**CITATION:** Hillier v. His Majesty the King in Right of The Province of Ontario, 2023 ONSC 6611
**COURT FILE NO.:** CV-22-00682682-0000
**DATE:** 20231122

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
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| RANDY HILLIER | ) | |
| | ) | *Sayeh Hassan, Chris Fleury, Henna Parmar* and *Darren Leung*, for the Applicant |
| Applicant | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | *Ryan Cookson* and *Ryan Padraic*, for the Respondent |
| HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO | ) | |
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| Respondent | ) | |
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| | ) | **HEARD:** July 27, 28, 2023/ Supplementary Submissions September 12,2023/November 13,2023 |

**CALLAGHAN, J.**

**REASONS FOR JUDGMENT**

[1] In the spring of 2021, Ontario issued regulations and orders that limited the movement and gatherings of Ontarians with the intent of curbing the spread of COVID-19. These restrictions were part of what was commonly known as "the lockdown" and described herein as the Gathering Restrictions.

[2] In this is application, Mr. Randy Hillier challenges the province of Ontario's COVID-19 Gathering Restrictions as being unconstitutional. This challenge arises in the context of provincial prosecutions against Mr. Hillier, who was charged with violating the Gathering Restrictions in the spring of 2021 when he attended political protest rallies objecting to the Gathering Restrictions. Mr. Hillier asserts that the Gathering Restrictions violated his right to peaceful assembly under s. 2(c) of the *Charter of Rights and Freedoms*. Further, he asserts that the violation cannot be justified under s. 1 of the *Charter*.

[3] This is not a case of first impression. The pandemic restrictions have given rise to decisions from across the country grappling with the exact issues raised in this case. Indeed, the same set of regulations, albeit a different subsection, were challenged and upheld recently by the Ontario Court of Appeal.

**Overview**

[4] By March 2020, the world was confronting a novel coronavirus, which would become known as COVID-19. Ontario was no exception. The virus came in waves, inflicting illness and death. Each wave brought new challenges to Ontario's health care system. By the third wave, in the spring of 2021, Ontario's health care system was in a precarious position. The hospital network was already strained after enduring a relentless parade of COVID-19 admissions beginning in March 2020. Public health officials warned that the new strains of COVID-19 emerging in early 2021 were more transmissible. If drastic action was not taken to confront the transmission of the virus, it was feared that the health care system, particularly the hospital network, would collapse under the strain of yet more COVID-19 patients. In response, the province introduced a strict stay-at-home order and Gathering Restrictions to prevent not only illness and death, but the collapse of Ontario's fragile hospital network. The Gathering Restrictions prevented people from gathering outside familial groupings, with some exceptions, for much of the period of early April to early June 2021. It was at this time that Mr. Hillier, then a Member of Provincial Parliament, attended rallies in various parts of the province voicing his objection to these restrictions. The rallies were political protests attended by groups who wanted the government to lift the restrictions.

[5] Mr. Hillier was charged with several counts of violating the Gathering Restrictions. Some of those charges have been dropped but several remain outstanding in various courts across Ontario. Mr. Hillier intends to defend his actions, in part, by asserting that the Gathering Restrictions were unconstitutional and that the charges therefore must be dismissed. Rather than challenge the constitutionality of the Gathering Restrictions in each court, Mr. Hillier and the Crown have agreed that one determination as to the constitutionality of the impugned legislation by this court would not only be the most expeditious resolution but would save judicial resources. Further, I am told other protesters who have been charged with similar offences also assert that the Gathering Restrictions are unconstitutional on the same basis as Mr. Hillier. A resolution of the issue in this case is believed to be of some assistance in the cases of other similarly charged protesters.

[6] Ontario concedes that the Gathering Restrictions infringed s. 2(c) of the *Charter*. The debate is whether those limits are justified under s. 1 of the *Charter*. There have already been several cases, including at the appellate level, which have examined whether legislated COVID-19 restrictions violated *Charter* rights and whether such restrictions were justified under s. 1 of the *Charter*. In each case, the courts have held the infringements were justified under s. 1: see *Harjee v. Ontario*, 2023 ONCA 716; *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 , aff'd 2023 ONCA 134; *Gateway Bible Church v. Manitoba*, 2021 MBQB 219 aff'd 2023 MBCA 56; *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427, leave to appeal refused, 2023 CanLII 72130 (S.C.C.); *Grandel v. Saskatchewan*, 2022 SKKB 209.

**Spring 2021**

[7] By spring 2021, COVID-19 had battered the province. The province had faced previous public health emergencies, but nothing like COVID-19. The virus was taking its toll both on the population and the health care system. The first wave of the pandemic began in March 2020 which resulted in the province declaring a state of emergency on March 17, 2020.

[8] A second wave of COVID-19 resulted in a second state of emergency from January 12 to February 26, 2021. By the spring of 2021, the hospitals in Ontario were buckling under the influx of people seeking treatment for COVID-19. Five percent of those who contracted COVID-19 required hospitalization. Those admitted to hospital typically required oxygen and often ICU-level care. By mid-2021, 543,571 people had been diagnosed with COVID-19 and 9,101 had died.

[9] Ontario's hospital system was not designed to handle the demands of a pandemic. Ontario has fewer hospital beds per capita than any other jurisdiction in the Organization for Economic Co-operation and Development (OECD). Ontario has 1.4 hospital beds per 1,000 residents. This compares with an average of two hospital beds per 1,000 residents in the rest of Canada and much higher rates in the rest of the world. For example, the United States has 20 percent more hospital beds than Canada, Italy has 30 percent more hospital beds than Canada, and France has 55 percent more hospital beds than Canada. In addition, Ontario's expenditure per capita on hospitals was lower than any other province. Prior to the pandemic, Ontario coped with its lower hospital bed count by moving patients to other parts of a city, or another municipality, or even another province. Such a strategy does not work well with a transmissible disease such as COVID-19. By the spring of 2021, COVID-19 had the very real potential to push the acute care system past the point of being able to provide care to patients, both those suffering from COVID-19 and those simply in need of acute hospital care.

[10] After the first wave, Ontario announced additional expenditures to support the health care system, including hospitals. However, there was no quick fix. Repurposing space for more hospital beds was possible but did not solve the problem. Each bed required doctors, nurses, personal support workers and other staff that the province did not have and would take years to train.

[11] COVID-19 disproportionately impacted the elderly and those who already had compromised health. When infected with COVID-19, they were most in need of hospital care. Those needing non-COVID-19 hospital care, such as cardiac patients, were at risk of not getting proper care as the hospitals addressed a growing number of COVID-19 patients. The general population also stood to lose as hospitals became overcrowded. Elective surgeries and other non-emergency care were postponed as health care workers dealt with COVID-19 patients.

[12] In April 2021, new COVID-19 variants of concern began to emerge. During this time, each new variant became more transmissible and had a greater impact on younger people in their 40s and 50s. The Beta and Gamma variants were found to be 50 percent more transmissible than the original version. Emerging data in late April into early May showed the Delta variant (which came after Beta and Gamma) to be even more transmissible. The true impact of any variant is

not ascertainable at the outset. Only with the collection and analysis of data after the fact can the public health community truly assess both the impact of the variant and whether the precautionary measures employed to address the variants were successful.

