

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

**RANDY HILLIER**

Appellant  
(Applicant)

-and-

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

Respondent  
(Respondent)

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

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May 22, 2023

**THE ATTORNEY GENERAL OF ONTARIO**

[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED] [REDACTED]

**Ryan Cookson**  
LSO No. 61448D

[REDACTED] [REDACTED]  
[REDACTED]

**Padraic Ryan**  
LSO No. 61687J

[REDACTED] [REDACTED]  
[REDACTED]

Counsel for the Respondent,  
His Majesty the King in Right of the Province of  
Ontario

**TO: CHARTER ADVOCATES CANADA**

[REDACTED]  
[REDACTED]

**Chris Fleury**

LSO No. 67485L

Email: [REDACTED]

**Hatim Kheir**

LSO No. 79119E

Email: [REDACTED]

Counsel for the Appellant,  
Randy Hillier

## TABLE OF CONTENTS

<b>PART I – OVERVIEW .....</b>	<b>1</b>
<b>PART II – SUMMARY OF THE FACTS .....</b>	<b>2</b>
A. The State of the COVID-19 Pandemic in Spring 2021 .....	2
B. The Risks of Public Gatherings in Spring 2021 .....	5
C. Ontario’s Temporary Public Health Measures In Spring 2021 .....	8
D. The Appellant .....	13
E. The Application Judge’s Decision .....	13
<b>PART III – LAW AND ARGUMENT .....</b>	<b>16</b>
A. Issues .....	16
B. Standard of Review .....	16
C. The Application Judge Applied the Correct Test at the Minimal Impairment Stage....	17
D. The Application Judge Did Not Uphold a “Hierarchy of Rights” .....	23
<b>PART IV - ADDITIONAL ISSUES .....</b>	<b>27</b>
<b>PART V – ORDER SOUGHT .....</b>	<b>28</b>
<b>CERTIFICATE.....</b>	<b>29</b>
<b>SCHEDULE A – LIST OF AUTHORITIES.....</b>	<b>31</b>
<b>SCHEDULE B – LEGISLATION.....</b>	<b>33</b>

## PART I – OVERVIEW

1. COVID-19 is a highly contagious and potentially deadly respiratory disease that caused the worst global pandemic in over a century. In Ontario alone, even with stringent public health measures, more than 14,000 people have died due to COVID-19.
2. Outdoor gatherings, like other settings where people gather together for extended periods of time, pose a risk of COVID-19 transmission. To reduce that risk, save the healthcare system from being overwhelmed, and save lives, Ontario implemented emergency public health measures (the “**Gathering Limits**”) in the spring of 2021 that temporarily prohibited outdoor public events and social gatherings between members of different households and temporarily prohibited leaving one’s residence for non-essential purposes. These prohibitions were in effect for 69 days and 55 days, respectively. Once the public health situation improved, the Gathering Limits were eased and eventually lifted entirely.
3. Justice Callaghan of the Superior Court of Justice (“the application judge”) concluded that the Gathering Limits were a reasonable limitation on the right to freedom of assembly protected by s. 2(c) of the *Canadian Charter of Rights and Freedoms* and dismissed the application brought by the Appellant, Randy Hillier.
4. On appeal, Mr. Hillier does not dispute the application judge’s finding of fact that outdoor gatherings posed a risk of transmission of COVID-19 and could contribute to overwhelming the Ontario health care system. Instead, he makes two legal arguments, both of which should be rejected.
5. First, he argues that there is a different test under s. 1 of the *Charter* for “absolute” bans on *Charter*-protected activity. This is contrary to the Supreme Court’s decades of jurisprudence

establishing a single test for reasonable limits under s. 1 – the *Oakes* test – which was properly applied by the court below.

6. Second, he argues that a law cannot be reasonable under s. 1 if it establishes a “hierarchy of rights” by permitting some *Charter*-protected activities but not others. This is a new argument on appeal which this Court should not entertain, and in any event is contrary to this Court’s ruling in *Trinity Bible*,<sup>1</sup> which established that the government is entitled to allow some activities while prohibiting others in order to balance limiting the spreading of COVID-19 with achieving other important policy objectives.

