

COURT OF APPEAL FOR ONTARIO

(Appeal in an application)

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Applicant (Respondent in appeal)

-and-

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

Respondents (Appellants)

AND BETWEEN:

HER MAJESTY THE QUEEN IN ONTARIO

Applicant (Respondent in appeal)

-and-

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

Respondent (Appellants)

*APPLICATION UNDER the Reopening Ontario (A Flexible Response to COVID-19) Act, S.O.
2020, c.17, s. 9 (the “ROA”)*

FACTUM OF THE APPELLANTS

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Overview

1. During the COVID-19 pandemic (the “**Pandemic**”), the province of Ontario enacted regulations which strictly limited attendance at both indoor and outdoor religious gatherings (the “**Restrictions**”). The Appellants tried to practice their religion in a safe manner during the Pandemic - but were prohibited from doing so and charged with breaches of the regulations. The Appellants are also subject to orders of the Ontario Superior Court of Justice (the “**Orders**”) which require them to comply with the Restrictions.

2. COVID-19 (“**COVID**”) transmission can occur indoors, whether at a religious gathering or at a retail store. However, religious services at even the largest, best ventilated churches were strictly limited at certain times to as few as 5 attendees while retail stores remained open throughout the Pandemic with flexible attendance limits based on building size.

3. The risk of outdoor transmission is negligible. According to Ontario's own expert witness Dr. Zain Chagla: (i) outdoor religious gatherings are safe, whether there are 10 COVID cases a day or 10,000, regardless of variants of concern; (ii) the Outdoor Restrictions may have increased COVID transmission by encouraging clandestine gatherings in small indoor spaces where transmission risks are much higher; and (iii) restrictions on outdoor gatherings are not justified or appropriate from a public health perspective.

Appeal Book, Tab 6A, Affidavit of Dr. Thomas Warren at para. 55
Appeal Book, Tab 5A, Cross-Examination of Dr. Zain Chagla at Q. 14-25, 96-125

4. The Appellants brought a motion to set aside the Orders, challenging the constitutionality of the Restrictions. The motion was dismissed by Pomerance J. at first instance. This is an appeal of that decision.

Part I – The Appellants and the Decision

5. The Appellants are two churches and associated individuals who were charged with Provincial offences related to holding or attending religious gatherings during the pandemic.

Trinity Bible Chapel et. al.

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

Appeal Book, Tab 6B, Affidavit of Jacob Reaume at para 4

7. In the early months of the Pandemic, the church building was closed and Trinity provided online religious services for its congregation. When churches were finally permitted to open to 30% capacity in June of 2020, Trinity developed a comprehensive policy to mitigate COVID risk, provided masks and hand sanitizer to parishioners, and used their large gymnasium as an overflow area to facilitate social distancing during services.

Appeal Book, Tab 6B, Affidavit of Jacob Reaume at paras. 5, 14

Provincial Offence Charges & Court Orders (Trinity)

8. When Ontario locked down churches again in December of 2020, Trinity's elders decided they could not in good conscience close their doors to the faithful again. This resulted in numerous summonses issued to Trinity and its leadership. Each charge for individuals may result in a \$100,000 fine and/or one-year of imprisonment, and for the church each charge carries a maximum penalty of \$10 million. Those charges remain outstanding, pending the outcome of this hearing.

Appeal Book, Tab 6B, Affidavit of Jacob Reaume at paras. 18, 21, 32-34, 52

9. The Attorney General commenced the Application for a statutory injunction under s. 9 of the Reopening Ontario Act (the “**ROA**”), leading to the impugned Orders, on January 21 with a return date of January 22. The Restraining Order was granted, with a 30-day period within which to move to set aside the Restraining Order on constitutional grounds or otherwise. That motion to set aside, and a subsequent one based on a more broadly-worded Restraining Order dated April 26, 2021, are the proceedings before this Honourable Court.

Appeal Book, Tab 6B, Affidavit of Jacob Reaume at para. 40

10. Following the imposition of the statutory Restraining Orders, Trinity continued to meet in numbers exceeding the allowable limits and faced contempt of court proceedings and significant fines and legal costs totaling approximately \$200,000, which they have since paid. They were also locked out of their church building by Court order for several months.

Appeal Book, Tab 6B, Affidavit of Jacob Reaume at paras. 55, 58-59

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

11. The Church of God (Restoration) Aylmer (“**Church of God**”) is a non-denominational religious organization located in Aylmer, Ontario. Church of God's facility can safely accommodate more than 400 people. Many of the Church of God parishioners come from a Mennonite background.

Appeal Book, Tab 6C, Affidavit of Heinrich Hildebrandt at paras. 2, 4

12. Heinrich (Henry) Hildebrandt is the pastor at the Church of God. Abram Bergen, Jacob Hiebert, Peter Hildebrandt, Susan Mutch, Elvira Tovstiga and Trudy Wiebe are elders or former elders of the church.

Appeal Book, Tab 6C, Affidavit of Heinrich Hildebrandt at paras. 2-3

13. The Church of God did not hold services at the beginning of the Pandemic, but began holding drive-in services in April, 2020. The Regulations did not contemplate drive-in religious

gatherings at that time, but Aylmer Police deemed them to be illegal outdoor gatherings of more than 5 people, and threatened the Church of God with penalties of up to \$100,000 and a year in jail. The Church of God brought a constitutional challenge to the prohibition on drive-in services in May 2020, and by the end of May 2020 Ontario amended the regulations to allow drive-in religious services. The Church continued holding drive-in services until churches were permitted to open with limited capacity in June of 2020.

Appeal Book, Tab 6C, Affidavit of Heinrich Hildebrandt at paras. 9-10, 13, 20, 22

14. When they resumed in-person services, Church of God made masks and hand sanitizer available, posted signs reminding parishioners to follow public health protocols, and advised parishioners not to attend if they or a family member were feeling unwell. The Church (working with the police) determined the capacity of the building and adhered to that limit. An overflow room was made available to allow extra space for physically distanced seating, and drive-in services continued for those who were not comfortable entering the building.

Appeal Book, Tab 6C, Affidavit of Heinrich Hildebrandt at para. 23

Provincial Offence Charges & Court Orders (Church of God)

15. Church of God continued to largely abide by public health guidelines and had few difficulties with police until January of 2021, when the Province reimposed a near total prohibition on religious gatherings. The Church and its leaders faced numerous charges over the ensuing weeks and ultimately a s. 9 Restraining Order was obtained by the Province. This, too, resulted in contempt of court proceedings and significant fines and costs totaling over \$274,000, which have been paid. Additional charges under the ROA are outstanding, pending the outcome of this hearing. Many of the charges and the final contempt finding related to outdoor services held on the church's large acreage. Aylmer Police harassed parishioners and flew drones overhead during services to obtain evidence to be used against the Church in court.

Appeal Book, Tab 6C, Affidavit of Heinrich Hildebrandt at paras. 33-47

The Lower Court Decision

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

17. Pomerance J. issued her decision dismissing the Appellants’ motions on February 28, 2022 (the “**Decision**”).

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

Part II – Nature of the Case

18. Evidence on the Motion was provided by way of affidavit. Ontario’s witnesses were:

- **Dr. David McKeown** – Associate Chief Medical Officer of Health for Ontario (2020-21)
- **Dr. Matthew Hodge** (*expert witness*) – Emergency physician and public health doctor
- **Dr. Zain Chagla** (*expert witness*) – Infectious disease physician.

19. The Appellants’ witnesses were:

- **Rev. Jacob Reaume** – Pastor at Trinity Bible Chapel
- **Craig Williams** – Trinity Bible Chapel parishioner
- **Heinrich (Henry) Hildebrandt** – Pastor at the Church of God
- **Karen Bergen** – Church of God parishioner
- **Dr. Thomas Warren** (*expert witness*) – Infectious diseases consultant and medical microbiologist
- **Dr. Richard Schabas** (*expert witness*) – Public health physician and former Chief Medical Officer of Health for Ontario (1987-1997)

The Appellants’ Argument at First Instance

20. At the Motion, the Appellants argued that the Restrictions infringed on fundamental freedoms guaranteed by sections 2(a), 2(b), 2(c) and 2(d) of the *Canadian Charter of Rights and Freedoms* (the “**Charter**”) in a manner that could not be demonstrably justified in a free and

democratic society. The harms caused by the Restrictions far outweighed any salutary effect, and that they must be struck down.

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

21. Ontario enacted regulations which imposed capacity limits on religious gatherings held indoors (the “**Indoor Restrictions**”) and outdoors (the “**Outdoor Restrictions**”). At certain times, both indoor and outdoor religious gatherings were governed by regulatory provisions that made no distinction between indoor and outdoor religious gatherings (“**Merged Restrictions**”).

22. The Appellants argued that the objective of each of these types of restrictions should be defined and considered separately when applying the Oakes Test. Because the body of evidence in this case does not establish a meaningful risk of COVID transmission outdoors, the objective of the Outdoor Restrictions (preventing the spread of COVID outdoors) was not pressing and substantial. In the event that the Court defined the objective more broadly (preventing the spread of COVID generally), restrictions on outdoor gatherings (where COVID transmission is unlikely) were not rationally connected to that objective.

23. The Appellants argued that Merged Restrictions must be struck down at the minimal impairment stage of Oakes, because while COVID can spread indoors, the risk of transmission at outdoor gatherings was negligible. Imposing the same restrictions on indoor and outdoor gatherings was never within a reasonable range of alternatives available to the Province – from the first days of the Pandemic, experts knew that COVID was unlikely to spread outdoors based on experience with other infectious respiratory diseases.

24. The Appellants concede that COVID can spread in indoor settings. But the capacity limits imposed on indoor religious gatherings were significantly more restrictive than those imposed on essential retailers. While Ontario argued that church services had characteristics (eg: duration,

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

Part III – The Legislative Framework

25. On March 17, 2020, at the beginning of the Pandemic, Ontario Regulation 52/20 declared a province-wide emergency pursuant to section 7.0.1 of the Emergency Management and Civil Protection Act (“EMCPA”).

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

26. On March 24, 2020, O. Reg.82/20 ordered the closure of all “non-essential” businesses and institutions and from March 18 to July 17, 2020 O. Reg.52/20 placed limits on the number of people permitted to attend public events, including indoor and outdoor religious gatherings.

27. On July 24, 2020 the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020 was proclaimed into force. It terminated the provincial emergency, but continued certain emergency orders made under the EMCPA, including O. Reg 82/20.