[13] The practice of public health is a medical specialty. Its purpose is to assess disease and other health issues on a population scale and provide recommendations to combat those diseases and health issues. In Ontario, the public health community applies the precautionary principle which stipulates that public health measures should not await scientific certainty before action is taken. The province's Health Plan for an Influenza Pandemic (the "Plan"), which was the pandemic response plan existing prior to the COVID-19 pandemic, references the precautionary principle as a guiding principle in responding to a pandemic. The precautionary principle is most important in the early stages of a new disease or variant of a disease where the transmissibility and the severity are not fully understood at the time government action would be the most effective. The Plan specifically provided:

> The MOHLTC [Ministry of Health and Long-Term Care] does not await scientific certainty before taking action to protect health. For example, the MOHLTC considers the precautionary principle when developing recommendations and directives related to OHS & IPAC [Occupational Health & Safety and Infection Prevention & Control] measures, especially during the early stages of an influenza pandemic when scientific evidence on the severity of the novel virus is limited.

[14] Public health authorities also apply the burden principle which provides that it is appropriate to implement more restrictive public health measures when an infectious disease imposes a higher burden on the population. In public health parlance, burden is a function of the prevalence of the disease (i.e., the number of cases in a population) and the exposure risk (i.e., the probability that one affected person will affect another person) and the consequence of infection such as hospitalization and death. The burden principle also takes into consideration the impact of the disease on the public health infrastructure, such as hospitals. When the burden on the healthcare system is already significant, even small increases in transmissions within the population can have a drastic negative impact on the healthcare system and patient care.

[15] In the spring of 2021, the COVID-19 vaccination program was still in its infancy but was gaining momentum. By April 3, 2021, 14.5 percent of the population had been vaccinated with one of the two required doses. This increased to 63.1 percent by the week of June 12, 2021. While improving, the vaccination rate was not significant enough in early April such that other precautionary measures could be rejected or terminated.

[16] With more transmissible variants and a still-vulnerable population, the risk of more illness and death was increasing. By April 1, 2021, the seven-day rolling average of new cases per day had increased to 3,327, a near 200 percent increase from March 1, 2021. By April 12, 2021, that number had increased to 4,884 being an increase of over 300 percent from early March. The number of hospitalizations followed a similar trend. ICU occupancy in some regions in Ontario was over 88 percent. At the end of March, the Ontario Science Table, which monitored COVID-19 in the province and publicly reported to government, found that hospitalizations were 28 percent higher than in December 2020. By April 16, 2021, hospitalizations and ICU occupancy

were at their highest level since the start of the pandemic. It was further reported that these numbers would grow significantly as there is a lag time between infections and the full burden to the health care system. These dramatic increases of hospitalizations and ICU occupancy created a serious risk that the healthcare system would be stretched beyond its limits, affecting not only COVID-19 patients but anyone needing acute care.

**Emergency Orders**

[17] On March 17, 2020, Ontario declared the first state of emergency of the pandemic under s. 7.0.1 (1) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E. 9 ("EMCPA"). During a declared state of emergency, s. 7.0.2(4) of the EMCPA authorizes the Lieutenant Governor in Council ("LGIC") to make emergency orders. On March 24, 2020, one such emergency order, O. Reg. 82/20, came into force. That order created rules intended to combat the spread of COVID-19. The initial order required the closure of non-essential businesses and institutions. The regulation was amended over time to address the evolving threat of COVID-19. Orders under s. 7.02 expire after 14 days unless extended by the LGIC. O. reg. 82/20 was renewed every 14 days pursuant to the requirements of the EMCPA.

[18] In July 2020, the Legislature passed the *Reopening Ontario (A Flexible Response to COVID-19) Act*, S.O. 2020 ("ROA"). The ROA provided that orders made under the EMCPA that had not been revoked as of July 24, 2020, were continued as valid and effective orders under ROA. Therefore, on July 24th, 2020, O. Reg. 82/20 ceased to be an EMCPA order and became an ROA order. An order extended expired after 30 days unless extended by the LCIG. O. Reg. 82/20 was extended until expired on March 16, 2022.

[19] To respond to the changing public health situation, Ontario established a tiered approach to its public health regulations. This allowed the province to scale up and scale back restrictions on a regional basis in response to surges. The intent was to address the specific threats in each health unit/region in the province. This tiered approach initially involved three stages of public health measures with restrictions becoming less restrictive with each successive stage. The conditions and restrictions under each stage was the subject of separate regulations initially passed under the EMCPA and then continued under the ROA. In November 2020, Ontario modified its approach by establishing five levels of public health protections, instead of the initial three. These five levels were colour coded. The restrictions were set out in regulations. The most restrictive was the grey area, reflecting a lockdown. The LGIC continued to have the power to designate geographic areas as being in one of the various colour coded areas (see O. Reg. 363/20).

**Gathering Restrictions in April/May 2021**

[20] On April 3, 2021, the LGIC moved every public health unit in the province into a "Shutdown Zone" under O. Reg. 82/20, Sch. 4, s. 1 which prohibited outdoor organized public events and social gatherings of more than five people. This prohibition was in effect across Ontario.

[21] On April 16, 2021, the LGIC amended O. Reg. 82/20, Sch. 4, s. 1 to prohibit all outdoor organized public events or social gatherings, subject to certain exceptions. That is, the five-person

restriction was reduced to zero for outdoor gatherings. The exceptions included gatherings for a wedding, funeral, or religious service right or ceremony, subject to capacity limits and certain other conditions. The exceptions also permitted a person who lived alone to gather outdoors with members of another household. There was no exception for political assemblies or protests.

[22] These public health measures came into force on April 17, 2021. They remained in effect until May 22, 2021, when a subsequent amendment returned the capacity limit for outdoor organized public events in social gatherings to more than five people.

[23] On June 11, 2021, all Ontario public health units were moved out of the shutdown zone and there was no longer a restriction on outdoor public events and social gatherings.

[24] In addition to the restrictions in O. Reg. 82/20, on April 7, 2021, Ontario declared another state of emergency under s. 7.0.1 (1) of the EMCPA. This new emergency order (O. Reg 265/21) required everyone in Ontario to remain at home unless they were leaving their home for certain purposes set out in that and the regulation (the "Stay-at-Home Order"). That order permitted individuals to leave their home for the purpose of, among other things, attending certain gatherings that were permitted by law. By way of example, at this time, a limited number of people were permitted to attend a religious service under O. Reg. 82/20. Some stores, including the Liquor Control Board of Ontario ("LCBO") and big box retailers could still stay open with certain restrictions. In addition, individuals who lived alone could leave their home to gather with members of one other family household. The Stay-at-Home Order did not permit people to leave their home to attend "an organized public event or social gathering that is held outdoors". Like O. Reg 82/20 (after April 17, 2021), O. Reg 265/21 prevented outdoor gatherings for the purpose of political rallies or protests. The Stay-at-Home Order expired on June 2, 2021, having been in effect for 55 days. The declaration of a state of emergency was revoked on June 9, 2021

[25] Under s. 7.0.11 of the EMCPA and s. 10.1(1) of ROA, every person who failed to comply with the Gathering Limits faced fines up to $100,000 and/or incarceration for a term of not more than one year.

[26] These two schemes, the Stay-at-Home Order and the restrictions on gatherings were key to the province's response to the growing threat of the new emerging variants of COVID-19 (collectively the "Gathering Restrictions"). The Gathering Restrictions prevented gatherings for rallies such as the ones attended by Mr. Hillier.