7. The Respondent, His Majesty the King in Right of Ontario, submits that the appeal should be dismissed.

## PART II – SUMMARY OF THE FACTS

### A. The State of the COVID-19 Pandemic in Spring 2021

8. COVID-19 is a highly contagious and potentially deadly respiratory disease that caused the worst global pandemic in more than a century.<sup>2</sup> In spring 2021, Ontario was experiencing the most serious and dangerous phase of the pandemic. Beginning in March 2021, COVID-19 cases began to increase rapidly. The average number of daily COVID-19 cases grew by more than 300%, from 1,113 per day (as of March 1, 2021) to 4,484 per day (as of April 12, 2021).<sup>3</sup> The number of COVID-19 hospitalizations followed a similar trend.<sup>4</sup> In a two-week period in March

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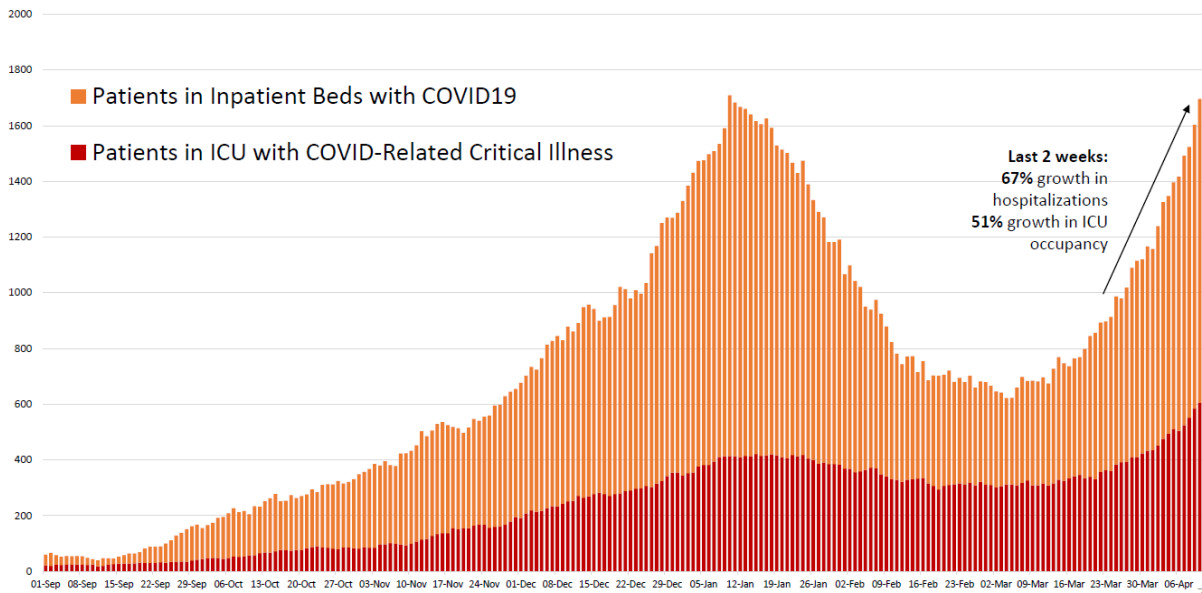
<sup>1</sup> *Ontario (Attorney General) v. Trinity Bible Chapel*, [2023 ONCA 134](#) [“*Trinity Bible (ONCA)*”], leave to appeal to SCC refused, [40711](#) (10 August 2023).

<sup>2</sup> Affidavit of Dr. David McKeown affirmed November 22, 2022 [“McKeown Affidavit”] at para. 7, Respondent’s Compendium [“RC”] Vol 2, Tab 2, p. 382.

<sup>3</sup> McKeown Affidavit at para. 38, RC, Vol 2, Tab 2, pp. 393-394.

<sup>4</sup> McKeown Affidavit at para. 39, RC, Vol 2, Tab 2, p. 394.

2021, there was a 67% growth in COVID-19 hospitalizations and a 51% growth in COVID-19 patients in intensive care units (“ICU”), as shown in the graph<sup>5</sup> below.



9. By April 16, 2021, COVID-19 cases, hospitalizations and ICU occupancy were at their highest levels since the start of the pandemic.<sup>6</sup> The dramatic increases in hospitalizations and ICU occupancy created a serious risk that the healthcare system would be stretched beyond its limits. ICU occupancy in some regions in Ontario had reached nearly 90% capacity.<sup>7</sup> The COVID-19 Science Advisory Table (“**Science Table**”), a group of scientific experts and health system leaders, projected even more significant increases in cases, hospitalizations and ICU admissions if immediate steps were not taken to stop the spread of the virus.<sup>8</sup> On April 1, 2021,

<sup>5</sup> McKeown Affidavit at para. 41, RC Vol 2, Tab 2, p. 395.

