sports and recreational fitness activities,

(iii) businesses or places that are in hotels or facilities mentioned in subclause (i) or (ii), and

(iv) restaurants or bars; and

(b) persons who are NHL participants.

(4) A business or place that is listed in the professional sports plan for the NHL as being available for the use of NHL participants may open for use by NHL participants if the business or place complies with the following conditions:

1. The business or place must operate in accordance with the professional sports plan for the NHL.

2. No spectators may be permitted at the business or place except in accordance with the professional sports plan for the NHL.

3. The business or place must ensure that any other conditions or requirements set out in this section are complied with on the premises of the business or place.

(5) The following provisions do not apply to the provision of goods or services to an NHL participant by a business or place listed in the professional sports plan for the NHL in accordance with clause (3) (a) when they are provided in accordance with the professional sports plan for the NHL:

1. Subsection 2 (4) of this Schedule, but only in respect of NHL players and coaches.

2. Sections 3, 5 and 7 of this Schedule.

3. Section 48 of Schedule 2.

4. Clauses 1 (1) (a) and (b) of Schedule 4.

(6) Businesses and places listed in the professional sports plan for the NHL may provide in-person dining if they meet the conditions set out in paragraphs 2, 4, 6, 8, 9, 10, 12 and 13 of subsection 1 (1) of Schedule 2 to Ontario Regulation 263/20 (Rules for Areas in Stage 2) made under the Act.

(7) Hotels listed in the professional sports plan for the NHL may open indoor pools, indoor fitness centres or other indoor recreational facilities that are part of the operation of the hotels, other than communal steam rooms, saunas and whirlpools, if the following conditions are met:

1. The hotels must ensure that the facilities are open only for the use of NHL participants.
2. The hotels must ensure that the facilities are used in accordance with the professional sports plan for the NHL.

(8) Therapists referred to in the professional sports plan for the NHL may open for the sole purpose of providing services to NHL players and shall provide such services in accordance with the professional sports plan for the NHL.

(9) Television productions relating to NHL games that are in compliance with the professional sports plan for the NHL may open, and the conditions set out in paragraphs 1 to 5 of subsection 63 (1) of Schedule 2 do not apply to such television productions.

#### AHL

**12.** (1) In this section,

“AHL” means the American Hockey League; (“LAH”)

“AHL participant” means a person who has been specified as a member of a participant group in the professional sports plan for the AHL; (“participant de la LAH”)

“professional sports plan for the AHL” means the document titled “2021 AHL Season COVID-19 Protocol” and any attachments to it approved by the Office of the Chief Medical Officer of Health. (“plan de sports professionnels applicable à la LAH”)

(2) The Office of the Chief Medical Officer of Health may approve a professional sports plan for the AHL.

(3) The professional sports plan for the AHL shall list,

- (a) the businesses and places that may be used by AHL participants, which may include,
  - (i) hotels,
  - (ii) facilities for indoor or outdoor sports and recreational fitness activities,
  - (iii) businesses or places that are in hotels or facilities mentioned in subclause (i) or (ii), and
  - (iv) restaurants or bars; and

(b) persons who are AHL participants.

(4) A business or place that is listed in the professional sports plan for the AHL as being available for the use of AHL participants may open for use by AHL participants if the business or place complies with the following conditions:

1. The business or place must operate in accordance with the professional sports plan for the AHL.
2. No spectators may be permitted at the business or place except in accordance with the professional sports plan for the AHL.
3. The business or place must ensure that any other conditions or requirements set out in this section are complied with on the premises of the business or place.

(5) The following provisions do not apply to the provision of goods or services to an AHL participant by a business or place listed in the professional sports plan for the AHL in accordance with clause (3) (a) when they are provided in accordance with the professional sports plan for the AHL:

1. Subsection 2 (4) of this Schedule, but only in respect of AHL players and coaches.
2. Sections 3, 5 and 7 of this Schedule.
3. Section 48 of Schedule 2.
4. Clauses 1 (1) (a) and (b) of Schedule 4.

(6) Businesses and places listed in the professional sports plan for the AHL may provide in-person dining if they meet the conditions set out in paragraphs 2, 4, 6, 8, 9, 10, 12 and 13 of subsection 1 (1) of Schedule 2 to Ontario Regulation 263/20 (Rules for Areas in Stage 2) made under the Act.

(7) Hotels listed in the professional sports plan for the AHL may open indoor pools, indoor fitness centres or other indoor recreational facilities that are part of the operation of the hotels, other than communal steam rooms, saunas and whirlpools, if the following conditions are met:

1. The hotels must ensure that the facilities are open only for the use of AHL participants.
2. The hotels must ensure that the facilities are used in accordance with the professional sports plan for the AHL.

(8) Therapists referred to in the professional sports plan for the AHL may open for the sole purpose of providing services to AHL players and shall provide such services in accordance with the professional sports plan for the AHL.

(9) Television productions relating to AHL games that are in compliance with the professional sports plan for the AHL may open, and the conditions set out in paragraphs 1 to 5 of subsection 63 (1) of Schedule 2 do not apply to such television productions.

**RANDY HILLIER.**

and

**HIS MAJESTY THE KING IN RIGHT  
OF THE PROVINCE OF ONTARIO**

Applicant

Respondent

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**FACTUM OF THE APPLICANT**

**CHARTER ADVOCATES CANADA**  
529-439 University Avenue  
Toronto ON M5G 1Y8

**SAYEH HASSAN**  
LSO No. 53406E

**CHRIS FLEURY**  
LSO No. 67485L

**HENNA PARMAR**  
LSO No. 79119E

COUNSEL FOR THE APPLICANT