[27] The Gathering Restrictions outdoors was just one prong of a multi-prong approach. The restrictions also prevented people from attending their workplace, attending school, or attending most other places where people congregate, either indoors or outdoors.

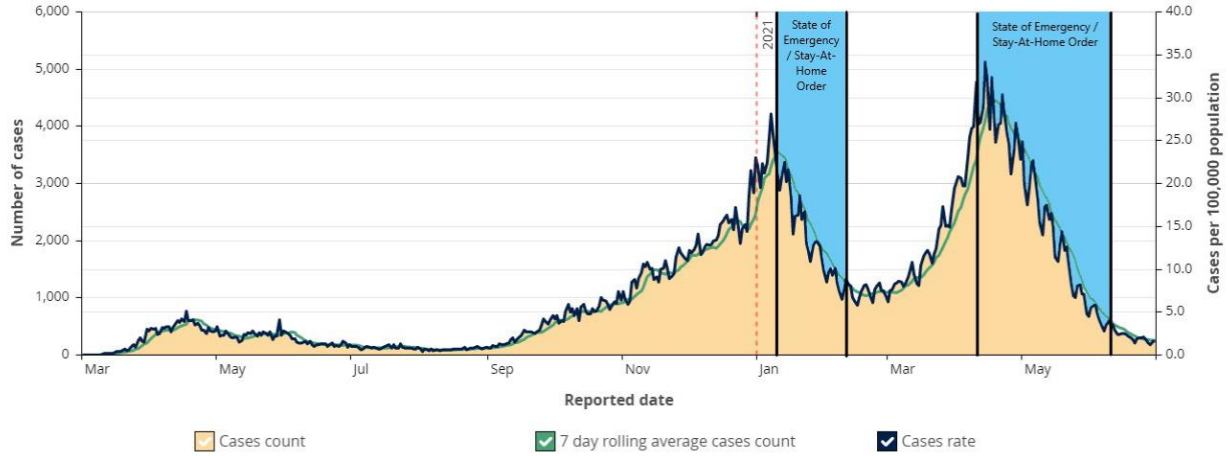
**The Impact of the Restrictions**

[28] The Gathering Restrictions, along with other measures such as increased vaccinations, began to work. Case counts began to decline.

[29] The following chart produced by Public Health Ontario ("PHO") shows the peaks and valleys of COVID-19 cases in the first half of 2021. The two areas shaded in blue reflect the

period of the stay-at-home orders. The first blue period reflects the earlier provincial stay-at-home order in January and February 2021. During this time, the restrictive measures were initiated at the peak of transmissions followed by a dramatic decrease in transmissions after the measures were put in place. The spring 2021 Gathering Restrictions are the second blue shaded area. The chart shows the Gathering Restrictions were initiated near the peak of case counts, which soon began to decline over the following 55 days. As there is an incubation period between infection and symptoms of COVID-19 and then ordinarily a period of declining health, the hospitalization rates lagged behind these case counts.

**Laboratory confirmed COVID-19 daily case counts and rates by reported date in Ontario - March 1, 2020 to June 30, 2021**




[30] Ontario's witness, Dr. Hodge, compared Ontario's death rate from COVID-19 with jurisdictions that adopted less stringent public health measures between March 2020 and June 2021. In his opinion, Ontario prevented between 11,000 and 25,000 deaths by implementing the temporary emergency measures it did.

## Mr. Hillier and the Protests

[31] Mr. Hillier was a member of provincial parliament for Lanark-Frontenac-Kingston. Prior to entering politics, he was an advocate for landowners. He was the founder of the Lanark Landowners Association and the first president of the Ontario Landowners Association. In those roles, he organized rallies to further the cause of landowners. He became a Progressive Conservative MPP in 2007. He later became an independent member of the Legislature.

[32] After the first declaration of emergency in March 2020, Mr. Hillier states he initially abided by the spirit of the declaration but later became disenchanted. He believed the province did not have adequate solutions to the problems created by COVID-19. He became more frustrated as time progressed. Because of COVID-19 restrictions, there were fewer opportunities to voice his concerns at the Legislature due to curtailed sittings. Meanwhile, he continued to hear from frustrated constituents. He began to attend protest rallies.

[33] While Mr. Hillier attended and was charged for attending earlier protests, this application addresses rallies in 2021 in response to the Gathering Restrictions. Mr. Hillier attended an outdoor gathering in Kemptville, Ontario on April 8, 2021, and another in Cornwall, Ontario on May 1, 2021. He faces charges as a host or organizer pursuant to s. 10.1(1) of the ROA. If found guilty, he faces a fine of $10,000 to $100,000 plus possible imprisonment of up to a year. At the time of this hearing, he was facing other charges for attending gatherings in Smiths Falls, Belleville, Peterborough, Stratford, Kitchener and Chatham during April and May 2021.

[34] Mr. Hillier encouraged his supporters not to wear masks or get vaccinated against COVID-19. The overwhelming majority of the hundreds of people at the outdoor gathering in Stratford, Ontario on April 26, 2021, were not wearing masks and were not distanced from each other. There is no evidence that COVID-19 was spread during these gatherings.

[35] These gatherings were intended to protest the government's implementation of the very regulations and orders under which Mr. Hillier was later charged. Mr. Hillier wanted to stop what he believed to be the harm caused by the shutdown and what he viewed as the unfairness that some businesses, such as big-box stores and the LCBO, could stay open while most every other business could not. The purpose of the gatherings was to assemble a sizable group together to amplify their collective voice in protest of the government policies and restrictions regarding COVID-19.

**Medical Evidence**

[36] Both sides called medical evidence. In the case of Mr. Hillier, he called three experts. Ontario responded with two, one being an expert fact witness. The experts have all testified in other cases regrading COVID-19 restrictions in Ontario and elsewhere. As such, there is varying commentary on each of them by other courts.

[37] Much of the evidence adduced by Mr. Hillier challenged the effectiveness of the various measures employed by Ontario to curb the spread of COVID-19. Dr. Warren, an infectious disease consultant and microbiologist, took issue with the effectiveness of masking and social distancing. He also took issue with the spread of COVID-19 in outdoor settings. He described the risk of transmission in outdoor settings as low. Dr. Warren was critical of imposing restrictions on outdoor gatherings in the absence of definitive evidence of a significant risk of transmission. Dr. Warren is not a public health expert.

[38] Dr. Kettner is an epidemiologist and former Chief Medical Officer of Health for Manitoba. He was the only public health expert called by Mr. Hillier. He accepts that the spread of COVID-19 has several determinants that influence whether someone would be infected at a gathering by the virus. These include the closeness of the contact, duration of the contact and environmental factors. For example, mask wearing is a barrier that would reduce the risk. Gathering in outdoor spaces would also reduce the risk. This is because COVID-19 is transmitted by droplets which will disperse outdoors more readily than indoors. Dr. Kettner cites one US Centre for Disease Control study that looked at other studies and initially found that less than ten percent of infections were due to outdoor transmissions; that number was significantly reduced to less than one percent, but this revision was only published after the Gathering Restrictions

were ended. Dr. Kettner was critical that the province did not have more effective data in early spring, 2021. Early in the pandemic, the province had implemented a surveillance or contact tracing program for those infected with the virus. Dr. Kettner believed that this data would give Ontario the necessary information upon which to determine the potential effectiveness of any limitations. However, he could locate no data from the surveillance that informed the public health response, including the Gathering Limits. Dr. Kettner agreed that there was a risk of exposure, even for outdoor gatherings. He testified that he was "not arguing that we shouldn't be concerned about the potential transmissions or rates of transmissions at outdoor gatherings."