<sup>6</sup> McKeown Affidavit at para. 40, RC Vol 2, Tab 2, p. 395.

<sup>7</sup> McKeown Affidavit, Exhibit “K” at Table 4, RC, Vol 2, Tab 2, p. 593.

<sup>8</sup> Attached as Exhibit “V” to the McKeown Affidavit, RC, Vol 2, Tab 2, pp. 672-690 is an “Update on COVID-19 Projections” dated April 1, 2021, from the Ontario COVID-19 Science Advisory Table; attached as Exhibit “W” to the McKeown Affidavit, RC, Vol 2, Tab 2, pp. 692-710 is an “Update on COVID-19 Projections” dated April 16, 2021, from the Ontario COVID-19 Science Advisory Table.

the Science Table concluded that “COVID-19 threatens [the] health system[’s] ability to deal with regular ICU admissions and the ability to care for all patients.”<sup>9</sup>

10. This rapid increase in cases and hospitalizations was largely driven by new variants of concern. In spring 2021, four variants were particularly concerning in Ontario: the Alpha, Beta, Gamma and Delta variants.<sup>10</sup> The Alpha, Beta and Gamma variants were each estimated to be at least 50% more transmissible than the original SARS-COV-2 virus.<sup>11</sup> Preliminary evidence suggested that the newly-emerged Delta variant was more transmissible than all previous strains and caused more severe illness.<sup>12</sup> However, evidence about all variants of concern was still evolving and there was considerable uncertainty regarding their levels of transmissibility, their methods of transmission, and the likelihood that they would result in more severe illness, hospitalizations and deaths.<sup>13</sup>

11. At that time, very few Ontarians had been vaccinated and vaccine supply was still limited. In April 2021, only 2.8% of the Ontario population were fully vaccinated and most of those individuals were in nursing or long-term care facilities.<sup>14</sup> Most vaccines required two doses, as a single dose did not provide sufficient protection against symptomatic illness. The protective effects of the vaccine (for both the first and the second dose) took several weeks to develop. While vaccines had been shown to be effective in preventing symptomatic illness, the evidence at the time was less clear on the degree to which vaccines prevented transmission.<sup>15</sup>

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<sup>9</sup> McKeown Affidavit, Exhibit “V” at p. 2, RC, Vol 2, Tab 2, p. 673.

<sup>10</sup> McKeown Affidavit at para. 27, RC, Vol 2, Tab 2, pp. 388-389.

<sup>11</sup> McKeown Affidavit at para. 28, RC, Vol 2, Tab 2, p. 389.

<sup>12</sup> McKeown Affidavit at para. 28, RC, Vol 2, Tab 2, p. 389.

<sup>13</sup> McKeown Affidavit at para. 44, RC, Vol 2, Tab 2, p. 397.

<sup>14</sup> McKeown Affidavit at para. 45, RC, Vol 2, Tab 2, p. 397.

<sup>15</sup> McKeown Affidavit at para. 45, RC, Vol 2, Tab 2, p. 397.

**B. The Risks of Public Gatherings in Spring 2021**

12. Given the state of the pandemic in spring 2021, public gatherings – whether held indoors or outdoors – posed a significant public health risk.<sup>16</sup> Gatherings of people from different households had been shown to be associated with a high risk of COVID-19 transmission that could lead to exponential spread of the virus.<sup>17</sup> At that time, even small increases in COVID-19 transmission risked increasing hospitalizations and ICU admissions beyond the healthcare system’s capacity, potentially impacting patient care for those with COVID-19 and those with other medical conditions.<sup>18</sup>

13. Ontario tendered two experts in public health, both of whom testified about the public health risks of indoor and outdoor gatherings in spring 2021:

- **Dr. David McKeown** was the Associate Chief Medical Officer of Health for Ontario from August 2016 to November 2021. He is a certified specialist in public health and preventative medicine in Canada and the United States and has over 35 years of experience in public health, including 12 years as Medical Officer of Health for the City of Toronto.<sup>19</sup>
- **Dr. Matthew Hodge** is a certified specialist in public health and preventative medicine and an emergency physician at Scarborough General Hospital. He has a Ph.D. in epidemiology and biostatistics from McGill University and a master’s degree in healthcare management from Harvard University. He has over 20 years experience in public health and preventative medicine.<sup>20</sup>

14. Dr. McKeown and Dr. Hodge testified that:

- The primary method of COVID-19 transmission is through direct contact with respiratory droplets from an infected person. Transmission occurs

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<sup>16</sup> McKeown Affidavit at para. 46, RC, Vol 2, Tab 2, pp. 397-398.

<sup>17</sup> McKeown Affidavit at para. 46, RC, Vol 2, Tab 2, pp. 397-398.

<sup>18</sup> McKeown Affidavit at para. 47, RC, Vol 2, Tab 2, p. 398.

<sup>19</sup> McKeown Affidavit at para. 1, RC, Vol 2, Tab 2, p. 380.

<sup>20</sup> Affidavit of Dr. Matthew Hodge affirmed November 18, 2022 [“Hodge Affidavit”] at paras. 1-2, RC, Vol 1, Tab 1, pp. 1-2.



predominantly through close contact with an infected individual (2 metres or less), but transmission over longer distances is still possible.<sup>21</sup>

- Public gatherings, whether indoors or outdoors, present a risk of COVID-19 transmission. There is a risk of transmission any time people are in close physical proximity. While there is a lower risk of COVID-19 transmission in outdoor settings due to increased air circulation that disperses respiratory droplets, being outdoors did not eliminate the risk of transmission.<sup>22</sup>
- Certain behaviours may increase the risk of COVID-19 transmission, such as coughing, shouting, loud talking or heavy breathing, each of which can result in more forceful exhalation of droplets.<sup>23</sup>
- Masking and physical distancing can help reduce, but not eliminate, the risk of COVID-19 transmission. The efficacy of masking and physical distancing is highly variable and depends on the degree to which participants strictly comply with those public health measures. In practice, there are often circumstances when individuals wear masks incorrectly or do not consistently adhere to physical distancing requirements.<sup>24</sup>
- COVID-19 can be transmitted by people who are symptomatic (i.e. currently experiencing COVID-19 symptoms), pre-symptomatic (i.e. have not yet developed symptoms), or asymptomatic (i.e. never developed symptoms). As a result, screening for symptoms is insufficient to prevent the spread of COVID-19 when individuals gather in groups.<sup>25</sup>

15. Dr. McKeown and Dr. Hodge emphasized that the risk of COVID-19 transmission in any setting is related to the baseline level of COVID-19 in the community. The higher the number of COVID-19 cases in the population, the more likely that people who participate in a gathering will have COVID-19 and pass it on to others. As Dr. Hodge noted, the risk of a gathering includes the risk of “secondary cases...from people with primary transmission returning to their

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<sup>21</sup> McKeown Affidavit at para. 11, RC, Vol 2, Tab 2, p. 383; Hodge Affidavit at para. 22, RC, Vol 1, Tab 1, p. 10.

<sup>22</sup> McKeown Affidavit at paras. 49-55, RC, Vol 2, Tab 2, pp. 398-401; Hodge Affidavit at para. 34, RC, Vol 1, Tab 1, p. 15-16.

<sup>23</sup> McKeown Affidavit at para. 14, RC, Vol 2, Tab 2, pp. 384-385; Hodge Affidavit at para. 23, RC, Vol 1, Tab 1, p. 10.

<sup>24</sup> McKeown Affidavit at paras. 16-21, RC, Vol 2, Tab 2, pp. 385-387; Hodge Affidavit, para. 26, RC, Vol 1, Tab 1, pp. 11-12.

