

Courts of Justice Act

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

RANDY HILLIER

Applicant

-and-

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

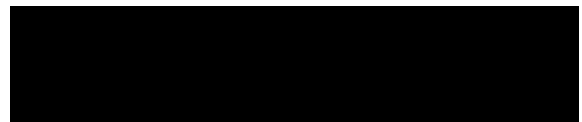
Respondent

REPLY FACTUM OF THE APPLICANT

Date: 17th day of July, 2023

CHARTER ADVOCATES CANADA

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Reply to Crown Factum:

1. The Applicant provides the following reply to the Respondent's Factum.

Risk of Outdoor Transmission:

2. Throughout their factum and as part of their evidence the Respondent repeatedly refers to "large gatherings" presenting increased risk of transmission.¹ At no time does the Respondent refer to nor provide any evidence with respect to risk of transmission within small outdoor gatherings. There is no evidence before this Court to suggest any measurable difference between putting a limit on outdoor peaceful protests versus completely banning them.

3. The Respondent refers to the North Dakota study for the proposition that 51 people developed Covid-19 after attending an outdoor motorcycle rally in North Dakota in 2020.² The Dakota study refers to a 10-day motorcycle rally with indoor and outdoor components and 460,000 attendees. While this example is in no way comparable to a small peaceful rally that is a few hours long without an indoor component, it is noteworthy that in circumstances of a 10-day long event with both indoor and outdoor component the transmission rate is 0.01%.³

4. In *CCLA v Nova Scotia (Attorney General)*⁴, Bryson J.A. criticized the Chief Medical Officer of Health (CMOH) of Nova Scotia for his lack of supporting evidence in bringing a *quia timet* injunction. Bryson J.A. was especially critical of the use of the word "even." The CMOH stated that "[r]ecent evidence also shows that even outdoors, if people are not distanced from each other or masked, transmission can happen from an infectious person to someone else."⁵ The Respondent's expert Dr. Hodge has presented his evidence in nearly identical terms, where he

¹ Affidavit of Dr. McKeown at para 13, see also Factum of the Respondent at para 11 ("McKeown Affidavit).

² Factum of the Respondent at para 15.

³ Affidavit of Dr. Hodge at para 30 (Hodge Affidavit); see also Exhibit "U."

⁴ [The Canadian Civil Liberties Association v. Nova Scotia \(Attorney General\)](#), 2022 NSCA 64 at paras 93-94.

⁵ *Ibid* at para 92.

states that "...even a small number of cases from outdoor gatherings could result in large numbers of secondary infections..."⁶

5. In the case at bar, the Respondent's experts could not explain the degree of risk for outdoor gatherings, except that it was lower than indoors. The Court cannot properly analyze the minimal impairment of a measure without understanding the risks involved. If the proposition is that merely a degree of risk exists, any measure that violates the *Charter* can be justified.

Lockdowns and Ban on Peaceful Assembly:

6. In response to paragraph 29 of the Respondent's factum, on April 3rd, 2021, all Ontario public health units were moved to shutdown zone which allowed for outdoor gatherings including peaceful assembly of five (5) people, however as of April 7th, 2021, a province wide Stay at Home Order was issued which effectively *banned* outdoor peaceful assembly until June 2nd, 2021. The Stay at Home Order completely prevented peaceful outdoor assembly of Ontarians in a free and democratic country for almost two months.

7. The Respondent refers to Dr. Hodge's comparison of death rates from Covid-19 in jurisdictions that adopted less stringent public health measures between March 2020 and June 2021 and estimates that Ontario avoided between 11,000 to 25,000 deaths by implementing lockdown and complete ban on outdoor peaceful protests.⁷ However, Dr. Hodge's estimates do not take into consideration factors such as age, co-morbidity, vaccination rates, as well as availability of the health care system which would all impact Covid-19 related death rates. It is not accurate to suggest that lockdowns and ban on peaceful assembly was the only relevant factor when comparing rate of death in different jurisdictions.

⁶ Factum of the Respondent at para 51.

⁷ *Ibid* at para 32; see also Hodge Affidavit at para 51.

The Applicant:

8. The Respondent suggests that Mr. Hillier encouraged his supporters not to wear masks or get vaccinated against Covid-19.⁸ In fact, Mr. Hillier's evidence was "No, I said for all people to think and look at their own circumstances and make a determination."⁹

9. The Respondent takes no position as to "whether the protests that Mr. Hillier organized and attended were peaceful assemblies protected by s.2(c)."¹⁰ It should be noted that there is no evidence before this Honourable Court to suggest Mr. Hillier was the organizer of the protests in question. In his affidavit, Mr. Hillier unequivocally denies organizing the protests that are subject of this hearing.¹¹ Furthermore, on the issue of the peacefulness of the protests, the evidence before this Court is that the protests were entirely peaceful.¹² Mr. Hillier's evidence with respect to the peacefulness of the protests was not challenged by the Crown during cross examination.