[39] Dr. Bardosh is a medical anthropologist and implementation scientist. He is not a public health expert. He conducted a review of 150 journal articles. The review was intended to capture the alleged impacts of government restrictions during COVID-19. The restrictions spanned the gamut from stay-at-home orders to school closures. Dr. Bardosh opined that Canada's governments did not sufficiently consider the adverse impacts of restrictions on Canadian society. He states that it is "entirely possible that pandemic restrictions in Canada caused more harm than good". He indicated in cross-examination that he did not read all the articles that he cited but stood by his views that the literature demonstrates there is "an emerging consensus that the stringency and scale of government COVID-19 restrictions undertaken in Canada caused excessive and needless harm to mental health, physical health and well being of Canadians."

[40] Ontario called Dr. McKeown, who is the Associate Chief Medical Officer of Health for Ontario. He was the Associate Chief Medical Officer of Health at various times during the pandemic. He provided advice to the Chief Medical Officer of Health who briefed government. As such, he is a participating expert who was the key witness as to the response by the government to the pandemic in the spring of 2021.

[41] Dr. McKeown testified that information was continually evolving throughout the pandemic. This included the impacts of new and emerging strains of COVID-19. The spread of COVID-19 was a significant concern as it could be spread by those who were both asymptomatic and symptomatic. From a public health perspective, the risk of exposure was not easily contained. Measures such as social distancing and masking could help reduce the spread. The government's response was informed by not only the transmissibility of COVID-19 but the burdens that COVID-19 placed on the healthcare system, particularly the hospitals.

[42] By April 2021, with increasing COVID-19 rates, more virulent strains, and increasing hospitalizations, the government feared that the healthcare system would collapse as hospitalizations and deaths rose. Dr. McKeown testified that the Gathering Restrictions were part of an overall package of restrictions to combat the rising burden of COVID-19. He acknowledged that the spread of COVID-19 outdoors was significantly less than indoors. The extent of the risk outdoors involved the consideration of factors such as social distancing, mask wearing, or any shouting, screaming, or singing that propelled droplets. Gatherings where people do not social distance, do not wear masks and are vocal, are likely to produce more transmissions. There were concerns that such events would involve ancillary activities such as participants travelling together in cars or busses or using common bathrooms at the event where transmission was even more likely. In addition, those infected would be vectors for further infections when they return home. Dr. McKeown testified that the potential adverse impacts were constantly changing, and,

in the spring of 2021, vaccines were not widely distributed, even assuming they would work on these evolving strains of COVID-19.

[43] Dr. McKeown testified that making public health decisions requires a complex balancing of costs and benefits. He testified that in April 2021, there was a certainty of further infections, deaths and overtaxing the health care system if nothing was done. The public health advisors were cognizant that there were adverse physical and social effects to a lockdown that needed to be considered. For example, children's mental health was one such concern when making policy recommendations to the government. Others included those living alone and the need for exercise.

[44] Dr. Hodge was called by Ontario. He practises Public Health & Preventive Medicine and Emergency Medicine. He joined Public Health Ontario (PHO- which provides scientific and technical advice to Ontario and others) in October 2020 and was the co-lead for epidemiology and surveillance activities within the Incident Management System structure of the Health Protection division of PHO from November 2020 until April 9, 2021. He testified about the role of public health professions. Public health is a distinct expertise focusing on the health of the wider community. Public health officials in Ontario must consider the precautionary principle and the burden principle. He described the growing concern in the spring 2021 over new variants, the growing COVID-19 cases, and the burden of increased cases to the healthcare system. Further, he responded to Dr. Kettner's concern that, with contact tracing in place since 2020, the province ought to have had the ability to provide more analytical analysis. Dr. Hodge testified that due to the lack of human resources and the sheer number of cases, the province did not have the ability to produce the analytical analysis which Dr. Kettner believed should have been available in April 2021.

[45] Dr. Hodge testified that even a small number of cases from an outdoor gathering could result in many secondary infections when attendees returned home. While Dr. Hodge accepted that the rate of infections while outdoors would be much lower than infections indoor, the risk was still real. Dr. Hodge also cited the CDC study referred to by Dr. Kettner but noted that the study expressed that indoor transmission was 18.7 times more likely than outdoor transmissions. Moreover, that finding was said to be made with a 95 percent confidence interval which meant that the range was anywhere from 6 times to 59 times more likely to transmit indoors than outdoors which is a significant spread. He acknowledged that public health officials must work with imperfect data. He expressed the dilemma this way: "Central to our public health practice is the notion of the precautionary principle, where if we wait for perfect evidence, we will have fallen short of our professional role. Part of the challenge of being a public health physician is how do you make recommendations with imperfect or incomplete evidence".

[46] The expert evidence established that in the spring of 2021, the science as to the transmissibility of COVID-19 outdoors was not settled. This is still the case. The risk of being infected by COVID-19, while not defined, was much more likely at an indoor event, but the risk was not zero at outdoor events. There were insufficient studies to determine with exactitude the risk of spread in such circumstances. Any infections that did occur would undoubtedly result in additional infections of others, including family members. In addition, the impact of new variants was still emerging. Hospital stays and deaths were increasing. The possible collapse of the

hospital network was a real threat. Experience, particularly in the second wave of the pandemic, demonstrated that restrictive measures did have a beneficial impact on reducing the transmission of the virus and thereby alleviating death, illness and hospital stays. I accept Dr. McKeown's evidence that the province was genuinely attempting to balance a complex web of issues when it introduced the Gathering Limits and, as Dr. Hodge pointed out, was doing so with imperfect and incomplete evidence. In the end, the restrictions, including the Gathering Restrictions, had a dramatic impact in reducing the transmission of COVID-19 which, in turn, reduced death, illness and hospitalizations.

**Issues**

[47] The issues raised in this case are as follows:

(a) did the Gathering Restrictions violate Mr. Hillier's freedom of peaceful assembly as provided for in section 2(c) of the *Charter*?

(b) if yes, is the violation justified under s. 1 of the *Charter*?

**Analysis**

[48] This is not a case of first impression. As noted, there have been numerous cases across the country challenging various governments' COVID-19 restrictions that infringed various *Charter* rights. Each of these cases upheld the challenged restrictions as being justified under s. 1 of the *Charter*. While all the decisions are helpful, the Ontario Court of Appeal's decision in *Trinity Bible* is the governing decision.

[49] Ontario concedes that the Gathering Restrictions violated Mr. Hillier's s. 2 (c) *Charter* rights. The applicant asks that I nonetheless set out a framework test for s. 2(c) of the *Charter*. The main event on this application is whether the Gathering Restrictions were justified under s.1 of the *Charter*. I begin my analysis of s.1 by considering whether *Trinity Bible* has already authoritatively answered the s.1 issue. I then address the s.1 analysis.

**Section 2 (c)**

[50] Mr. Hillier initially challenged the restrictions as violating not only his right to peaceful assembly but also his right to freedom of expression under s. 2(b) and to freedom of association under s. 2(d). He subsequently abandoned his challenges under s. 2(b) and (d) and now limits his challenge to a breach of s. 2(c). Ontario concedes that the Gathering Restrictions constituted a violation of Mr. Hillier's freedom of peaceful assembly.