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

28. On April 27, 2020 Ontario released its *Framework for Reopening our Province*, which set out a three stage approach to reopening the economy. Then, on November 3, 2020 The Province’s *Keeping Ontario Safe and Open Framework* (the “**Framework**”) refined the three stage approach

by establishing five color-coded "zones"(the "**Zones**") of increasingly restrictive public health orders which the Province could apply on a regional basis. O. Reg. 363/20 assigns each of Ontario's public health units to one of the Framework Zones, and has been amended whenever one or more regions were assigned into a different Zone.

<https://files.ontario.ca/moh-covid-19-response-framework-keeping-ontario-safe-and-open-en-2020-11-24.pdf>
O. Reg. 363/20

29. Concerned about increasing COVID case counts, on December 21, 2020 Ontario announced that effective December 26, the Framework would be suspended and a more restrictive "Provincewide Shutdown" would begin. On January 12, 2021 Ontario declared a second province-wide state of emergency, and issued a stay-at-home order which was continued in force in most regions after the state of emergency ended on February 9, 2021 by amending O. Reg. 82/20 to add a new Stage 1 "Shutdown Zone".

*Declaration of Emergency, O Reg 7/21, <<https://canlii.ca/t/54w8b>>
Stay-at-Home Order, O Reg 11/21, <<https://canlii.ca/t/54wst>>*

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

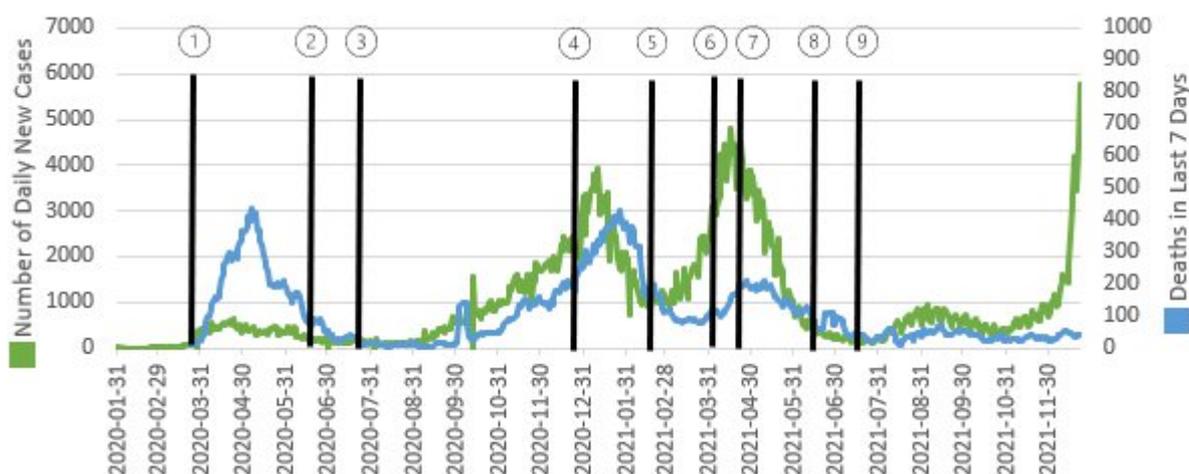
ZONE	REGULATION
STAGE 3 - GREEN - PREVENT	O. Reg. 364/20
STAGE 3 - YELLOW - PROTECT	O. Reg. 364/20
STAGE 3 - ORANGE - RESTRICT	O. Reg. 364/20
STAGE 2 - RED - CONTROL	O. Reg. 263/20
STAGE 1 - GREY - LOCKDOWN	O. Reg. 82/20
STAGE 1 - SHUTDOWN	O. Reg. 82/20

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

Summary of Regulations & Religious Gathering Restrictions

32. A series of charts is provided at Schedule C hereto summarizing Ontario's religious gathering regulations throughout 2020 and 2021, with point-in-time links to the version of the regulations in force whenever relevant amendments were made.

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



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

Part IV – Issues and Argument

“...The standard of review on a question of law is that of correctness...”

The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a ‘palpable and overriding error’”

Housen v. Nikolaisen, 2002 SCC 33 (CanLII) at paras. 7, 10
<<https://canlii.ca/t/51tl>>

Issue 1: The Expert Evidence

Issue 1(a) – Treating Dr. McKeown as an expert witness.

34. Pomerance J. erred in law by admitting and heavily relying on the opinion evidence of Dr. McKeown, a fact witness.

Appeal Book, Tab 2, Reasons for Decision at paras. 41-59

35. One of the few pieces of evidence offered in support of her finding any risk of COVID transmission whatsoever outdoors was Dr. McKeown’s opinion that “...*during some periods... the rate of transmission was so high that outdoor gatherings that would otherwise have posed a relatively small risk of transmission could still have had a significant impact on the overall spread of the virus across the province.*” At the proportionality stage of her Oakes analysis, the sole basis of her finding that the Restrictions had any salutary impact at all was “*Dr. McKeown’s... opinion that the rate of illness and death in Ontario would have been much higher were it not for gathering limits.*”

Appeal Book, Tab 2, Reasons for Decision, paras. 56, 161

“It is trite law that an expert witness has a duty to the court to give fair, objective and non-partisan opinion evidence, and that this duty prevails over any obligation owed by the expert to a party... An expert must be aware of this duty and be able and willing to carry it out”

Owala v. Makary, 2021 ONSC 7475 (CanLII), <<https://canlii.ca/t/jkhv8>>, at para 29

36. Dr. McKeown was not an expert witness, and his opinion evidence should not have been admitted. Dr. McKeown did not provide an Acknowledgement of Expert's Duty form, as is required by the Rules of Civil Procedure. All evidence in this matter was provided by way of affidavit, and there is no evidentiary or other basis upon which Pomerance J. could have found that Dr. McKeown was aware of or able and willing to perform the duties of an expert under the Rules.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 4.1.01(1)(a), 4.1.01(2) and 53.03(2.1)

37. In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, the Supreme Court summarized the test for admissibility of expert opinion evidence:

“ First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert.

[then], the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks.”

White Burgess Langille Inman v. Abbott and Haliburton Co. (“White Burgess”), 2015 SCC 23 (CanLII), [2015] 2 SCR 182, <<https://canlii.ca/t/ghd4f>>, at paras. 19-24

38. Four expert reports were filed in this matter, accompanied by the form required under the Rules. All four expert affiants were cross-examined as experts. Dr. McKeown's opinion evidence was not necessary to assist the trier of fact. Opinion evidence is subject to a prima facie exclusionary rule. Dr. McKeown may have medical expertise, but he was not a properly qualified expert witness in this matter.

39. These concerns are heightened in light of the fact that much of the opinion evidence offered by Dr. McKeown and relied on by Pomerance J. (eg: outdoor transmission risk, effectiveness of the Restrictions) was speculative, controversial, without a clear evidentiary or factual basis, and not settled science. *“A party wishing to rely on novel scientific evidence must first establish that the underlying science is sufficiently reliable to be admitted in a court of law.”*

R. v. Trochym, 2007 SCC 6 (CanLII), [2007] 1 SCR 239, <<https://canlii.ca/t/1qbvvh>> at para. 33

40. Dr. McKeown's factual evidence was properly admitted, but Pomerance J. erred in law by admitting and relying on his opinion evidence. Any findings of fact based on Dr. McKeown's opinion evidence – including finding a risk of transmission outdoors, and that the Restrictions were effective in controlling COVID – constituted palpable and overriding errors which this Court must remedy.

Issue 1(b) – Failure to Address Concerns About Dr. Hodge

41. Dr. Hodge testified on cross examination that provincial case counts – each “case” require a positive PCR test - have accounted for 90% of the cases in the community. In other words, only 10% of cases have gone undetected by the Province's testing. This estimate is not at all consistent with other expert testimony or studies of case count accuracy, and would imply rates of undetected community COVID prevalence far lower than the Province's own COVID data and projections.

Appeal Book, Tab 5B, Cross-Examination of Dr. Matthew Hodge at Q. 66-68

42. Dr. Hodge acknowledges in his affidavit that “Many people infected with COVID-19 show no symptoms.” A May 2020 document published by Public Health Ontario estimated that up to 87% of COVID infections are asymptomatic. Asymptomatic people would be highly unlikely to be tested or captured in Ontario's case counts. Rates of asymptomatic infection alone make it impossible for Ontario's testing and case counts to have recorded anywhere close to 90% of total cases in the Province.

Appeal Book, Tab 6D, *Affidavit of Dr. Matthew Hodge* at para. 20
Appeal Book, Tab 6H, *Affidavit of Dr. David McKeown*, Exhibit DD, *Asymptomatic Infection and Asymptomatic Transmission* at p. 1

43. Ontario's other expert witness Dr. Chagla testified that Dr. Hodge's estimate was “false,” “not even close” and “not just a little bit wrong, but very wrong”. Dr. Chagla testified that an

understanding of case counts is fundamental to understanding the Pandemic, and that he would question the expertise of anyone who expressed that opinion.

Appeal Book, Tab 5A, Cross-Examination of Dr. Zain Chagla at Q. 14-25

44. And yet, Dr. Hodge worked as co-lead for Epidemiology & Surveillance for Public Health Ontario from November 2020 to April 9 2021. He ought to have known about the rates of undetected community COVID prevalence. His unwillingness to acknowledge the basic fact that many cases go untested calls into question his credibility and impartiality.

Appeal Book, Tab 6D, Affidavit of Dr. Matthew Hodge at para. 1

“ the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert’s evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded...

The trial judge must determine...whether the expert is able and willing to carry out his or her primary duty to the court.”

White Burgess Langille Inman v. Abbott and Haliburton Co. (“White Burgess”), 2015 SCC 23 (CanLII), [2015] 2 SCR 182, <<https://canlii.ca/t/ghd4f>>, at paras. 48-49

45. The Appellants raised these concerns about in their factum, and Ontario did not respond.

46. In closing arguments, counsel for Ontario referred to “*Dr. McKeown and Dr. Hodge, the actual experts who were advising the government of Ontario at the relevant time*” and indicated that when making determinations about COVID policy Ontario relied on the “detailed on the ground advice of experts like Dr. Hodge and Dr. McKeown.”

Transcript of Proceedings Below, Submissions of Mr. Hunter at pg 28, line 3-5; and pg 32, line 20-21

47. However, this claim contradicts Dr. Hodge’s statements on cross-examination:

“Q: Other than in your affidavit, did you provide any advice, comments, or recommendations related to the religious Restrictions that are in place...that were in place in Ontario during the pandemic?”