The Precautionary Principle:

10. The Respondent asserts that the Court should consider the precautionary principle, which holds that a lack of scientific consensus is not a reason to forego measures to combat a serious and urgent threat to public health.¹³

11. It bears reminding that the precautionary principle stems from international law and has been considered by the Supreme Court of Canada in the context of environmental law.¹⁴ The precautionary principle states that where there are serious threats to the environment, lack of full

⁸ Factum of the Respondent at para 34.

⁹ Cross Examination of Randy Hillier at p 26, q 79.

¹⁰ Factum of the Respondent at para 39.

¹¹ Affidavit of Randy Hillier (Hillier Affidavit) at paras 49-50.

¹² Cross Examination of Randy Hillier at q 46, 105, 117, and 125; see also Hillier Affidavit at para 35.

¹³ Factum of the Respondent at para 44.

scientific certainty should not be used as a reason for postponing measures to prevent environmental harm.¹⁵

12. There is often debate in its interpretation, largely because the precautions themselves may carry significant risks of harm, particularly when they have not previously been employed and involve critical and/or complex systems, such as Stay at Home Orders. A Covid-19-related analysis by Professor Colleen Flood and colleagues' notes:

While in the environmental sector the trade-off is often adoption of a technology or an economic benefit versus environmental protection, the dynamic is different in public health. In particular, the application of the precautionary principle in public health often fails to recognize that precautions themselves may bear significant risks. For example: lockdown measures imposed as a precaution against COVID-19 may deter people seeking receiving essential health care, or trigger mental health issues, or even cause dangerous disruptions in the food supply. It has certainly caused huge economic shocks and the loss of jobs and income which will in the longer run have an impact on health. In other words, there are risks on both sides of the ledger. Wise public policy will interrogate all the risks and their probabilities.¹⁶

13. Dr. Warren states that “The precautionary principle cannot be an ungrounded abstraction. Application of the precautionary principle has to be grounded in pre-existing knowledge, as limited as that knowledge might be, otherwise, the precautionary principle can be weaponized to justify anything.”¹⁷

The Respondent has not Demonstrated Minimal Impairment:

14. The Respondent asserts that even during period of highest risk, there was never a complete ban on outdoor gatherings, as limited exceptions were made for activities that were important for physical or mental health.¹⁸ While the Respondent made limited exceptions for weddings,

¹⁵ [114957 Canada Ltee \(Spraytech, Societe d'arrosage\) v. Hudson \(Town\)](#), 2001 SCC 40 at para 31

¹⁶ Colleen M. Flood., et al, [Reconciling Civil Liberties and Public Health in the Response to COVID-19](#), (Royal Society of Canada, 2020) at 10-11.

¹⁷ Affidavit of Dr. Warren (Warren Affidavit) at para 7.

¹⁸ Factum of the Respondent at para 61.

funerals, and religious services, the Stay at Home Order effectively banned the constitutionally protected right to peaceful outdoor assembly for two months. Ontario has failed to demonstrate how a total ban on peaceful assembly in a democratic country made a measurable impact on rate of transmission or hospitalization.

15. The Respondent cannot point to another jurisdiction which had a complete ban on outdoor gatherings because every other province was able to navigate the pandemic without them. The exception being British Columbia who conceded that the complete ban on peaceful protests was an unjustifiable infringement of the *Charter*.¹⁹

16. The three cases of *Trinity Bible*, *Grandel*, and *Gateway* referenced by the Applicant and the Respondent²⁰ clearly distinguish between limiting outdoor peaceful assembly and a complete ban on peaceful assembly.²¹ In *Grandel*, Justice Konkin stated that “Saskatchewan did not opt for the most draconian measure to combat the pandemic, such as complete lockdowns for extended periods.²²”

17. In *Trinity Bible*, which is the only Ontario case cited, Justice Pomerance clearly distinguished between limitations and complete ban on *Charter* protected rights by finding:

Yet, it remains the fact that, despite the claimants’ characterization as such, there was never a complete ban on religious gatherings or religious activity. It was always open to the churches to deliver services to congregants, albeit in a less than optimal fashion. Gathering limits imposed a significant burden on religious activity, but they did not prevent it from occurring.²³

¹⁹ [Beaudoin v. British Columbia, 2021 BCSC 512](#) at paras 174, 251.

²⁰ Factum of the Respondent at para 55.

²¹ Factum of the Applicant at paras 83-85.

²² [Grandel v Saskatchewan, 2022 SKKB 209 \(CanLII\)](#) at para 112.

²³ [Ontario v. Trinity Bible Chapel et al., 2022 ONSC 1344](#) at para 167.