[51] Notwithstanding Ontario's concession, Mr. Hillier asks that I adopt a test of general application for violations of the freedom of peaceful assembly. It is asserted that there has been little direction from the courts on what constitutes a violation of s. 2(c) and that it would assist if this court provided guidance by articulating a test of general application.

[52] Mr. Hillier is correct that there is extraordinarily little by way of judicial pronouncement on s. 2 (c). Mr. Justice Rouleau in his recent *Report of the Public Inquiry into the 2022 Public*

*Order Emergency* (Volume 2: Analysis (Part 1)) (Ottawa: Public Order Emergency Commission, 2023) considered s. 2(c) and commented on the dearth of case law under 2(c) as follows:

> Freedom of peaceful assembly is protected under section 2(c) of the *Charter*, yet it has received little attention from the courts. Unlike freedom of expression, the Supreme Court of Canada has not determined the values, objectives, scope, and limits of freedom of peaceful assembly. Nor has the Supreme Court articulated a legal framework in which to analyze the right's application. Some lower-level courts, however, have recently considered section 2(c) in the context of challenges to gathering rules contained in COVID-19 public health measures.
> ……..
> Freedom of peaceful assembly remains one of the *Charter's* most under-developed rights. There are many questions of first principle that do not yet have clear legal answers, such as whether section 2(c) extends to virtual spaces, or if it protects activities integral to the assembly, such as mobilizing resources, planning, preparing, and publicizing a gathering and travelling to and from an assembly. What should be recognized, however, is the important conceptual role that it plays within the *Charter's* fundamental freedom provisions. Just as public protest necessarily engages with freedom of expression, it also necessarily engages with freedom of peaceful assembly: at pp. 49 and 53.

[53] However, it is not necessary for me to make sweeping pronouncements as to s. 2(c) to resolve what is in dispute in this case. Where so little of the principles underlining s. 2(c) have been explored, it would be unwise to do so. The Supreme Court of Canada in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, 124 D.L.R. (4th) 129, at para. 6, cautioned courts not to decide issues that are not necessary to determine the matter at hand. The court put it succinctly as follows:

> This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal. This is particularly true with respect to constitutional issues ….

[54] It is sufficient to simply observe that the Gathering Restrictions prevented the peaceful assembly of people outdoors, including those who wished to gather to protest the government's policies. There is no doubt that the right to peaceful assembly was engaged when Mr. Hillier gathered with others to protest the COVID-19 restrictions, including the very restrictions that prohibited the protest rally. I accept that the Gathering Restrictions were, therefore, legislative restrictions on Mr. Hillier's s. 2 (c) *Charter* rights. The issue is whether those restrictions were justified test under s.1 of the *Charter*.

**Trinity Bible**

[55] In *Trinity Bible*, the COVID-19 restrictions in O. Reg. 20/21 limiting the numbers who could attend religious services at indoor and outdoor gatherings were challenged. The restrictions on religious gatherings that were in place during the pandemic varied. Orders of non-compliance were issued against a group of religious organizations who held religious services in

contravention of the restrictions. Notwithstanding the challenged restrictions were now expired, the religious organizations sought an order declaring the regulations of no force and effect under s. 52(1) of the *Constitution Act, 1982* and an order setting aside the various orders of non-compliance.

[56] *Charter* violations under s.2 (a) (freedom of religion), (b) (freedom of expression), (c) (freedom of peaceful assembly) and (d) (freedom of association) were alleged. The motions judge found that the regulations infringed s.2(a) of *Charter,* being the right to religious freedom. She declined to determine whether the regulations infringed s. 2(b)-(d) as she found that those rights were subsumed by the s.2(a) violations in that case. She then proceeded to consider s.1 and found the limits were justified given the prevailing circumstances of the pandemic. Because the other *Charter* violations were subsumed in the s. 2(a) violations, it was only necessary to conduct one section 1 analysis. This approach was approved by the Court of Appeal. Sossin J.A. said "even if the motion judge expressly had found infringements of ss. 2(b)-(d) in this case, I am not persuaded that this would have led to a different result, as those same protected interests were considered at the proportionality stage": at para. 73. In *Trinity Bibl*e, the court was considering the same factual matrix as this case. In particular, the court was considering whether the exigent circumstances caused by the pandemic, including in the spring of 2021, justified the restrictions in issue.

[57] In *Trinity Bible,* the challenge was also to O. Reg. 82/20 Sch. 4 ss. 1 and 2. Sections 1 and 2 of the regulation provide the basis for both restricting religious gatherings and the outdoor gatherings. The challenge in *Trinity Bible* included a longer temporal period. It covered many iterations of the regulation but included the period of April 2021-June 2021 that is being challenged here.

[58] The following is the version of O. Reg. 82/20, Schedule 4, section 1(1), in force from April 23, 2021, to May 19, 2021 (i.e. at the time of the May 1, 2021, gathering at issue in this case):

> Gatherings, Stage 1 area
>
> 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) 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.

[59] Subsection (c) is the outdoor gathering restriction which Mr. Hillier is alleged to have violated, whereas subsection (d) addresses religious gatherings. The limited gatherings for religious purposes were part of the same response to the COVID-19 threat in the spring of 2021.In this proceeding, Dr. McKeown described these provisions as part of the government's

cost/benefit balancing process in arriving at the total package of restrictions. In the case of religious gatherings, Ontario sought to facilitate remote religious services. He testified as follows:

> Among other things, the higher capacity limits allowed a small number of people who may not be in the same household to produce and disseminate virtual religious services to a wider community. A capacity limit of 10 people permitted a few individuals (such as readers, cantors, videographers, etc.) to assist officiants in conducting the online services that remained permitted. Ontario recognized that religious services can be a source of support, comfort, and guidance for the communities they serve.

[60] *Trinity Bibl*e did not address O. Reg 265/21, the Stay-At-Home Order. However, the Stay-At-Home Order restricted gatherings in the same manner as O. Reg. 20/21. As Mr. Hillier summarized in his supplementary submissions "both regulations prohibited Mr. Hillier from participating and speaking at an outdoor gathering." The restrictions under both regulations had the same impact on Mr. Hillier and the justification proffered by Ontario under s.1 is the same. The analysis under s.1 does not change and to the extent *Trinity Bible's* s.1 analysis relating to O. Reg 20/21 applies in this case, I see no reason why it would not equally apply to O. Reg. 265/21.

[61] Like this case, *Trinity Bible* turned on whether the restrictions were justified under s.1 of the *Charter*. The same factual issues of concern regarding the spread of COVID-19 and its impact on both the health of Ontarians and the healthcare system were at the centre of *Trinity Bible's* analysis and Ontario's justification for imposing the restrictions.

[62] I must consider whether the analysis under s. 1 as set out by the Court of Appeal in *Trinity Bible* is binding or just persuasive. Mr. Hillier asserts that it is just persuasive but if it is binding, I may depart from it. Ontario states portions of the Court of Appeal's decision are binding but other portions, due to factual distinctions, are just persuasive. I agree with this general proposition.