A. No.”

Appeal Book, Tab 5B, Cross-Examination of Dr. Matthew Hodge at Q. 5

48. The Appellants raised this apparent contradiction on reply, but Pomerance J. failed to address the issue in her Decision. Instead, she relied heavily on Dr. Hodge’s evidence, saying *“I found the evidence of Dr. McKeown and Dr. Hodge to be the most informative in explaining the challenges faced by those with responsibility for public health decision making.”*

Appeal Book, Tab 2, Reasons for Decision at paras. 40, 145

49. By failing to consider and address the issues with Dr. Hodge’s evidence, Pomerance J. committed an error of law which must be remedied. Her decision to give significant weight to Hodge’s evidence was a palpable and overriding error. Findings of fact based on Dr. Hodge’s evidence constitute palpable and overriding errors which taint the Decision and must be remedied by this Court.

Issue 1(c) – Discounting the Evidence of the Other Experts

50. Pomerance J. weighted the evidence of Dr. Hodge and Dr. McKeown far more heavily than that of the other experts in this matter, based on her conclusion that *“The views expressed by Dr. McKeown and Dr. Hodge best reflect what was known and understood by Ontario when it made its decisions.”*

Appeal Book, Tab 2, Reasons for Decision at para. 40

51. While Dr. McKeown was one of many people providing advice to the Province, in this matter he was a fact witness whose opinion evidence should not have been admitted.

52. Dr. Hodge testified that he did not provide Ontario with any advice, comments, or recommendations relevant to the matters at issue, and real concerns about the credibility, impartiality and reliability of his evidence were raised before the Court at first instance.

Appeal Book, Tab 5B, Cross-Examination of Dr. Matthew Hodge at Q. 5

53. Dr. Chagla, on the other hand, testified that he “*worked on provincial guidelines for COVID-19 through Ontario Health on personal protective equipment, procedures and surgical guidelines, and operating assessment clinics.*” Dr. Schabas was the Chief Medical Officer of Health for Ontario from 1988 to 1997.

Appeal Book, Tab 6E, Affidavit of Drs. Karim Ali and Zain Chagla, Exhibit A, Expert Report at para. 2.1(j)

54. Moreover, the evidence of Dr. Warren, Dr. Schabas and Dr. Chagla was based on publicly available epidemiological knowledge, scientific papers and medical data. No real concerns were raised about their expertise or the acceptance and reasonableness of their opinions and analysis within the larger medical community. If Ontario and its advisors were not aware of or did not understand the perspectives, studies, knowledge and data reflected in their testimony when enacting the Restrictions, then Ontario failed in its due diligence. Ontario’s own negligence cannot be used to insulate its actions from *Charter* scrutiny.

55. Pomerance J.’s decision to assign greater weight to the evidence of Dr. Hodge and Dr. McKeown while discounting the other expert evidence was a palpable and overriding error which must be remedied. All witnesses in this matter testified via affidavit and were examined out of court, and this Court has been provided with the same affidavit and transcript evidence that was provided to the Court below. The trier of fact was no better equipped to assess that evidence than this Court.

Schwartz v. Canada, 1996 CanLII 217 (SCC), [1996] 1 SCR 254, <<https://canlii.ca/t/1frcq>> at para 32
Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 SCR 235, <<https://canlii.ca/t/51tl>> at para 12

Issue 1(d) - Retrospective Evidence

Pomerance J. erred in law by excluding from her analysis facts which may have become known after the Restrictions were enacted.

56. Pomerance J. erred in holding that up-to-date information on COVID cannot be used to evaluate the Restrictions. She held that the court ought not to consider what is currently known about Covid, but rather only that which “was reasonably known” at the time of the Restrictions. This cannot be the “demonstrable justification” standard against which the *Charter*-infringing laws are evaluated. Such a standard would insulate laws from judicial oversight which new information reveals to have always been unjustified. The exclusion of admissible evidence is an error of law.

Fanjoy v. The Queen, 1985 CanLII 53 (SCC), [1985] 2 SCR 233, <https://canlii.ca/t/1ftw3>

Courts regularly use up-to-date information in Charter Analysis

57. For decades, the courts have not hesitated to rely on contemporary knowledge and understanding to strike down laws which are no longer justifiable. For example, the Supreme Court relied on the Badgley Report from 1977 in striking down the criminal prohibition of abortion. At the time, the criminalization of abortion was over 90 years old. The Court was not limited to information about abortion known in the 1800s. Indeed, changes in facts and evidence can be used by lower courts to justify departing from vertical precedent. If current knowledge justifies departing from precedent, *a fortiori*, that information can be considered.

R. v. Morgentaler, [1988] 1 SCR 30 at paras. 57-58
The Criminal Code, 1892, SC 1892, c 29, s. 271
Canada v. Bedford, 2013 SCC 72 at para. 42
Carter v. Canada, 2015 SCC 5 at para. 47

58. Evidence of the effects and application of legislation is relevant to the s. 1 analysis. By its very nature, this sort of evidence will be retrospective. For example, in a constitutional challenge to administrative segregation provisions, the British Columbia Court of Appeal reviewed data on

the use of administrative segregation. The Court also considered the “development of international norms.” Excluding this evidence would blind the Court to the realities of legislation to the detriment of an honest analysis of salutary or deleterious effects.

British Columbia Civil Liberties Association v. Canada (Attorney General), 2019 BCCA 228 at paras. 71-75, 81-89

59. Courts have also relied on retrospective evidence to uphold challenged legislation. In *R. v. Butler*, the Supreme Court upheld the criminalization of obscene material by relying on contemporary evidence of the degrading effect obscene material can have on women. The Court noted that the “*understanding of the harms caused by these materials has developed considerably since*” the legislation was first enacted. Whether used to uphold or strike down, courts have not shied away from retrospectively using up-to-date information to review the constitutionality of legislation.

New information is relevant even if laws are no longer in force

60. **First**, while the Restrictions have been repealed, they have an ongoing effect insofar as tickets for contraventions of the Restrictions are still in the system. So long as individuals are still impacted by laws which breach their *Charter* rights, the evidentiary record should not be limited because the laws were changed before more information could come to light.

61. **Second**, reliance on retrospective evidence is consistent with presumption that declarations of invalidity have retroactive effect. Laws found to be unconstitutional are presumed to be unconstitutional from the moment enacted. Repealed regulations, then, are no different in that the Court is called to evaluate government action with information unavailable at the time of the action. Limiting the analysis to historical information “*would risk leaving those harmed in the past by an unconstitutional law without a remedy.*”

R. v. Albashir, 2021 SCC 48 at paras. 38-42

62. **Third**, the government ought not to be given the benefit of an analysis limited to historically available information out of a sense of fairness. The constitutional analysis is not aimed at casting blame. Rather, its purpose is to prevent the enforcement of unjustified regulations to the detriment of individual rights. The analysis ought, therefore, to have the benefit of all the available evidence.

63. **Fourth**, retrospect is unique to the Court's institutional competence. Whereas legislatures make laws to apply to the future, the Court's role is to weigh in after all is said and done. It has the sobering advantage of distance from the events at issue and should not deprive itself of the benefit of retrospect.

The Restrictions were unjustified even based on what we knew then

64. At the time that the government enacted the Restrictions at issue in this appeal, the safety of outdoor gatherings was well known. Dr. Chagla, testified that holding outdoor gatherings was safe throughout the pandemic, whether there were 10 cases per day or 10,000. Dr. Warren and Dr. Schabas agreed on the safety of outdoor gatherings, stating that the risk was “negligible”, or “trivial” and it was known since the first outbreaks in Wuhan. Experience with other infectious respiratory diseases showed clearly that outdoor transmission is not a serious risk.

Appeal Book, Tab 5A, Cross-Examination of Dr. Zain Chagla at Q. 104, 119-20

Appeal Book, Tab 6A, Affidavit of Dr. Thomas Warren at paras. 58-60

Appeal Book, Tab 5C, Cross-Examination of Dr. Richard Schabas at Q. 83

65. Similarly, the federal and provincial governments' pandemic preparedness plans, which long pre-dated COVID, recognized the unsuitability of lockdowns. The plans anticipated an influenza pandemic, but their underlying principles were applicable to the current pandemic. Dr. Chagla agreed that COVID fell within the range of contemplated outcomes in Ontario's plan and that it was comparable in deaths to the Asian Flu and Hong Kong Flu. Notably, lockdowns were not part of the planned pandemic responses. In fact, Ontario's preparedness plan did not plan for any mandatory measures for a pandemic on the scale of the Asian Flu. Rather, the plan prioritized

minimizing disruption to normal life. The influenza preparedness plans were available to the Province when the Restrictions were implemented. Even without retrospectively applying current knowledge, the Court had ample evidence that the Restrictions were unjustified.

Appeal Book, Tab 5A, Cross-Examination of Dr. Zain Chagla at Q. 64, 222, 233, 249

Appeal Book, Tab 6F, Affidavit of Dr. Richard Schabas at para. 26

Appeal Book, Tab 6G, Affidavit of Dr. Richard Schabas, Exhibit D, *Ontario Health Plan for an Influenza Pandemic*, Chapter 4 at p. 4

Issue 2: Disregarding s. 2(b), (c), and (d) Infringement

66. Pomerance J. erred in law by failing to consider whether the Restrictions infringed upon s. 2(b), 2(c), and 2(d) of the *Charter*. Each right protects distinct values. The cumulative violations of all four freedoms reflects a particularly severe encroachment into *Charter*-protected interests. The failure to give weight to compound violations skewed the s. 1 proportionality analysis.

Appeal Book, Tab 2, Reasons for Decision at paras. 113-116

67. Where a single pattern of conduct engages the protection of multiple *Charter* rights, it reflects the importance of the conduct and the heightened constitutional protection it ought to be afforded. Where the conduct is prohibited by law, the analyses of the *Charter* violations cannot simply be “wholly subsumed” under one right. For example, where a teacher was removed from his teaching position for making antisemitic comments, the Supreme Court found that both his freedom of expression and freedom of religion were infringed.

Appeal Book, Tab 2, Reasons for Decision at para. 114

Ross v. New Brunswick School District No. 15, [1996] 1 SCR 825 at 867, 871

68. By way of further example, consider *Saskatchewan v. Durocher*. Mr. Durocher had erected a tipi on government property as part of a ceremonial fast protesting the high suicide rate among Indigenous youth. The Court gave weight to both the religious and political value of Mr. Durocher’s fast and found that a Notice of Trespass issued to Mr. Durocher infringed both ss. 2(a) and (b).