<sup>25</sup> McKeown Affidavit at para. 15, RC, Vol 2, Tab 2, p. 385; Hodge Affidavit at para. 24, RC, Vol 1, Tab 1, p. 10.

households, or other prolonged confined spaces such as workplaces, and infecting people who did not attend the location/event.”<sup>26</sup> While some types of gatherings may pose a low public health risk when the level of COVID-19 in the population is low, those same gatherings may pose a higher public health risk when the level of COVID-19 in the population is high.<sup>27</sup>

16. Ontario’s experts further testified that the public health risk of an activity must be assessed in the context of the overall burden on the healthcare system. When the burdens on the healthcare system are high, even small increases in transmission in the population can have a significant negative impact on the healthcare system. Activities that pose a relatively low risk of transmission could significantly increase the burden on an already strained healthcare system.<sup>28</sup> If the healthcare system becomes overwhelmed, it would significantly compromise care for all patients, Dr. Hodge noted:

A health system in which every available bed is occupied by someone infected with COVID-19 has no way to respond to people with heart attacks, hip fractures or strokes, potentially adding to the elevated mortality attributable to COVID-19. Put simply, the harms caused by COVID-19 would be compounded with additional preventable deaths.<sup>29</sup>

17. Dr. McKeown and Dr. Hodge testified that all gatherings, including outdoor gatherings, posed a significant public health risk in spring 2021.<sup>30</sup> All gatherings posed a risk of COVID-19 transmission and the public health situation was dire. The number of cases and hospitalizations were at their highest point in the pandemic.<sup>31</sup> The healthcare system was nearing capacity and

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<sup>26</sup> Hodge Affidavit at para. 29, RC, Vol 1, Tab 1, p. 13.

<sup>27</sup> McKeown Affidavit at paras. 13, 23, RC, Vol 2, Tab 2, pp. 384, 387.

<sup>28</sup> McKeown Affidavit at para. 25, RC, Vol 2, Tab 2, p. 388.

<sup>29</sup> Hodge Affidavit at para. 21, RC, Vol 1, Tab 1, p. 9.

<sup>30</sup> McKeown Affidavit at paras. 49-55, RC, Vol 2, Tab 2, pp. 398-399; Hodge Affidavit at paras. 34-40, RC, Vol 1, Tab 1, pp. 15-18.

<sup>31</sup> McKeown Affidavit at para. 40, RC, Vol 2, Tab 2, pp. 394-395.

was at risk of becoming overwhelmed.<sup>32</sup> New variants of concern were spreading across the province and there was evidence that those variants were more transmissible and caused more severe illness. Vaccines could not be administered fast enough to prevent the exponential spread of the virus.<sup>33</sup> The Science Table was projecting a substantial rise in cases and hospitalizations and concluded that “[a] 6 week stay-at-home order with a vaccination rate of at least 100K doses per day is the only way to flatten the curve.”<sup>34</sup> Dr. McKeown testified that “[w]aiting for scientific certainty before taking actions to prevent the spread of SARS-CoV-2 could have resulted in substantial numbers of preventable infections, severe illnesses and deaths.”<sup>35</sup>

**C. Ontario’s Temporary Public Health Measures In Spring 2021**

18. The *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17 came into force on July 24, 2020 (“*ROA*”). Section 17 of *ROA* terminated the declaration of emergency previously declared by the Premier under s. 7.0.1 of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 (“the *EMCPA*”) on March 17, 2020.<sup>36</sup>

19. Section 2 of *ROA* provided that orders made under the *EMCPA* that had not been revoked as of its coming into force were continued as valid and effective orders under *ROA* and ceased to be orders under the *EMCPA*. Section 4 of *ROA* provided the Lieutenant Governor in Council with powers to make certain amendments to *ROA* emergency orders. Those orders set out gathering limits and other restrictions on a broad range of activities and business operations to

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<sup>32</sup> McKeown Affidavit, Exhibit “V” at p. 2, RC, Vol 2, Tab 2, p. 673.

<sup>33</sup> See McKeown Affidavit at para. 45, RC, Vol 2, Tab 2, p. 397; see also McKeown Affidavit, Exhibit “W” at p. 2, RC, Vol 2, Tab 2, p. 693.

<sup>34</sup> McKeown Affidavit, Exhibit “W” at p. 8, RC, Vol 2, Tab 2, p. 699.

<sup>35</sup> McKeown Affidavit at para. 55, RC, Vol 2, Tab 2, p. 401.