[63] In *R. v. Sullivan*, 2022 SCC 19, 427 D.L.R. (4th) 521, the Supreme Court recently considered the concept of *stare decisis* as it applied to findings of unconstitutionality and horizontal *stare decisis*. Horizontal *stare decisis* applies where one court at the same level has previously determined the same matter. In doing so, Justice Kasirer made the following general comments at para. 56:

> While it is true that *stare decisis* pertains to the reasons given by a court and a s. 52(1) declaration is a remedy, the reasons explain the status of the impugned law in terms of its consistency with the Constitution. The constitutional status of the law is, as I say, a question of law. The scope of the legal reasoning extends beyond the individual claimant, with effect beyond the parties flowing from the binding character of the judgment as a matter of precedent (*Albashir*, at para. 65).

[64] Vertical *stare decisis* binds a lower court to follow a higher court's ruling. As stated simply by Justice Kasirer at para. 65: "A constitutional ruling by any court will, of course, bind lower courts through vertical *stare decisis*."

[65] Recently, the Ontario Court of Appeal in *Harjee v. Ontario*, 2023 ONCA 716 found that the principles laid out in *Trinity Bible* are the governing principles to be applied in addressing the constitutionality of public health measures, particularly arising from the pandemic at para. 6:

> Nor are we satisfied that there is a need for additional guidance from this court on the legal principles applicable to consideration of *Charter* rights and government justification for limits on *Charter* rights in the context of public health responses to the COVID-19 pandemic. This court recently provided guidance on these issues in *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134. Further, courts across the country have provided guidance on the constitutionality of government public health measures in response to the pandemic[1] – in each case finding that public health restrictions either did not breach *Charter* rights or were justified under s. 1 of the *Charter*.

[66] Mr. Hillier submits that on the basis of cases such as *Canada (Attorney General) v. Bedford*, 2013 SCC 72 or *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, I may depart from the decision of the Ontario Court of Appeal in *Trinity Bible*. *Bedford* and *Carter* addressed changes in circumstances and new legal arguments which would allow a lower court to depart from a higher court ruling. In both cases, the courts were revisiting older authority following a period of evolving social and legal change. In *R v. Comeau*, 2018 SCC 15, [2018] 1SCR 3342, the Supreme Court again commented on the importance of vertical *stare decisis* and how hard it is for a lower court to meet the test to deviate from prior precedent. The court held that "subject to extraordinary exceptions, a lower court must apply the decision of higher courts to the facts before it": para 26. In that case, it was argued that the evidentiary basis demonstrated that a significant shift in the foundational legislative and social facts. Such a change is not a matter of opinion but rather the change must arise from a "'fundamental shift' how jurists understand the legal question at issue": at para 34.

[67] The test for a lower court to deviate from a *vertical* precedent is understandably high. Only where there is a "fundamental shift" from the governing principle may a lower court even entertain such a request and, even then, it is "extraordinary".

[68] While Mr. Hillier undoubtedly places more emphasis on some facts and some parts of the legal test, there are no evolving legal principles that would require any departure from the principles in *Trinity Bible*. In short, this is not a case where there has been a societal shift or an evolution in the law that allows me to depart from the Court of Appeal. The issue is whether the facts pertaining to Mr. Hillier and the Gathering Limits are distinguishable from *Trinity Bible*, not whether I may revisit the principles in *Trinity Bible*.

[69] With these comments in mind, I will review the section 1 analysis below.

**Section 1**

[70] Having established a violation of s. 2(c), it falls on Ontario to establish that the Gathering Restrictions were limits prescribed by law that can be demonstrably justified in a free and democratic society. Individual rights are not absolute but any encroachment on those rights is subject scrutiny by the court.

[71] The Supreme Court of Canada in *R. v. Oakes*, [1986] S.C.R. 103, articulated the test that applies when the court is required to review the proffered justification of any limit to a *Charter* right. Under the *Oakes* test, the court seeks to balance the need for the legislated limit with its impact on the right being limited. First, the limit must be prescribed by law. The restrictions in this case were implemented by regulation which satisfies the requirement that they were prescribed by law: see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 46. The *Oakes* test then requires consideration of four separate but interconnected issues. First, the prescribed law must have as its object the addressing of a pressing and substantial concern that justifies limiting a fundamental *Charter* right. Second, there must be a rational connection between the restriction and the pressing and substantial objective of the prescribed law. Third, the legislative restriction must minimally impair the right while meeting the intended legislative objective. Lastly, the *Oakes* test requires a consideration whether the benefit of the restriction is proportionate to the impairment of the freedom.

**Pressing and Substantial Objective**

[72] Mr. Hillier concedes that the Gathering Restrictions were enacted to address a pressing and substantial concern, namely COVID-19. This included the pressing need to reduce the transmission of COVID-19, and to reduce hospitalization and ICU admissions. The Court of Appeal in *Trinity Bible* found COVID-19 was a pressing and substantial concern in the spring of 2021. The Court of Appeal further accepted the motion judge's finding that the "the objective of the religious gathering restrictions was to reduce COVID-19 transmission, hospitalization and death, and to mitigate threats to the integrity of the healthcare system": at para. 88.

[73] As reviewed earlier in this decision, these were factually the same considerations before me. The rising caseloads and mounting deaths required government action. Without government intervention and restrictions, many more people would die. In Ontario, the pressing and substantial concern was heightened because its healthcare system, particularly the hospital sector, was close to its breaking point. Not only were those who suffered from COVID-19 at risk, but so were all the Ontarians who might need acute hospital care. There was no immediate fix to this long-standing structural problem, aside from doing all that was possible to reduce the spread of COVID-19. In short, it is hard to envision a more pressing and substantial objective.

[74] Accordingly, while I would have come to the same conclusion, there is no factual or legal basis for me to depart from the finding in *Trinity Bible*, that the Gathering Regulations were enacted to address the pressing and substantial objective of reducing the transmission of COVID-19.

**Rational Connection**

[75] The rational connection element of the test asks whether the legislation is rationally connected to the legislation's objective. It is not an onerous element of the test.

[76] In Mounted *Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 143, the Supreme Court explained the test as follows:

> The government must demonstrate that the infringing measure is rationally connected to its objective. This test "is not particularly onerous" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228; *Health Services*, at para. 148). It is not necessary to establish that the measure will *inevitably* achieve the government's objective. A reasonable inference that the means adopted by the government will help bring about the objective suffices (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 40; *Health Services*, at para. 149). The assessment is a matter of causal relationship.

[77] To establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.

[78] In *Hutterian Brethren,* the issue was whether Alberta's security requirement that all residents have a photo driver's licence, even though some religions prohibit photos, infringed the right to religious freedom. At this stage of the analysis, the Alberta Court of Appeal questioned the effectiveness of photo drivers licenses as a security measure and therefore whether the regulation was rationally connected to its objective. The Supreme Court said that, at this stage, the effectiveness of the regulation or statute was not the issue. The Court explained as follows at para. 51:

> These concerns confuse rational connection with proportionality of negative and positive effects of the measure. The issue at the stage of rational connection is simply whether there is a rational link between the infringing measure and the government goal. The balance between positive and negative effects of the measure falls to be considered at the final stage of the s. 1 analysis.

[79] Mr. Hiller argues that the government failed to adduce sufficient evidence that limiting outdoor gatherings would measurably decrease transmissions, alleviate the burden on the healthcare system and result in lower hospitalization. In addition, he states that Ontario ought to have been able to provide demonstrative data that its proposed measures would be effective, particularly given the province's surveillance program. In short, Mr. Hillier says that Ontario has not met its evidentiary onus to establish a rational connection between the Gathering Restrictions and the threat of the outdoor spread of COVID-19.