Saskatchewan v. Durocher, 2020 SKQB 224 at paras. 26-38, 46; see also *Right to Life Association of Toronto v. Canada (Employment, Workforce, and Labour)*, 2021 FC 1125; and *CUPW/STTP v. Canada (Attorney General)*, 2016 ONSC 418

69. The Supreme Court’s approach in *Trinity Western* is inapplicable to the case at bar. In *Trinity Western*, the majority found that “*the parties themselves have almost exclusively framed the dispute as centering on religious freedom.*” Rowe J. concurred and provided additional context in finding that “*the claimants have provided little to go on regarding these subsidiary arguments, nor were these claims argued extensively before the courts below or before this Court.*”

Law Society of British Columbia v. Trinity Western University, 2018 SCC 32 at paras. 77 and 252

70. The same cannot be said for the present matter. Throughout the proceedings, the Appellants have maintained that the Restrictions infringe all four fundamental freedoms. “*Given the submissions made to the Court, it is incumbent on this Court to resolve all the constitutional issues raised by the parties in this appeal.*”

Saskatchewan v. Good Spirit School Division No. 204, 2020 SKCA 34 at para. 93

Failure to consider all s. 2 rights impaired proportionality analysis

71. The Restrictions have infringed the Appellants’ freedoms of religion, expression, assembly, and association. The impact of the infringements cannot be fully accounted for without regard to all four freedoms because the nature of each violation is different. Whereas the Restrictions infringe the rights to religious freedom and free expression *by effect*, they infringe the right to peaceful assembly *in their purpose*. The Restrictions limit assembly *per se* which ought to be given greater weight in the proportionality analysis. The distinctions between the violations are lost when ss. 2(b), (c), and (d) are “wholly subsumed” under s. 2(a).

72. Contrary to the Her Honour’s finding, multiple *Charter* breaches arising from the same conduct *are* given enhanced weight in s. 24(2) analysis. Pomerance J. held that cases where multiple *Charter* rights are violated by police “*are invariably concerned with multiple, distinct acts.*” However, that is not so. For example, in *R. v. Poirier*, an accused was detained for 43 hours

without bail pursuant to a warrant authorizing a “bedpan vigil search.” This Court found that the police’s conduct violated both ss. 8 and 9 of the *Charter*. The conduct giving rise to both *Charter* breaches was one act: “bedpan vigil search.” This Court held that “*the trial judge erred in principle in not recognizing the cumulative effect of the Charter breaches that took place*” when conducting the s. 24(2) analysis.

Appeal Book, Tab 2, Reasons for Decision at para. 116
R. v. Poirier, 2016 ONCA 582 at para. 91

73. The Court ought to recognize the cumulative effect of multiple *Charter* breaches under s. 1. Section 1 and s. 24(2) are analogous in that both are engaged where the government has infringed an individual’s *Charter* rights. Both require a balancing of society’s interest in achieving a public goal with the interests protected by the individuals’ rights. The Court recognises the weight of the cumulative effect of multiple *Charter* breaches under s. 24(2). So too, the cumulative effect of multiple breaches ought to be given greater weight at the proportionality stage of the s. 1 analysis.

Issue 3: Misapplication of the Oakes Test

Pomerance J. erred in law by incorrectly applying the test set out in R. v. Oakes and finding that the Restrictions could be justified under s. 1 of the Charter.

Issue 3(a) – Conflating Indoor and Outdoor Restrictions

“...all steps of the Oakes test are premised on a proper identification of the objective of the impugned measure.”

Toronto Star Newspapers Ltd. v. Canada, 2010 SCC 21 (CanLII), [2010] 1 SCR 721, <<https://canlii.ca/t/2b11p>>, at para 20

74. Pomerance J.'s *Oakes* analysis is fatally compromised by her overbroad definition of Ontario's objective and her failure to consider the Indoor and Outdoor Restrictions separately.

R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 ("**Oakes**") , <<https://canlii.ca/t/1ftv6>> at para 69-70

75. When applying the *Oakes* test, "*Care must be taken not to overstate the objective. **The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.***" The objective of an impugned measure may be narrower than the objective of the legislative scheme as a whole.

RJR-MacDonald Inc. v. Canada (Attorney General), 1995 CanLII 64 (SCC), [1995] 3 SCR 199, <<https://canlii.ca/t/1frgz>>, at para 144

76. In *R. v. K.R.J.*, the Supreme Court applied *Oakes* to determine whether the retrospective application of s. 161(1)(c) and (d) of the Criminal Code could be constitutionally justified where those provisions came into force after the defendant was convicted but prior to sentencing. The Court defined the 'infringing measures' for the purposes of *Oakes* very narrowly – s. 161(1)(c) and (d) on their face were found to be insufficiently specific for the purposes of *Oakes*. Instead, the court focused only on their retrospective application:

"...the overarching objective of the prospective operation of the 2012 amendments is to enhance the protection s. 161 affords to children against the risk of harm posed by convicted sexual offenders. It follows naturally that the objective of the retrospective operation of these amendments — the infringing measure — is to better protect children from the risks posed by offenders like the appellant who committed their offences before, but were sentenced after, the amendments came into force. This latter objective anchors the s. 1 analysis.."

R. v. K.R.J., 2016 SCC 31 (CanLII), [2016] 1 SCR 906, <<https://canlii.ca/t/gsm3w>> at para 65

77. In the matter at hand 'infringing measures' must be defined with similar specificity in order to avoid overstating their objectives and thereby compromising the entire *Oakes* analysis. The objectives of the Indoor and Outdoor Restrictions ought to have been considered separately and

defined specifically. Instead, Pomerance J. framed the objective of both types of restrictions as follows:

“The government objectives in this case are amongst the most compelling imaginable – the protection of human life in the face of an unprecedented and unpredictable virus, carrying a threat of devastating health consequences.”

Appeal Book, Tab 2, Reasons for Decision at para. 159

“Each sphere of restriction contributed to the overarching objective of protecting the life and health of people in Ontario. Therefore, while this case focuses on religious gathering limits, the limits must be understood as operating within a comprehensive regulatory framework.”

Appeal Book, Tab 2, Reasons for Decision at para.132

78. This was an error of law which fatally compromised each stage of the Oakes analysis.

79. In the alternative, if the court accepts that the Objective of both types of Restrictions was *“the protection of human life in the face of an unprecedented and unpredictable virus, carrying a threat of devastating health consequences”* then in light of the lack of evidence of outdoor transmission risk, the Outdoor Restrictions should have been found not to have a rational connection to that objective.

Issue 3(b) – “A Comparison of Comparables”

80. Retail stores were permitted to remain open throughout the Pandemic with flexible attendance limits based on building capacity while a church of equal size faced much more stringent capacity restrictions. The Appellants’ argued that workers in retail settings faced the equal or greater risk of infection than churchgoers, and the disparity in retail and religious gathering restrictions showed that the Indoor Restrictions should fail at the minimal impairment stage of *Oakes*.

81. Pomerance J. rejected this argument. Her Decision lists COVID transmission risk factors she found to be present in religious gatherings settings: people typically spend over an hour at religious services; parishioners know each other and may be tempted to hug, shake hands, or otherwise violate social distancing requirements; and churchgoers singing, breathing heavily, or speaking loudly can spread infectious droplets.

Appeal Book, Tab 2, Reasons for Decision at paras. 3, 135, 148, 152-153

“Dr. Chagla identified the risks associated with transmission in the workplace for essential workers. First, he pointed out that the **workers are indoor with poor ventilation for eight or more hours per shift. Second, he asserted that workers socialize, talk, and sometimes talk loudly in their workplaces. He also presumed that some people may sing, breathe heavily, and hug coworkers while at work.** Third, even where plexiglass has been installed to minimize the risk of transmission, people often stand at the end of such barriers.

Finally, Dr. Chagla suggested that, if workers feel symptoms, they may be reluctant to test themselves for Covid-19 due to financial pressures and the potential resulting need to miss work.”

Appeal Book, Tab 2, Reasons for Decision at para. 73

82. Dr. Chagla testified that retail workers face all of the risks that Pomerance J. found that churchgoers face. In an apparent attempt to distinguish the two, she asserts: “*While staff are on site for prolonged periods, employers are bound by statute to employ measures to keep staff safe.*” But Ontario churches are similarly bound by regulatory public health orders to take steps to protect their parishioners, who typically spend far less time in church than retail workers spend at their places of employment.

Appeal Book, Tab 2 Reasons for Decision at para. 152

83. Pomerance J.’s finding that this was not a “comparison of comparables” was a palpable and overriding error.

Issue 3(c) – Inappropriate Proportionality Factors

“[159] ...Ontario was entitled to impose restrictions in the interests of public health, *and the public was entitled to have those restrictions imposed.* ...The measures protected the constitutional rights of those individuals to life and security of the person.” [Emphasis in original]

Appeal Book, Tab 2, Reasons for Decision at para. 159

84. At the proportionality stage, Pomerance J. weighs the Restrictions’ deleterious impact on *Charter* rights against a s. 7 *Charter* right she manufactures from whole cloth without basis in law or evidence. The general public does not have a right under s. 7 or anywhere else in the *Charter* to government imposition of restrictive public health measures. This is particularly true where - as here – those restrictions infringe on real rights that are explicitly guaranteed under the *Charter*. At minimum, if the Court’s proportionality analysis creates a novel *Charter* right and measures that against the Appellants interests at the proportionality stage of the *Oakes* test, the compound infringements of the Appellants’ well-established s. 2(b), (c), and (d) *Charter* rights should have been given a full accounting.

85. Her proportionality analysis relies on a number of other purported salutary benefits of the Restrictions for which there was no evidentiary basis. For example, she found without evidence that “There may be individuals who would not have attended services absent these protections.”

86. Pomerance J.’s conclusion that the Restrictions had salutary effect relies heavily on the inadmissible opinion evidence of fact witness Dr. McKeown regarding the effectiveness of the Restrictions. Reliance on inadmissible evidence is an error of law which must be remedied.

R. v. Cook, 2020 ONCA 731 (CanLII), <<https://canlii.ca/t/jbm3n>> at para 110

Issue 3(d) - Deference

87. Pomerance J. erred by reviewing the Restrictions under an excessively deferential standard. Her Honour’s excessively deferential approach was a product of three errors. First, Her Honour

confused medical debates between the precautionary principle and scientific certainty with the governing legal test, which is demonstrable justification on a balance of probabilities. Second, Her Honour effectively gave the Province the deference which ought only to be given to experts exercising administrative functions. Third, Pomerance J. erred by analogizing the Restrictions to less obtrusive, voluntary regulatory schemes such as driver licensing.

RJR-MacDonald Inc. v. Canada (Attorney General), 1995 CanLII 64 (SCC), [1995] 3 SCR 199 at para. 137 <https://canlii.ca/t/1frgz>

88. **First**, the governing legal standard must not be replaced by scientific degrees of proof. Section 1 requires that limits to *Charter*-protected rights be “reasonable” and “demonstrably justified.” This demonstrable justification must be established by “proof by a preponderance of probability” which “must be applied rigorously.” It requires “a very high degree of probability” which is “commensurate with the occasion.”