18. It is respectfully submitted that the Respondent has failed to show that public health measures that effectively banned peaceful protests were minimally impairing.

Expert Evidence From Dr. Bardosh Should be Given Significant Weight:

19. The Respondent asserts that Dr. Bardosh “miscalculated excess mortality statistics, overstating the proportion of excess deaths in Canada due to causes other than COVID-19.”²⁴ At the beginning of his cross examination, Dr. Bardosh was transparent with counsel for the Respondent and explained on the record that he wanted to correct the statement in his affidavit regarding excess mortality rates.²⁵ Counsel for the Respondent stated “[I]t’s actually one of the areas I wanted to cover, so why don’t we wait and we’ll go through that together and we can all be on the same page.”²⁶ Dr. Bardosh acknowledged and tried to rectify his error at the outset of cross examination.

20. The Respondent argues that Dr. Bardosh’s evidence should be given little weight since he is not a medical doctor, the papers he cites were not limited to Ontario, and because he discusses the potential harms but ignores the benefits of the measures.²⁷

21. Dr. Bardosh is qualified to give his expert opinion on the social harms caused by the measures. Dr. Bardosh is a medical anthropologist, the study of social cultural, economic, and political factors that affect health and medicine.²⁸ He is also an implementation scientist with expertise in infectious disease, public health, and global development.²⁹ He is a professor at the

²⁴ Factum of the Respondent at para 35.

²⁵ Cross Examination of Dr. Bardosh at q 7-9.

²⁶ *Ibid* at q 9, lines 22-25.

²⁷ Factum of the Respondent at para 74.

²⁸ Affidavit of Dr. Bardosh (Bardosh Affidavit) at para 2.

²⁹ *Ibid*.

University of Washington School of Public Health,³⁰ co-author of 45 peer-reviewed articles, editor of 2 books, reviewer for academic journals, and has worked in more than 20 countries including Canada on health and development research programs.³¹ He has authored a peer-reviewed publication in *BMJ Global Health* titled “The unintended consequences of COVID-19 vaccine policy: why mandates, passports, and restrictions may cause more harm than good.”³² He’s also the first author of academic articles titled “Was lockdown worth it? Community perspectives and experiences of the Covid-19 pandemic in remote southwestern Haiti.” He has been invited to speak on Covid-19 policies around the world where he’s spoken about lockdown policies and public trust.³³ He has published several peer reviewed articles on Covid-19 and social harms.³⁴ He has also been extensively involved in research and policy during epidemic response for Ebola and Zika.³⁵

22. Dr. Bardosh presents compelling evidence from both Ontario and across Canada, highlighting the significant and harmful social consequences of lockdown measures on children, vulnerable populations, and Canada's democratic principles. The data concerning the adverse effects of lockdowns on the most vulnerable groups and on Canada's democracy is vital for the Court’s consideration and has not been provided by Respondent’s experts. It is worth noting that the Respondent’s expert, Dr. Hodge, also relies on studies outside of Ontario and Canada.³⁶

³⁰ *Ibid* at paras 4-5.

³¹ Exhibit “A” of Bardosh Affidavit, at p. 3-7.

³² *Ibid* at para 7.

³³ *Ibid* at para 11.

³⁴ *Ibid* at paras 11-13.

³⁵ *Ibid* at para 14.

³⁶ Hodge Affidavit at para 30; see also Factum of the Respondent at para 15.

23. Section 1 of the *Charter* requires the Court to consider the deleterious effects and the salutary effects of government measures that infringe *Charter* rights. The Respondent concedes that the impugned measures breach s.2(c) of the *Charter*, placing the burden on the Respondent to justify the breach. The Respondent has not presented any of the deleterious effects associated with the measures before this Court. Dr. Bardosh's evidence ought to be given significant weight given that it is the only evidence on the record that can help this Court conduct a full comprehensive section 1 proportionality analysis.

All of which is respectfully submitted this 17th day of July 2023



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July 17th, 2023

SCHEDULE A – LIST OF AUTHORITIES

Case Law	
1.	<i>114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)</i> , 2001 SCC 40
2.	<i>Beaudoin v. British Columbia</i> , 2021 BCSC 512
3.	<i>Grandel v Saskatchewan</i> , 2022 SKKB 209 (CanLII)
4.	<i>Ontario v. Trinity Bible Chapel et al.</i> , 2022 ONSC 1344
5.	<i>The Canadian Civil Liberties Association v. Nova Scotia (Attorney General)</i> , 2022 NSCA 64
Secondary Sources	
6.	Flood, Colleen.M., et al, <i>Reconciling Civil Liberties and Public Health in the Response to COVID-19</i> , (Royal Society of Canada, 2020)

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

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THE APPLICANT**

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