[80] However, the evidence available at the time demonstrated that outdoor gatherings were a risk for the spread of COVID-19, albeit much smaller than indoor gatherings. Studies at the time the Gathering Restrictions were imposed were not conclusive. As mentioned, one study available at the time of the imposition of the restrictions said ten percent of cases were caused by outdoor gatherings. I accept that the surveillance program in the spring of 2021 was unable to provide the data envisioned by Dr. Kettner. Given the state of affairs in April 2021, I accept that even a small risk of spread could create a significant burden to Ontario's overtaxed health care system. This was particularly so where new variants had not been fully analysed and the vaccine was not widely available. Restricting the gathering of people, even outdoors, was a rational means of reducing the transmission of COVID-19.

[81] The issue at this stage is only whether there is a rational connection between the Gathering Restrictions and the objective of reducing the transmission of COVID-19. Ontario is not required to establish that the restrictions are effective in order to meet the rational connection element of the test. In particular, the debate between experts as to the effectiveness of the restrictions is not something that needs to be resolved at this stage. As Sossin J.A. said in *Trinity Bible*, "I agree with the motion judge that Ontario was not required to scientifically prove that the challenged regulations in fact reduced the spread of COVID-19": at para. 96. This applies equally to Mr. Hillier's argument.

[82] In *Trinity Bible,* the motion judge also accepted evidence that "the record that outdoor gatherings, while reducing the risk of transmission, did not eliminate it, and that any increased risk of transitions could have consequences for the health care system more broadly": at para. 96. This was held to be sufficient to establish a rational connection. This is the same rational connection Ontario has argued before me.

[83] The rational connection here is the same as that accepted in *Trinity Bible.* I see no facts or legal argument that would distinguish the analysis such that the result should be any different.

[84] To the extent an independent conclusion is required, I am satisfied that the record before me supports that the Gathering Restrictions were rationally connected to the objective.

**Minimal Impairment**

[85] This part of the test examines whether the measures undertaken to tackle the pressing and substantial concern were tailored to the objective. Mr. Hillier asserts that the government failed to prove that the approach utilized was minimally impairing. In particular, he states that unlike *Trinity Bible* where numbers of congregants were limited, the Gathering Limits banned outdoor gatherings all together. He asserts that Ontario could have and should have imposed restrictions that were less impairing than a total ban on the right to assemble outdoors. Moreover, it was argued that Ontario did not have a zero COVID-19 policy as it allowed some gatherings, including at box stores and the LCBO. While these arguments are somewhat different than those raised in *Trinity Bible,* I do not think they are significantly different such as to allow me to deviate from the result in that case. Nonetheless, I provide my own analysis below as to why I am satisfied that measures taken meet the minimal impairment portion of the test in s.1.

[86] At this stage, the issue is "whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit" (*Hutterian Brethren*, at para. 53). In considering whether the regulation is "reasonably tailored" to the goal, the government is entitled to a measure of deference commensurate with the pressing and substantial concern being addressed. The analysis is contextual. The more complex the social issues being considered, the greater the deference the courts will accord the legislature. In this way, the courts acknowledge that the legislature is better able to choose among the range of options available to best combat the social issue of pressing and substantial concern.

[87] Justice Sossin in *Trinity Bible* made the point that deference is not a "blank cheque" allowing government to run rough shod over individual freedoms: at para. 102. By the same token, the chosen legislative action need not abandon its goal of addressing the pressing and substantial concern. The legislature is not "necessarily restricted to the least common denominator of actions taken elsewhere" and that minimal impairment does not require legislatures to choose the least ambitious means to protect vulnerable groups: see *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393, 147 O.R. (3d) 398, at para. 154.

[88] The courts are sensitive to the fact that governments are called upon to address multi-faceted emergencies and other circumstances which require them to balance a host of competing issues, often with significant consequences to all involved. The Supreme Court has cautioned that the constitution ought not to create too high a barrier to creative solutions. In *Hutterian Brethren*, the Court commented as follows: "The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened": at para. 37.

[89] Justice Sossin addressed the dilemma facing Ontario during the pandemic at para. 103.

> In this case, the COVID-19 pandemic required Ontario to act on an urgent basis, without scientific certainty, on a broad range of public health fronts. That context not only informs the degree of deference owed to government as the crisis shifted on the ground in real time, but also the heightened importance of vigilance by all branches of government over fundamental rights and freedoms during such times of crisis.

[90] The evidence before me is consistent with the evidence in *Trinity Bible*. Of course, this is not surprising. However, Mr. Hillier asserted that the evidence of infections outdoors was so wanting that there was no basis to conclude that a ban on outdoor gatherings would impact the fight on COVID-19. I disagree. I accept that the spread of COVID-19 at outdoor gatherings is less than indoor gatherings, perhaps significantly so. However, even as of the date of this hearing, the scientific evidence is not clear on this point. Moreover, in spring 2021, there were new variants of concern whose patterns of transmission and severity of infection were unknown. Public health officials in Ontario were working in a time of great uncertainty. The health and lives of Ontarians were at stake, as was the Ontario hospital network.

[91] Like *Trinity Bible*, the evidence before me established that Ontario relied upon the precautionary principle in acting as it did in imposing the restrictions. The precautionary principle

provides that governments need not wait for scientific certainty before acting. In this case, Dr. McKeown and Dr. Hodge testified that the precautionary principle was relied upon given the scientific uncertainty that existed in the spring of 2021. I accept their evidence in this regard.

[92] Both doctors referred to the precautionary principle as informing Ontario's response to the pandemic and, as already noted, was a governing principle in the Ontario Health Plan for an Influenza Pandemic. The Plan defined the "precautionary principle" as follows:

> A principle used by the Ministry of Health and Long-Term Care and Chief Medical Officer of Health to guide decision-making during an emergency. According to this principle, reasonable steps to reduce risk should not await scientific certainty (Source: Spring of Fear, Justice Archie Campbell).

[93] The Plan references Spring of Fear, Mr. Justice Archie Campbell's report into the causes and lessons of SARS: Justice Campbell, *SARS Report* (Toronto: The SARS Commission, 2006). The SARS outbreak of 2003 resulted in 44 people dying and several hundred people being quarantined. SARS was largely confined to Toronto and Hong Kong. In Toronto, SARS was largely confined to hospitals. COVID-19 was much more widespread and deadly. Yet the lessons from SARS resonated. Justice Campbell found that the failure to apply the precautionary principle was a reason Ontario could not contain SARS. In considering the wisdom of the precautionary principle and the role of scientific knowledge in dealing with a health crisis, Justice Campbell observed:

> The point is not who is right and who is wrong about airborne transmission. The point is not science, but safety. Scientific knowledge changes constantly. Yesterday's scientific dogma is today's discarded fable. When it comes to worker safety in hospitals, we should not be driven by the scientific dogma of yesterday or even the scientific dogma of today. We should be driven by the precautionary principle that reasonable steps to reduce risk should not await scientific certainty.

[94] Justice Campbell urged the province to adopt the precautionary principle as its guiding principle in dealing with health care emergencies:

> If the Commission has one single take-home message it is the precautionary principle that safety comes first: that reasonable efforts to reduce risk need not await scientific proof. The Ontario health system needs to enshrine this principle and to enforce it. It is the most important single lesson of SARS, and it is a lesson ignored only at our collective peril.