R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, at paras. 67-68 <https://canlii.ca/t/1ftv6>

89. Pomerance J. is correct in stating that the Province “is not required to justify its choices on a standard of scientific certainty.” However, no one has argued that the government must justify its measures to a standard of “scientific certainty” or “scientific unanimity.” The inapplicability of scientific concepts of certainty does not mean that the precautionary principle may be relied upon at the expense of the established legal standard. If imported into the legal analysis, the principle would upend the burden on the government to justify its actions under the *Oakes* test.

Appeal Book, Tab 2, Reasons for Decision at para. 143

90. The precautionary principle does not translate well into legal analysis in the COVID context. Public health experts are, by virtue of their expertise, concerned with threats to public health. *Charter* analysis, on the other hand, requires potential health risks to be balanced against values like religion and free expression. The precautionary principle has been invoked to support the proposition that the government ought to err on the side of protecting health at the expense of *Charter* rights. However, one could argue that, given their constitutionally guaranteed status, the

government ought to err on the side of protecting fundamental freedoms. Ultimately, the precautionary principle cannot be used to evade the government's burden to demonstrably justify its actions on a stringent balance of probabilities. Reliance on the principle effectively reversed the burden of proof, which is an error in law.

R. v. Cyr-Langlois, 2018 SCC 54 (CanLII), [2018] 3 SCR 456 at para. 19, <https://canlii.ca/t/hwg1j>

91. **Second**, and relatedly, Her Honour misapplied the deference normally given to experts performing specialized administrative functions. Despite acknowledging the inapplicability of the *Doré* framework, Pomerance J. agreed with the decision in *Gateway Bible Baptist Church* that the Court cannot “casually second guess the decisions of public health officials.” However, the Restrictions are not the decisions of public health officials. They are a decision of the government.

Appeal Book, Tab 2 Reasons for Decision at paras. 124, 127
Gateway Bible Baptist Church et al. v. Manitoba et al., 2021 MBQB 219 at para. 292,
<https://canlii.ca/t/jk2rp>.

92. The deference to which public health officials are properly entitled is premised on “*legislative intent, respect for...specialized expertise...and recognition that courts do not have a monopoly on adjudication in the administrative state.*” Those factors are inapplicable to the case at bar. In fact, as argued above, there is no evidence as to what expert medical opinion the government relied on in implementing the Restrictions. Public health officials, acting as experts within a given field, and government politicians, balancing complex and myriad interests, are entitled to different types and degrees of deference. The deference owed to public health officials was not engaged here.

Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), [2012] 1 SCR 395, <https://canlii.ca/t/fqn88>

93. **Third**, due to the severity of the Restrictions the Province was not entitled to the same level of deference owed when the Court is evaluating less obtrusive regulatory systems. Pomerance J. correctly noted that there are degrees of deference depending on the nature of the impugned legislation:

“For example, criminal enactments tend to attract less deference because, in that context, the state is the singular antagonist of the individual. Greater deference is owed where public officials are dealing with a complex social problem, balancing the interests of competing groups, or seeking to protect a vulnerable segment of the population.”

Appeal Book, Tab 2 Reasons for Decision at para. 125

94. However, Her Honour erred in mixed fact and law by analogizing the Restrictions to the kinds of regulatory schemes where greater deference is owed. The example relied on, drivers licence photograph requirements in *Hutterian Brethren*, is a case of a “complex regulatory scheme” entitled to greater deference.

Canada (Director of Investigation and Research) v. Southam Inc., 1997 CanLII 385 (SCC), [1997] 1 SCR 748 at para. 35., <https://canlii.ca/t/1fr34>

95. The Restrictions fall much closer to criminal laws than regulatory schemes on the spectrum of deference. The mere facts that the Restrictions were complex or protected vulnerable groups with competing interests does not make it akin to regulatory schemes like driver licensing. There is no lack of complexity in the *Criminal Code* which has provisions protecting the most vulnerable in society, such as children. A law is criminal or quasi-criminal when “*it is aimed at promoting public order and welfare within a public sphere of activity.*” By contrast, regulatory schemes “*are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity.*”

Guindon v. Canada, 2015 SCC 41 (CanLII), [2015] 3 SCR 3, <https://canlii.ca/t/gkfb4>

96. The Restrictions did not apply to a privileged field into which one voluntarily enters, such as driving, hunting, or practicing law. Rather, they applied “a public sphere of activity”, namely, attending church. The Restrictions were not concerned with compliance, but rather public welfare more broadly. While the Appellants are not facing a possibility of imprisonment, their liberty, in particular their fundamental freedoms, have been greatly curtailed. Accordingly, the Province is entitled to little deference.

Part V – Order Sought

97. In light of the errors outlined above, the Appellants ask that the decision of Pomerance J. dated February 28, 2022 be set aside and that this Court grant judgment as follows:

- a) Declaring (pursuant to section 24(1) of Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the "Charter")) that section 1(1)(d) of both Schedule 4 (Shutdown Zone) and Schedule 9 (Grey Zone) of Ontario Regulation 82/20 (Rules for Areas Under Stage One); section 4 of Schedule 3 of Ontario Regulation 263/20 (Rules for Areas Under Stage Two); and, section 3 of Schedule 3 of Ontario Regulation 364/20 (Rules for Areas Under Stage Three), and any amendments thereto, of the Reopening Ontario (A Flexible Response to Covid-19) Act, 2020, S.O. 2020, c. 17 (the "ROA") infringe upon upon sections 2(a), 2(b), 2(c), and 2(d) of the Charter, and that those infringements are not justified under section 1 of the Charter.
- b) Declaring the Restrictions to be of no force or effect pursuant to section 52(1) of the Constitution Act, 1982.
- c) Setting aside the Order of The Honourable Mr. Justice Thomas, dated February 12, 2021, directing compliance with any continued s. 7.0.2 order, as defined in the ROA, in respect of gatherings for the purpose of a religious service, rite, or ceremony;
- d) Setting aside the Order of The Honourable Mr. Justice Sweeny, dated January 22, 2021, directing compliance with Rules for Areas in Shutdown Zone and at Step 1, O. Reg. 82/20;

- e) Setting aside the Order of The Honourable Mr. Justice Sweeny, dated April 16, 2021, directing compliance with Rules for Areas in Shutdown Zone and at Step 1, O. Reg. 82/20 or any other continued s. 7.0.2 order, as defined in the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, S.O. 2020, c. 17, in respect of gatherings for the purpose of a religious service; and
- f) Granting such further and other relief as counsel may advise and this Court may permit.

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



Rob Kittredge (LSO #54027Q)
Counsel for the Appellants

May 11, 2022

COURT OF APPEAL FOR ONTARIO

(Appeal in an application)

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO - *Applicant (Respondent in appeal)*

-and-

TRINITY BIBLE CHAPEL, JACOB REAUME, WILL SCHURMAN, DEAN WANDERS, RANDY FREY, HARVEY FREY, and DANIEL GORDON - *Respondents (Appellants)*

AND BETWEEN:

HER MAJESTY THE QUEEN IN ONTARIO - *Applicant (Respondent in appeal)*

-and-

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

Appellants' Certificate

The Appellants do not require an order under subrule 61.09 (2).

The Appellants estimate that 8 hours will be required for oral argument, not including reply.



*Rob Kittredge (LSO #54027Q)
Counsel for the Appellants*

May 11, 2022

Schedule A – List of Authorities

Cases Cited

1	<i>Ontario v. Trinity Bible Chapel</i> , 2022 ONSC 1344 (CanLII), < https://canlii.ca/t/jmp9d >
2	<i>Owala v. Makary</i> , 2021 ONSC 7475 (CanLII), < https://canlii.ca/t/jkhv8 >
3	<i>White Burgess Langille Inman v. Abbott and Haliburton Co.</i> , 2015 SCC 23 (CanLII), [2015] 2 SCR 182, < https://canlii.ca/t/ghd4f >
4	<i>R. v. Trochym</i> , 2007 SCC 6 (CanLII), [2007] 1 SCR 239, < https://canlii.ca/t/1qbvh >
5	<i>Schwartz v. Canada</i> , 1996 CanLII 217 (SCC), [1996] 1 SCR 254, < https://canlii.ca/t/1frcq >
6	<i>Housen v. Nikolaisen</i> , 2002 SCC 33 (CanLII), [2002] 2 SCR 235, < https://canlii.ca/t/51tl >
7	<i>Fanjoy v. The Queen</i> , 1985 CanLII 53 (SCC), [1985] 2 SCR 233, https://canlii.ca/t/1ftw3
8	<i>R. v. Morgentaler</i> , [1988] 1 SCR 30
9	<i>Canada v. Bedford</i> , 2013 SCC 72
10	<i>Carter v. Canada</i> , 2015 SCC 5
11	<i>British Columbia Civil Liberties Association v. Canada (Attorney General)</i> , 2019 BCCA 228
12	<i>R. v. Albashir</i> , 2021 SCC 48
13	<i>Ross v. New Brunswick School District No. 15</i> , [1996] 1 SCR 825
14	<i>Saskatchewan v. Durocher</i> , 2020 SKQB 224
15	<i>Right to Life Association of Toronto v. Canada (Employment, Workforce, and Labour)</i> , 2021 FC 1125
16	<i>CUPW/STTP v. Canada (Attorney General)</i> , 2016 ONSC 418
17	<i>Law Society of British Columbia v. Trinity Western University</i> , 2018 SCC 32
18	<i>Saskatchewan v. Good Spirit School Division No. 204</i> , 2020 SKCA 34
19	<i>R. v. Poirier</i> , 2016 ONCA 582
20	<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , 1995 CanLII 64 (SCC), [1995] 3 SCR 199, < https://canlii.ca/t/1frgz >
21	<i>R. v. Oakes</i> , 1986 CanLII 46 (SCC), [1986] 1 SCR 103
22	<i>R. v. Cyr-Langlois</i> , 2018 SCC 54 (CanLII), [2018] 3 SCR 456
23	<i>Gateway Bible Baptist Church et al. v. Manitoba et al.</i> , 2021 MBQB 219
24	<i>Doré v. Barreau du Québec</i> , 2012 SCC 12 (CanLII), [2012] 1 SCR 395
25	<i>Canada (Director of Investigation and Research) v. Southam Inc.</i> , 1997 CanLII 385 (SCC), [1997] 1 SCR 748
26	<i>Guindon v. Canada</i> , 2015 SCC 41 (CanLII), [2015] 3 SCR 3
27	<i>R. v. Cook</i> , 2020 ONCA 731 (CanLII), < https://canlii.ca/t/jbm3n >
28	<i>Toronto Star Newspapers Ltd. v. Canada</i> , 2010 SCC 21 (CanLII), [2010] 1 SCR 721, < https://canlii.ca/t/2b1lp >
29	<i>R. v. K.R.J.</i> , 2016 SCC 31 (CanLII), [2016] 1 SCR 906, < https://canlii.ca/t/gsm3w >