<sup>36</sup> *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17, [s. 17](#).

prevent the transmission of COVID-19.<sup>37</sup> Those restrictions, including gathering limits, were continually modified from 2020 to 2022 as the public health situation changed throughout different regions in Ontario.<sup>38</sup>

20. As of April 1, 2021, each of Ontario's public health units were under one of three levels of emergency orders under the ROA framework: Stage 1 (O. Reg. 82/20); Stage 2 (O. Reg. 263/20); or Stage 3 (O. Reg. 364/20). On April 3, 2021, Ontario moved all public health units into the Shutdown Zone of the Stage 1 order, which provided for the strictest level of restrictions.<sup>39</sup>

21. In the Shutdown Zone, Schedule 4, clause 1(1)(c) of the Stage 1 order initially prohibited attending an organized public event or social gathering of more than 5 people that was held outdoors.<sup>40</sup> On April 16, 2021, that clause was amended to prohibit attending any outdoor social gathering. The amendment came into force on April 17, 2021.<sup>41</sup> This stricter prohibition remained in effect until May 22, 2021, when a subsequent amendment again permitted attending outdoor social gatherings of up to 5 people.<sup>42</sup> Throughout the 35 days that the stricter prohibition was in force, there were exceptions in O. Reg. 82/20 that permitted gatherings between a household and a person who lived alone<sup>43</sup> and for weddings, funerals, and religious services.<sup>44</sup>

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<sup>37</sup> *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17, [ss. 2, 4](#).

<sup>38</sup> O. Reg 363/20 (Stages of Reopening) [as of April 1-2, 2021](#).

<sup>39</sup> [O. Reg 240/21](#), amending O Reg 363/20 (Stages of Reopening).

<sup>40</sup> O. Reg 82/20 (Rules for Areas in Stage 1) as of April 3-6, 2021, sch. 4, [s. 1\(1\)\(c\)](#).

<sup>41</sup> O. Reg. 295/21 (Rules for Areas in Stage 1), [s. 2](#), amending O. Reg 82/20 (Rules for Areas in Stage 1).

<sup>42</sup> O. Reg. 344/21 (Rules for Areas in Stage 1), [s. 3](#), amending O. Reg 82/20 (Rules for Areas in Stage 1).

<sup>43</sup> O. Reg 82/20 (Rules for Areas in Stage 1) as of April 17-18, 2021, sch. 4, [s. 2](#).

<sup>44</sup> O. Reg 82/20 (Rules for Areas in Stage 1) as of April 17-18, sch. 4, [s. 1\(1\)\(d\)](#).

22. All public health units were moved out of the Shutdown Zone on June 11, 2021.<sup>45</sup> The province-wide Shutdown Zone was only in effect for 69 days. The Stage 1 order was revoked on March 16, 2022.<sup>46</sup>

23. On April 7, 2021, in response to the rapid increase of COVID-19 transmissions and the increasing uncertain risks posed by new variants, Ontario declared an emergency<sup>47</sup> under s. 7.0.1(1) of the *Emergency Management and Civil Protection Act* and issued a Stay-at-Home Order requiring everyone to remain at home except for essential purposes, which did not include outdoor social gatherings.<sup>48</sup> The Stay-at-Home order was revoked on June 2, 2021, having been in effect for 55 days.<sup>49</sup> The declaration of a state of emergency was revoked on June 9, 2021.<sup>50</sup>

24. This chart summarizes the outdoor gathering limits that were in force between April and June 2021 (the “**Gathering Limits**”):

	<b>Dates</b>	<b>Gathering Limits under Stage 1 Order (ROA)</b>	<b>Stay-at-Home Order (EMCPA)</b>
1	April 3-6	Outdoor gatherings of no more than 5 people	Not in force
2	April 7-16	Outdoor gatherings of no more than 5 people	In force
3	April 17-May 21	No outdoor gatherings	In force
4	May 22-June 2	Outdoor gatherings of no more than 5 people	In force
5	June 3-June 11	Outdoor gatherings of no more than 5 people	Not in force

<sup>45</sup> [O. Reg 441/21](#) (Stages of Reopening), amending O Reg 363/20 (Stages of Reopening).

<sup>46</sup> O. Reg 168/22 (Revoking Various Regulations), [s.1](#).

<sup>47</sup> [O. Reg 264/21](#) (Declaration of Emergency).

<sup>48</sup> [O. Reg 265/21](#) (Stay-At-Home Order).

<sup>49</sup> [O. Reg 381/21](#) (Extensions of Orders), amending O. Reg 25/21 (Extensions of Orders).

<sup>50</sup> O. Reg 454/21 (Revoking Various Regulations), [s. 1](#).