[95] In focusing on the precautionary principle, I am not ignoring Justice Sossin's comments that there are no blank cheques, even in a pandemic. However, where there is a once-in-a-century pandemic, government has an obligation to address the safety of all, most particularly the vulnerable. The imperfect state of the science ought not to weigh against government action if the action is rationally connected to avoiding the death of many and the collapse of the health care system. As stated in *Trinity Bible*, the precautionary principle is an appropriate standard for government action in health emergencies and is not "excessively deferential": at para. 115.

[96] The lessons of SARS and the precautionary principle dictated action, rather than inaction. In this case, the restrictions were time limited. Over the course of the pandemic, Gathering Restrictions varied both with the prevalence of COVID-19 and the local circumstances. The restrictions in issue in this case represent the most severe restrictions and were reserved for a time when COVID-19 was on the rise and the health care system was already reeling from the burden of over a year of COVID-19. As stated by Dr McKeown: "in April and May 2021... the rate of transmission was so high that outdoor gatherings, which may otherwise have posed a relatively small risk of transmission, could still have a significant impact on the overall spread of the virus across the province".

[97] While the ban was absolute as it related to activities engaged in by Mr. Hillier, some outdoor gatherings were permitted as part of the government's response to the pandemic. As described in *Trinity Bible*, there were small gatherings for religious services. Those living alone could gather with one other family and people could shop in restricted numbers. Objection was taken that the gathering limits were not universal. Aside from religious services, there were some settings where people could gather such as big box stores and arenas. As was stated by Dr. McKeown, the risks in these settings were weighed along with the utility of allowing people to shop or attend at arenas. This demonstrated the ban was not absolute and that the government was weighing a multiplicity of factors in arriving at the Gathering Limits. As stated by the Court of Appeal in *Trinity Bible* at para. 118, the government was entitled to make these decisions as part of its weighing of the proposed measures:

> Ontario was entitled to balance the objective of reducing the risk of COVID-19 transmission in congregate settings with other objectives that did not arise in the context of regulating religious gatherings, such as preserving economic activity and preserving other social benefits which that activity made possible.

[98] The nature of the ban and whether it meets the s.1 analysis on impairment requires the court to examine whether it was a reasonable option given the government's objective, not that it was the best option. The objective is not to be sacrificed in this part of the analysis. The objective was to stop COVID-19. The bluntness of the restrictions reflected the risk that was being faced by the province. Under the circumstances, moving to smaller gatherings or exempting some gatherings, such as political rallies, would not have achieved the objective. The government was entitled to consider how best to control the spread of COVID-19 while weighing the wider societal interest as it did, for example, by allowing small gatherings to ensure that religious services may continue and to allow people to shop. The s.1 analysis must look to the larger context and ask whether the infringement at issue was directed at an important objective and is proportionate in its overall impact. As stated by the Supreme Court in *Hutterian Brethren* at para. 69:

> The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court

> to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.

[99] While success in meeting the pressing objective is not necessary to justify the restriction, I do accept that the total package of restrictions, including the Gathering Restrictions, not only flattened the curve but significantly reduced the spread of COVID-19 in the spring of 2021. In turn, deaths and hospital stays were dramatically reduced from what would have otherwise occurred. While success is not a requirement to justify action, particularly where the precautionary principle is concerned, the results in this case show that the collective measures, including the outdoor ban, were highly effective. It was not demonstrated to me, and I cannot envision that another path would have been equally effective, including a modified ban on outdoor gatherings. In the circumstances, I find that the Gathering Limits, "were a tailored and balanced response to an urgent public health crisis": *Trinity Bible*, at para. 125.

**Proportionality**

[100] The last part of the *Oakes* test "allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitations": *Hutterian Brethren*, at para. 77. At this stage, the court looks at whether the benefits of the restrictions outweigh the deleterious effects on freedom of assembly. Section 1 of the *Charter* recognizes, in some cases, that *Charter* freedoms must give way to the greater public good. Like the analysis in minimal impairment, I am not satisfied that the facts and reasoning presented in this case would allow me to deviate from *Trinity Bible*. Nonetheless, I will review the arguments and provide my analysis as I have no hesitation coming to the same conclusion.

[101] There can be no debate that Ontario was facing the greatest health crisis in a century. The most vulnerable in society were at risk, including the elderly and those already suffering from compromised health. There was a real and pressing threat that Ontario's hospital system would be so overburdened that non-COVID-19 emergencies could not be accommodated due to the burden imposed by rising COVID-19 counts. The Court of Appeal adopted the words of Justice Pomerance in *Trinity Bible* where she accurately described the threat, as follows at para. 127:

> It is not hyperbole to describe this as a crisis of the highest order, requiring early and effective intervention by public officials. Ontario was entitled to impose restrictions in the interests of public health, and *the public was entitled to have those in restrictions imposed.* While framed as a contest between Ontario and the moving parties, this case also implicates the interests of many Ontario residents who wished the government to keep them safe during a public health emergency. [emphasis in original]

[102] Mr. Hillier is not wrong to point out there were societal drawbacks to such significant restrictions. Ontario's witnesses conceded that the impositions of the restrictions involved

considerations of the negative impacts of those restrictions. Dr. McKeown noted "[n]one of [Ontario's] interventions could be implemented without some risk of adverse public health consequences." He went on to observe that even these risks needed to be weighed against not taking sufficient measures to stop the spread of COVID-19. A half-hearted strategy would have only exasperated an already precarious situation. Dr. Hodge described the challenge facing public health officials during the pandemic in these simple terms: "There is no great choices here. There is only the least bad choice."

[103] As Justice Pomerance observed, the public was entitled to expect that the duty to protect life and the medical institutions that preserve life would be the paramount concern during the height of the pandemic. The imposition of the Gathering Restrictions for approximately two months was not disproportionate to the threat facing Ontario in the spring of 2021.

[104] Any restriction on peaceful assembly is unfortunate. It diminishes the voices of those who wish to be heard. Peaceful assembly is integral to other *Charter* rights, including expression, religion, and association. In *Trinity Bible*, it was argued that the regulations infringed the right of religious freedom "in effect" and the right to peaceful assembly "in purpose". Yet, such infringements were accepted as being proportionate given the realities of the pandemic. As Justice Sossin observed, the pandemic "engaged the limits of institutional pluralism" and necessitated the balancing of individual rights with achieving the legitimate goal of reducing the spread of COVID-19. He further observed that "This balance led to policies which satisfied neither goal completely": at para. 133.

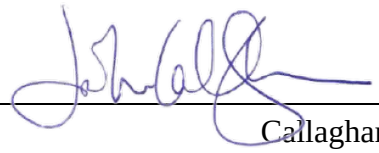
[105] In the extraordinary circumstances existing in the spring of 2021, the Gathering Restrictions were both necessary and a proportionate response to the most significant health crisis of our time. The challenged restrictions were justified under s. 1 of the *Charter*.

**Disposition**

[106] For the reasons set out above, the application is dismissed.

[107] On agreement of the parties, I make no order as to costs.

[108] Finally, I would like to thank Counsel for their thorough preparation and argument of this case.



Callaghan, J.

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**CITATION:** Hillier v. His Majesty the King in Right of The Province of Ontario, 2023 ONSC 6611
**COURT FILE NO.:** CV-22-00682682-0000
**DATE:** 20231122

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

RANDY HILLIER

Applicant

**– and –**

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO

Respondent

**REASONS FOR JUDGMENT**

CALLAGHAN, J.

**Released:** 20231122