Legislation and Regulations Cited

1	<i>Canadian Charter of Rights and Freedoms</i> , Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. < https://canlii.ca/t/ljsx >
2	<i>Declaration of Emergency</i> , O Reg 50/20, < https://canlii.ca/t/549l6 >
3	<i>Emergency Management and Civil Protection Act</i> , RSO 1990, c E.9, < https://canlii.ca/t/53nmt >
4	<i>Reopening Ontario (A Flexible Response to COVID-19) Act</i> , 2020, SO 2020, c 17, < https://canlii.ca/t/54clq >
5	O. Reg. 363/20
6	<i>Declaration of Emergency</i> , O Reg 7/21, < https://canlii.ca/t/54w8b >
7	<i>Stay-at-Home Order</i> , O Reg 11/21, < https://canlii.ca/t/54wst >
8	<i>Declaration of Emergency</i> , O Reg 264/21, < https://canlii.ca/t/55278 >
9	O. Reg. 364/20
10	O. Reg. 263/20
11	O. Reg. 82/20
12	O. Reg. 263/20

Schedule B – Excerpts of Statutes and Regulations

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

- (a)** freedom of conscience and religion;
- (b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c)** freedom of peaceful assembly; and
- (d)** freedom of association.

Enforcement

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, SO 2020, c 17

Provisions applying with respect to orders

7 (1) Subsections 7.2 (3) to (8) of the *Emergency Management and Civil Protection Act* continue to apply, with necessary modifications, with respect to orders continued under section 2, including any amendments to such orders made under this Act.

Same

(2) Subsections 7.0.2 (6) to (9) of the *Emergency Management and Civil Protection Act* continue to apply, with necessary modifications and the modifications specified in subsection (3), with respect to continued section 7.0.2 orders, including any amendments to such orders made under this Act.

Modifications

(3) The modifications referred to in subsection (2) are the following:

1. The reference, in paragraph 1 of subsection 7.0.2 (7) of the *Emergency Management and Civil Protection Act*, to the emergency is deemed to be a reference to the COVID-19 pandemic and its effects.
2. The reference, in paragraph 2 of subsection 7.0.2 (7) of the *Emergency Management and Civil Protection Act*, to when the declared emergency is terminated is deemed to be a reference to when the order in relation to which that paragraph applies is revoked or ceases to apply.

ONTARIO REGULATION 52/20

Emergency Management and Civil Protection Act

ONTARIO REGULATION 52/20

ORDER UNDER SUBSECTION 7.0.2 (4) OF THE ACT - ORGANIZED PUBLIC EVENTS, CERTAIN GATHERINGS

Note: This Order is revoked on May 19, 2020, unless it is extended. (See s. 7.0.8 of the Act and O. Reg. 106/20, Sched. 1)

Historical version for the period March 28, 2020 to May 15, 2020.

Last amendment: 99/20.

Legislative History: [+]

This is the English version of a bilingual regulation.



WHEREAS an emergency was declared on March 17th, 2020 pursuant to Order in Council 518/2020 (Ontario Regulation 50/20);

AND WHEREAS the criteria set out in subsection 7.0.2 (2) of the *Emergency Management and Civil Protection Act* have been satisfied;

NOW THEREFORE, this Order is made pursuant to paragraph 14 of subsection 7.0.2 (4) of the Act, the terms of which are set out in Schedule 1;

AND FURTHER, this Order applies generally throughout Ontario. O. Reg. 52/20; O. Reg. 99/20, s. 2.

SCHEDULE 1

ORGANIZED PUBLIC EVENTS, CERTAIN GATHERINGS

Prohibition

1. (1) Subject to subsection (3), no person shall attend,

- (a) an organized public event of more than five people, including a parade;
- (b) a social gathering of more than five people; or
- (c) a gathering of more than five people for the purposes of conducting religious services, rites or ceremonies.

(2) For greater certainty, subsection (1) applies to an event or gathering even if it is held at a private dwelling.

(3) Subsection (1) does not apply to the following:

- 1. A gathering of members of a single household.
- 2. A gathering for the purposes of a funeral service that is attended by not more than 10 persons. O. Reg. 99/20, s. 3.

ONTARIO REGULATION 364/20

Emergency Management and Civil Protection Act

ONTARIO REGULATION 364/20

RULES FOR AREAS IN STAGE 3

Historical version for the period July 13, 2020 to July 14, 2020.

Note: This Order is revoked on July 27, 2020, unless it is extended. (See s. 7.0.8 of the Act)

No amendments.

This is the English version of a bilingual regulation.

Terms of Order

1. The terms of this Order are set out in Schedules 1, 2 and 3.

Effective date

2. This Order applies as of 12:01 a.m. on July 17, 2020.

Application

3. This Order applies to the areas listed in Schedule 3 to Ontario Regulation 363/20 (Stages of Reopening).

Indoor vs. outdoor

4. (1) The outdoor capacity limits set out in this Order apply to a business, place, event or gathering if the people attending it are only permitted to access an indoor area,

(a) to use a washroom;

(b) to access an outdoor area that can only be accessed through an indoor route; or

(c) as may be necessary for the purposes of health and safety.

(2) The indoor capacity limits set out in this Order apply to a business, place, event or gathering if the business, place, event or gathering is fully or partially indoors.

(3) An indoor event or gathering cannot be combined with an outdoor event or gathering so as to increase the applicable limit on the number of people at the event or gathering.

SCHEDULE 1 BUSINESSES AND PLACES

Closures

1. (1) Each person responsible for a business or place, or part of a business or place, that is required to be closed by Schedule 2 shall ensure that the business or place, or part of the business or place, is closed in accordance with that Schedule.

(2) Each person responsible for a business or place, or part of a business or place, that Schedule 2 describes as being permitted to open if certain conditions set out in that Schedule are met shall ensure that the business or place, or part of the business or place, either meets those conditions or is closed.

[CONTINUED ON NEXT PAGE]

- (i) 50 people if the event is held indoors, or
 - (ii) 100 people if the event is held outdoors;
- (b) a social gathering of more than,
- (i) 50 people if the gathering is held indoors, or
 - (ii) 100 people if the gathering is held outdoors; or
- (c) a social gathering associated with a wedding, a funeral or a religious service, rite or ceremony of more than,
- (i) 50 people if the gathering is held indoors, or
 - (ii) 100 people if the gathering is held outdoors.
- (2) For the purposes of subsection (1), an indoor event or gathering cannot be combined with an outdoor event or gathering so as to increase the applicable limit on the number of people at the event or gathering.
- (3) A person attending an organized public event or social gathering shall comply with public health guidance on physical distancing.
- (4) For greater certainty, subsections (1) to (3) apply with respect to an organized public event or social gathering even if it is held at a private dwelling.

Exceptions from organized public event requirements

2. The prohibition on attendance at an organized public event in clause 1 (1) (a) does not apply with respect to attendance at,

- (a) an event to which a capacity limit set out in Schedule 1 or 2 applies, if the event is held in accordance with that capacity limit;
- (b) a day camp for children that is in compliance with section 9 of Schedule 2; or
- (c) a drive-in cinema, or a business or place that provides drive-in or drive-through concerts, artistic events, theatrical performances and other performances, that is in compliance with section 12 of Schedule 2.

Indoor wedding, funeral or religious service, rite or ceremony

3. (1) This section applies with respect to gatherings for the purposes of a wedding, a funeral or a religious service, rite or ceremony, if the gathering is held in a building or structure other than a private dwelling.

(2) No person shall attend a gathering to which this section applies unless the following conditions are met:

- 1. The number of persons occupying any room in the building or structure while attending the gathering must not exceed 30 per cent of the capacity of the particular room.
- 2. All persons attending the gathering must comply with public health guidance on physical distancing.

Outdoor wedding, funeral or religious service, rite or ceremony

4. (1) This section applies with respect to outdoor gatherings for the purposes of a wedding, a funeral or a religious service, rite or ceremony.

(2) No person shall attend a gathering to which this section applies unless the following conditions are met:

- 1. No more than 100 people may be in attendance.
- 2. All persons attending the gathering must comply with public health guidance on physical distancing.

Gathering in motor vehicles for religious service, rite or ceremony

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

ONTARIO REGULATION 82/20

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 December 26, 2020 to January 6, 2021.

Last amendment: 789/20.

Legislative History: [+]

This is the English version of a bilingual regulation.

Terms of Order

1. The terms of this Order are set out in Schedules 1, 2, 3, 4 and 5. O. Reg. 779/20, s. 1.

2. REVOKED: O. Reg. 654/20, s. 2.

Application

3. (1) This Order applies to the areas listed in Schedule 1 to Ontario Regulation 363/20 (Stages of Reopening) made under the Act. O. Reg. 413/20, s. 3.

(2) This Order applies throughout the Grey Zone. O. Reg. 779/20, s. 2.

Grey Zone

3.1 In this Order, a reference to the Grey Zone is a reference to all areas listed as being in the Grey Zone of Stage 1 in section 1 of Schedule 1 to Ontario Regulation 363/20 (Stages of Reopening) made under the Act. O. Reg. 779/20, s. 3.

Indoor vs. outdoor

4. (1) The outdoor capacity limits set out in this Order apply to a business, place, event or gathering if the people attending it are only permitted to access an indoor area,

(a) to use a washroom;

(b) to access an outdoor area that can only be accessed through an indoor route; or

(c) as may be necessary for the purposes of health and safety. O. Reg. 654/20, s. 3.

(2) The indoor capacity limits set out in this Order apply to a business, place, event or gathering if the business, place, event or gathering is fully or partially indoors. O. Reg. 654/20, s. 3.

(3) An indoor event or gathering cannot be combined with an outdoor event or gathering so as to increase the applicable limit on the number of people at the event or gathering. O. Reg. 654/20, s. 3.

SCHEDULE 1
GENERAL RULES

[CONTINUED ON NEXT PAGE]

6. Basketball courts.
7. BMX parks.
8. Skate parks.
9. Golf courses and driving ranges.
10. Frisbee golf locations.
11. Cycling tracks and bike trails.
12. Horse riding facilities.
13. Shooting ranges, including those operated by rod and gun clubs.
14. Ice rinks.
15. Tobogganing hills.
16. Snowmobile, cross country ski, dogsledding, ice skating and snow shoe trails.
17. Playgrounds.
18. Portions of parks or recreational areas containing outdoor fitness equipment.