25. Contrary to Mr. Hillier's submission, there was no "conflict" between the Stage 1 order and the Stay-at-Home order at any time.<sup>51</sup> Instead, there were merely two sets of requirements, intended to be read together. The Stay-at-Home Order required everyone in Ontario to remain at home except for certain defined essential purposes, which did not generally include social or political gatherings. The Stay-at-Home Order permitted individuals to leave their homes for certain purposes, while the Stage 1 order specified the rules that applied at the places and gatherings that individuals were permitted to go to. There is no constitutional or statutory requirement that an activity that does not contravene one law must be permitted under a different law.

26. The proper interpretation of both orders simply means that during the time period in rows 2 and 4 above, it was an *EMCPA* offence to attend a small outdoor gathering for a purpose other than a purpose permitted under the Stay-at-Home Order, but not a *ROA* offence. During the time period in row 3, on the other hand, it was an offence under both statutes to attend any outdoor gathering, subject to defined exceptions. Finally, during the time period in rows 1 and 5, attending larger gatherings was only a *ROA* offence as there was no relevant *EMCPA* order in force.

27. Conversely, it was lawful under both *ROA* and *EMCPA* orders during this time to leave one's residence to attend certain lawful gatherings. The Stay-at-Home order permitted leaving one's residence to attend a religious gathering but did not itself specify any size limits to gathering.<sup>52</sup> Instead, it separately specified that such gatherings had to be otherwise permitted by

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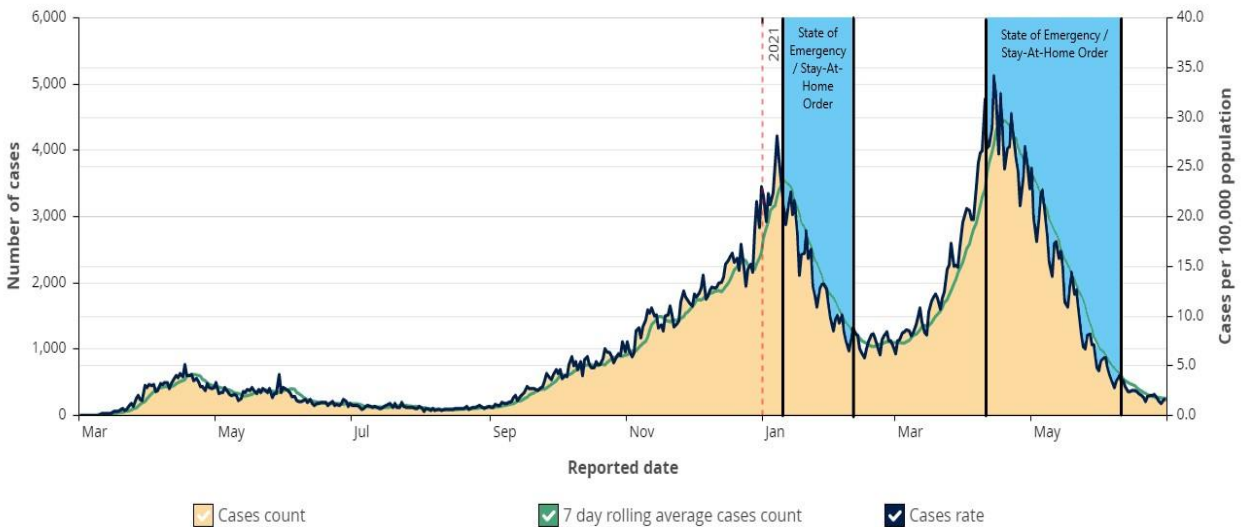
<sup>51</sup> Factum of the Appellant at paras. 14-15.

<sup>52</sup> O. Reg 265/21 (Stay-At-Home Order), [sch. 1, s.1\(1\)\(24\)](#).

law in order to be a valid essential purpose for leaving one's home.<sup>53</sup> The size limit was separately implemented through the *ROA* Stage 1 order during this period.

28. Dr. McKeown opines that there is evidence that these temporary public health measures in the spring of 2021 likely helped decrease the transmission of COVID-19, as demonstrated in the right-hand blue portion of this graph<sup>54</sup>:

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



29. Dr. Hodge estimates that based on a comparison with the per capita death rates from COVID-19 in jurisdictions that adopted less stringent public health measures between March 2020 and June 2021, Ontario avoided between 11,000 and 25,000 deaths by implementing the temporary emergency measures it did.<sup>55</sup>

<sup>53</sup> O. Reg 265/21 (Stay-At-Home Order), [sch. 1, s.1\(8\)](#).