(3) An outdoor recreational amenity described in subsection (2) may only open if,

- (a) any person who enters or uses the amenity maintains a physical distance of at least two metres from any other person who is using the amenity;
- (b) team sports are not practised or played within the amenity;
- (c) other sports or games that are likely to result in individuals coming within two metres of each other are not practised or played within the amenity; and
- (d) any locker rooms, change rooms, showers and clubhouses remain closed, except to the extent they provide access to equipment storage, a washroom or a portion of the amenity that is used to provide first aid.

Museums, etc.

5. Museums, galleries, aquariums, zoos, science centres, landmarks, historic sites, botanical gardens and similar attractions must be closed to members of the public.

O. Reg. 654/20, s. 4; O. Reg. 707/20, s. 1; O. Reg. 779/20, s. 6 (1), (5)-(8); O. Reg. 789/20, s. 1 (1).

SCHEDULE 4
ORGANIZED PUBLIC EVENTS, CERTAIN GATHERINGS

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 10 people that is held outdoors, including a social gathering associated with a gathering described in clause (d); or
- (d) a gathering of more than 10 people for the purposes of a wedding, a funeral or a religious service, rite or ceremony.

(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.

ONTARIO REGULATION 82/20

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 3, 2021 to April 6, 2021.

Last amendment: 239/21.

Legislative History: [+]

This is the English version of a bilingual regulation.

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Terms of Order

1. The terms of this Order are set out in Schedules 1 to 9. O. Reg. 96/21, s. 1.

2. REVOKED: O. Reg. 654/20, s. 2.

Work from home except where necessary

2.1 (1) Each person responsible for a business or organization that is open shall ensure that any person who performs work for the business or organization conducts their work remotely, unless the nature of their work requires them to be on-site at the workplace.

(2) Subsection (1) does not apply to a business or organization described in subsection 1 (9).

Capacity limits for businesses or facilities open to the public

3. (1) Subject to any additional restrictions set out in this Order, the person responsible for a place of business or facility that is open to the public shall limit the number of persons in the place of business or facility so that,

- (a) the members of the public are able to maintain a physical distance of at least two metres from every other person in the business or facility; and
- (b) the total number of members of the public in the business or facility at any one time does not exceed 50 per cent capacity, as determined in accordance with subsection (2).

(2) For the purposes of this Order, the maximum number of members of the public permitted in a business or facility that is operating at 50 per cent capacity is determined by taking the total square metres of floor area accessible to the public in the business or facility, not including shelving and store fixtures, dividing that number by 8 and rounding the result down to the nearest whole number.

(3) For the purposes of this Order, the maximum number of members of the public permitted in a business or facility that is operating at 25 per cent capacity is determined by taking the total square metres of floor area accessible to the public in the business or facility, not including shelving and store fixtures, dividing that number by 16 and rounding the result down to the nearest whole number.

(4) For greater certainty, subsection (1) does not require persons who are in compliance with public health guidance on households to maintain a physical distance of at least two metres from each other while in a place of business or facility.

(5) The person responsible for a place of business or facility that engages in retail sales to the public must post a sign in a conspicuous location visible to the public that states the maximum capacity they are permitted to operate under.

(6) Subsection (1) does not apply to schools and private schools within the meaning of the *Education Act* that are,

- (a) operating in accordance with a return to school direction issued by the Ministry of Education and approved by the Office of the Chief Medical Officer of Health; or
- (b) operated by,
 - (i) a band, a council of a band or the Crown in right of Canada,
 - (ii) an education authority that is authorized by a band, a council of a band or the Crown in right of Canada, or
 - (iii) an entity that participates in the Anishinabek Education System.

Requirements that apply to individuals

3.1 (1) Every person on the premises of a business or organization that is open shall wear a mask or face covering in a manner that covers their mouth, nose and chin during any period in which they are in an indoor area of the premises.

(2) Every person shall wear a mask or face covering in a manner that covers their mouth, nose and chin during any period in which they are,

- (a) in attendance at an organized public event or gathering permitted by this Order; and
- (b) within two metres of another individual who is not part of their household.

(3) Subsections (1) and (2) do not require a person to wear a mask or face covering if they are subject to an exception set out in subsection 2 (4).

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).

Exception, members of single household

2. Section 1 does not apply with respect to a gathering of members of a single household, or a gathering that includes members of a household and one other person from outside that household who lives alone.

Exception, attendance at business

3. The prohibitions on attendance at an organized public event in subsection 1 (1) do not apply with respect to attendance at a business for a purpose related to providing or receiving the goods or services provided by the business if the business is not required to close under this Order.

4. REVOKED: O. Reg. 221/21, s. 4 (3).

O. Reg. 654/20, s. 4; O. Reg. 10/21, s. 4; O. Reg. 221/21, s. 4.

SCHEDULE 5
INDIVIDUALS ELIGIBLE FOR EMERGENCY CHILD CARE

1. An individual who is,

- i. a regulated health professional, or
- ii. an unregulated health care provider working in health care delivery, either directly or indirectly.

1.1 An individual who works for a manufacturer or distributor of pharmaceutical products or medical supplies, including medications, medical isotopes, vaccines, antivirals, medical devices, sanitizers and disinfectants.

1.2 An individual who works in a pharmacy as defined in the *Drug and Pharmacies Regulation Act*.

1.3 An individual who works in an establishment where goods or services are sold or offered for sale to the public, if a pharmacy as defined in the *Drug and Pharmacies Regulation Act* is located within the establishment.

2. A police officer as defined in the *Police Services Act*.

Schedule C – DETAILED SUMMARY OF RELEVANT REGULATIONS

Below are six tables detailing the regulatory regime governing gathering limits over time. Table A provides an overview of the function of the various regulations and how they relate to the different systems implemented by the Province. Tables B-E set out the restrictions set out in each version of each regulation and whether those regulations were in force in either the Waterloo or Southwestern Public Health Units.

Summary of Capacity Restrictions

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

Date (D/M/Y)	Outdoor	Indoor	Regulation	Essential Retail
18/3/20-27/3/20	50 ppl	50 ppl	52/20 (18/3/20)	Allowed to operate (82/20)
28/3/20-15/5/20	5 ppl	5 ppl	52/20 (28/3/20)	Allowed to open, must follow guidance on distancing, cleaning (82/20)
16/5/20-28/5/20	5 ppl	5 ppl	52/20 (16/5/20)	Allowed to open, must follow guidance on distancing, cleaning (82/20)
29/5/2020-11/6/20	5 ppl	5 ppl	52/20 (29/5/20)	Allowed to open, must follow guidance on distancing, cleaning (82/20)
12/6/20-16/7/20	50 ppl	30% cap.	52/20 (12/6/20)	Allowed to open, must follow guidance on distancing,

				cleaning (82/20)
SW: 13/7/20-6/11/20 WA: 17/7/20-6/11/20	100 ppl	30% cap.	364/20 (13/7/20) per 363/20	Capacity limited to # capable of keeping 2m distance
7/11/20-22/11/20	100 ppl	30% cap.	364/20 (7/11/20) per 363/20	Capacity limited to # capable of keeping 2m distance
23/11/20-26/12/20	100 ppl (SW) 100 ppl (WA)	30% cap (SW) 30% cap (WA)	364/20 (23/11/20) per 363/20	Capacity limited to # capable of keeping 2m distance
26/12/20 - 9/2/21	10 ppl	10 ppl	82/20 (26/12/20) per 363/20	50% capacity and 2m distance
10/2/21-15/2/21	10 ppl	10 ppl	82/20 (10/2/21) per 363/20	50% capacity and 2m distance
16/2/21 - 28/2/21	100 ppl	30% cap.	263/20 (16/2/21) per 363/20	75% capacity and 2m distance
1/3/21 - 29/3/21	100 ppl (SW) 100 ppl (WA)	30% cap (SW) 30% cap (WA)	364/20 (26/2/21)(SW) 263/20 (26/2/21)(WA) per 363/20	Capacity limited to # capable of keeping 2m distance (SW) 75% capacity and 2m distance (WA)
29/3/21 - 2/4/21	No fixed limit - 2m distance	30% cap.	364/20 (29/3/21)(SW) 263/20 (29/3/21)(WA) per 363/20	Capacity limited to # capable of keeping 2m distance (SW) 75% capacity and 2m distance (WA)
3/4/21 - 18/4/21	Maintain 2m distance	15% cap.	82/20 (3/4/21) per 363/20	50% capacity and 2m distance
19/4/21 - 10/6/21	10 ppl	10 ppl	82/20 (19/4/21) per 363/20	25% capacity and 2m distance
11/6/21 - 29/6/21	Maintain 2m distance	15% cap.	82/20 (8/6/21) per 363/20	25% capacity and 2m distance
30/6/21 – 15/7/21	Maintain 2m distance	25% cap.	263/20 (29/6/20) per 363/20	50% capacity and 2m distance

Overview of Regulatory Framework

Regulation	Initial Lockdown	3 Stages	Colour-Coded Zones	3 Steps
52/20	Governed gathering restrictions across the province	Not used	Not used	Not used
82/20	Governed business closures. No gathering restrictions.	Stage 1 (most onerous gathering restrictions)	Grey zone and shutdown (most onerous gathering restrictions)	Step 1 (most onerous gathering restrictions)

263/20	Not used	Stage 2	Red zone	Step 2
364/20	Not used	Stage 3 (least onerous gathering restrictions)	Orange, yellow, and green zones (least onerous gathering restrictions)	Step 3 (least onerous gathering restrictions)
363/20	Not used	Assigned public health units to 1 of 3 stages	Assigned public health units to zones	Assigns province to 1 of 3 steps

O. Reg. 52/20

<i>Effective Date</i>	Merged Restriction Limit	In force in Southwestern PHU?	In force in Waterloo PHU?
<i>March 18, 2020</i>	50 people	Yes	Yes
<i>March 28, 2020</i>	10 people	Yes	Yes
<i>May 16, 2020</i>	5 people	Yes	Yes
<i>May 29, 2020</i>	5 people	Yes	Yes
<i>June 12, 2020</i>	10 people	Yes	Yes
<i>Revoked July 17, 2020</i>			

O. Reg. 82/20

= Periods during which the moving parties were subject to merged restrictions for indoor and outdoor gatherings.

<i>Effective Date</i>	Indoor Restriction Limit	Outdoor Restriction Limit	In force in Southwestern PHU?	In force in Waterloo PHU?
<u>July 15, 2020</u>	30% room cap.	50 people	No	No
<u>November 23, 2020</u>	10 people	10 people	No	No
<u>November 27, 2020</u>	10 people	10 people	No	No
<u>December 4, 2020</u>	10 people	10 people	No	No
<u>December 11, 2020</u>	10 people	10 people	No	No
<u>December 26, 2020</u>	10 people	10 people	Yes	Yes
<u>January 7, 2021</u>	10 people	10 people	Yes	Yes
<u>January 9, 2021</u>	10 people	10 people	Yes	Yes
<u>January 11, 2021</u>	10 people	10 people	Yes	Yes
<u>January 14, 2021</u>	10 people	10 people	Yes	Yes
<u>January 15, 2021</u>	10 people	10 people	Yes	Yes
<u>January 22, 2021</u>	10 people	10 people	Yes	Yes
<u>January 25, 2021</u>	10 people	10 people	Yes	Yes
<u>January 27, 2021</u>	10 people	10 people	Yes	Yes
<u>January 30, 2021</u>	10 people	10 people	Yes	Yes
<u>February 1, 2021</u>	10 people	10 people	Yes	Yes
<u>February 4, 2021</u>	10 people	10 people	Yes	Yes
<u>February 5, 2021</u>	10 people	10 people	Yes	Yes
<u>February 9, 2021</u>	10 people	10 people	Yes	Yes
<u>February 10, 2021</u>	10 people	10 people	Yes	Yes
<u>February 12, 2021</u>	10 people	10 people	Yes	Yes
<u>February 16, 2021</u>	10 people	10 people	No	No
<u>February 19, 2021</u>	10 people	10 people	No	No
<u>February 26, 2021</u>	10 people	10 people	No	No
<u>March 5, 2021</u>	10 people	10 people	No	No
<u>March 15, 2021</u>	10 people (Shutdown)/15% room cap. (Grey zone)	10 people (Shutdown)/50 people (Grey zone)	No	No
<u>March 20, 2021</u>	10 people (Shutdown)/15% room cap. (Grey zone)	10 people (Shutdown)/50 people (Grey zone)	No	No
<u>March 29, 2021</u>	15% room cap.	Follow public health guidance on distancing	No	No
<u>April 3, 2021</u>	15% room cap.	Follow public health guidance on distancing	Yes	Yes
<u>April 8, 2021</u>	15% room cap.	Follow public health guidance on distancing	Yes	Yes
<u>April 12, 2021</u>	15% room cap.	Follow public health guidance on distancing	Yes	Yes
<u>April 15, 2021</u>	15% room cap.	Follow public health	Yes	Yes

		guidance on distancing		
<u>April 17, 2021</u>	15% room cap.	Follow public health guidance on distancing	Yes	Yes
<u>April 19, 2021</u>	10 people (Shutdown)/15% room cap. (Grey zone)	10 people (Shutdown)/ Follow public health guidance on distancing (Grey zone)	Yes (Shutdown)	Yes (Shutdown)
<u>April 23, 2021</u>	10 people (Shutdown)/15% room cap. (Grey zone)	10 people (Shutdown)/ Follow public health guidance on distancing (Grey zone)	Yes (Shutdown)	Yes (Shutdown)
<u>May 20, 2021</u>	10 people (Shutdown)/15% room cap. (Grey zone)	10 people (Shutdown)/ Follow public health guidance on distancing (Grey zone)	Yes (Shutdown)	Yes (Shutdown)
<u>May 22, 2021</u>	10 people (Shutdown)/15% room cap. (Grey zone)	10 people (Shutdown)/ Follow public health guidance on distancing (Grey zone)	Yes (Shutdown)	Yes (Shutdown)
<u>June 7, 2021</u>	10 people (Shutdown)/15% room cap. (Grey zone)	10 people (Shutdown)/Maintain 2m distance (Grey zone)	Yes (Shutdown)	Yes (Shutdown)
<u>June 8, 2021</u>	10 people (Shutdown)/15% room cap. (Step 1)	10 people (Shutdown)/Maintain 2m distance (Step 1)	Yes (Shutdown until June 10; Step 1 June 11 and following)	Yes (Shutdown until June 10; Step 1 June 11 and following)
<u>June 18, 2021</u>	10 people (Shutdown)/15% room cap. (Step 1)	10 people (Shutdown)/Maintain 2m distance (Step 1)	Yes (Step 1)	Yes (Step 1)
<u>June 23, 2021</u>	10 people (Shutdown)/15% room cap. (Step 1)	10 people (Shutdown)/Maintain 2m distance (Step 1)	Yes (Step 1) until June 29. Moved to Step 2 on June 30.	Yes (Step 1) until June 29. Moved to Step 2 on June 30.
<u>December 10, 2021</u>	10 people (Shutdown)/15% room cap. (Step 1)	10 people (Shutdown)/Maintain 2m distance (Step 1)	No	No

O. Reg. 263/20

<i>Effective Date</i>	Indoor Restriction Limit	Outdoor Restriction Limit	In force in Southwestern PHU?	In force in Waterloo PHU?
<u>July 15, 2020</u>	30% room cap.	50 people	No	No
<u>July 31, 2020</u>	30% room cap.	50 people	No	No
<u>August 7, 2021</u>	30% room cap.	50 people	No	No
<u>August 15, 2021</u>	30% room cap.	50 people	No	No

<u>August 21, 2021</u>	30% room cap.	50 people	No	No
<u>October 10, 2020</u>	30% room cap.	100 people	No	No
<u>October 13, 2020</u>	30% room cap.	100 people	No	No
<u>October 17, 2020</u>	30% room cap.	100 people	No	No
<u>October 19, 2020</u>	30% room cap.	100 people	No	No
<u>November 7, 2020</u>	30% room cap.	100 people	No	No
<u>November 14, 2020</u>	30% room cap.	100 people	No	No
<u>November 23, 2020</u>	30% room cap.	100 people	No	Yes
<u>November 27, 2020</u>	30% room cap.	100 people	No	Yes until December 25
<u>January 9, 2021</u>	30% room cap.	100 people	No	No
<u>February 10, 2021</u>	30% room cap.	100 people	No	No
<u>February 12, 2021</u>	30% room cap.	100 people	No	No
<u>February 16, 2021</u>	30% room cap.	100 people	Yes	Yes
<u>February 19, 2021</u>	30% room cap.	100 people	Yes	Yes
<u>February 26, 2021</u>	30% room cap.	100 people	Yes until February 28	Yes
<u>March 5, 2021</u>	30% room cap.	100 people	No	Yes
<u>March 20, 2021</u>	30% room cap.	100 people	No	Yes
<u>March 29, 2021</u>	30% room cap.	Follow public health guidance on distancing	No	Yes until April 3
<u>April 23, 2021</u>	30% room cap.	Follow public health guidance on distancing	No	No
<u>May 20, 2021</u>	30% room cap.	Follow public health guidance on distancing	No	No
<u>June 23, 2021</u>	25% room cap.	Follow public health guidance on distancing	No	No
<u>June 29, 2021</u>	25% room cap.	Follow public health guidance on distancing	No until June 30	No until June 30
<u>July 7, 2021</u>	25% room cap.	Follow public health guidance on distancing	Yes until July 16	Yes until July 16
<u>December 10, 2021</u>	25% room cap.	Follow public health guidance on distancing	No	No
<u>January 1, 2022</u>	25% room cap.	Follow public health guidance on distancing	No	No
<u>January 3, 2021</u>	50% room cap.	Follow public health guidance on distancing	No until January 5	No until January 5

O. Reg. 364/20

<i>Effective Date</i>	Indoor Restriction Limit	Outdoor Restriction Limit	In force in Southwestern PHU?	In force in Waterloo PHU?
<u>July 13, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>July 15, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>July 31, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>August 7, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>August 15, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>August 21,</u>	30% room cap.	100 people	Yes	Yes

<u>2020</u>				
<u>September 18, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>September 19, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>September 24, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>September 26, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>September 28, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>October 3, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>October 10, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>October 17, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>October 19, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>November 7, 2020</u>	30% room cap.	100 people	Yes	Yes
<u>November 23, 2020</u>	30% room cap.	100 people	Yes	No
<u>November 27, 2020</u>	30% room cap.	100 people	Yes until December 25	No
<u>January 9, 2021</u>	30% room cap.	100 people	No	No
<u>February 10, 2021</u>	30% room cap.	100 people	No	No
<u>February 12, 2021</u>	30% room cap.	100 people	No	No
<u>February 16, 2021</u>	30% room cap.	100 people	No	No
<u>February 26, 2021</u>	30% room cap.	100 people	No until February 28	No
<u>March 5, 2021</u>	30% room cap.	100 people	Yes	No
<u>March 20, 2021</u>	30% room cap.	100 people	Yes	No
<u>March 29, 2021</u>	30% room cap.	Follow public health guidance on distancing	Yes until April 2	No
<u>April 23, 2021</u>	30% room cap.	Follow public health guidance on distancing	No	No
<u>May 20, 2021</u>	30% room cap.	Follow public health guidance on distancing	No	No
<u>July 9, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	No	No
<u>July 14, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	No until July 15	No until July 15
<u>July 30, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	Yes	Yes

<u>August 1, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	Yes	Yes
<u>August 24, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	Yes	Yes
<u>September 1, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	Yes	Yes
<u>September 7, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	Yes	Yes
<u>September 14, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	Yes	Yes
<u>September 22, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	Yes	Yes
<u>September 25, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	Yes	Yes
<u>October 9, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	Yes	Yes
<u>October 15, 2021</u>	Maintain 2m distance	Follow public health guidance on distancing	Yes	Yes
<u>October 25, 2021</u>	Maintain 2m distance	None	Yes	Yes
<u>October 27, 2021</u>	Maintain 2m distance	None	Yes	Yes
<u>November 18, 2021</u>	Maintain 2m distance	None	Yes	Yes
<u>November 25, 2021</u>	Maintain 2m distance	None	Yes	Yes
<u>November 30, 2021</u>	Maintain 2m distance	None	Yes	Yes
<u>December 10, 2021</u>	Maintain 2m distance	None	Yes	Yes
<u>December 18, 2021</u>	Maintain 2m distance	None	Yes	Yes
<u>December 19, 2021</u>	Maintain 2m distance	None	Yes	Yes
<u>December 20, 2021</u>	Maintain 2m distance	None	Yes	Yes
<u>December 31, 2021</u>	Maintain 2m distance	None	Yes	Yes
<u>January 1, 2022</u>	Maintain 2m distance	None	Yes	Yes
<u>January 5, 2022</u>	Maintain 2m distance	None	No	No