<sup>54</sup> McKeown Affidavit at para. 72, RC, Vol 2, Tab 2, p. 408.

<sup>55</sup> Hodge Affidavit at para. 40, RC, Vol 1, Tab 1, pp. 18-19.

**D. The Appellant**

30. The Appellant, Randy Hillier, attended an outdoor gathering in Kemptville, Ontario on April 8, 2021 and another in Cornwall, Ontario on May 1, 2021. He faces charges under the *Provincial Offences Act* for contravening the Stage 1 order and the Stay-at-Home Order in doing so. He is also facing other charges for attending gatherings in Smiths Falls, Belleville, Peterborough, Stratford, Kitchen and Chatham during April and May 2021.<sup>56</sup>

31. Mr. Hillier encouraged his supporters not to wear masks or get vaccinated against COVID-19.<sup>57</sup> The overwhelming majority of the hundreds of people at the outdoor gathering he attended in Stratford, Ontario on April 26, 2021 were not wearing masks and were not distanced from each other.<sup>58</sup>

**E. The Application Judge's Decision**

32. Mr. Hillier brought an application under Rule 14.05 seeking declarations that the Gathering Limits unjustifiably violated his right to freedom of assembly protected by section 2(c) of the *Charter*. Ontario conceded that the Gathering Limits limited this right but argued that these limitations were reasonably justified under s. 1 of the *Charter*. The application judge heard and dismissed the application.

33. The application judge reviewed the opinion evidence of Mr. Hillier's three witnesses and Ontario's two witnesses. He admitted the evidence of all five witnesses and summarized the record as follows:

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<sup>56</sup> Factum of the Appellant at paras. 26-29.

<sup>57</sup> Transcript of Cross-Examination of Randy Hillier on May 4, 2023 ["Hillier Cross"], pp. 25-26, 29-30, qq. 78-80, 97-100, RC, Vol 2, Tab 4, pp. 792-795.

<sup>58</sup> Hillier Cross at pp. 34-35, qq. 109-116, RC, Vol 2, Tab 4, pp. 797-798.



The expert evidence established that in the spring of 2021, the science as to the transmissibility of COVID-19 outdoors was not settled. This is still the case. The risk of being infected by COVID-19, while not defined, was much more likely at an indoor event, but the risk was not zero at outdoor events. There were insufficient studies to determine with exactitude the risk of spread in such circumstances. Any infections that did occur would undoubtedly result in additional infections of others, including family members. In addition, the impact of new variants was still emerging. Hospital stays and deaths were increasing. The possible collapse of the hospital network was a real threat. Experience, particularly in the second wave of the pandemic, demonstrated that restrictive measures did have a beneficial impact on reducing the transmission of the virus and thereby alleviating death, illness and hospital stays. I accept Dr. McKeown's evidence that the province was genuinely attempting to balance a complex web of issues when it introduced the Gathering Limits and, as Dr. Hodge pointed out, was doing so with imperfect and incomplete evidence. In the end, the restrictions, including the Gathering Restrictions, had a dramatic impact in reducing the transmission of COVID-19 which, in turn, reduced death, illness and hospitalizations.<sup>59</sup>

34. Mr. Hillier does not allege any error in these findings of facts.

35. The application judge agreed with the parties that the Gathering Limits restricted the right to freedom of assembly and declined Mr. Hillier's invitation to make general pronouncements about the scope of s. 2(c), noting the Supreme Court's caution that "This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal," which "is particularly true with respect to constitutional issues."<sup>60</sup>

36. The application judge concluded that his reasoning under s. 1 of the *Charter* was governed by this Court's decision in *Trinity Bible*, which considered limits on religious gatherings imposed in Ontario during COVID-19 and found them constitutional under s. 1.<sup>61</sup>

37. The application judge agreed with the parties that the Gathering Limits were enacted to further the pressing and substantial objectives of reducing the transmission of COVID-19 and

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<sup>59</sup> *Hillier v. His Majesty the King in Right of The Province of Ontario*, 2023 ONSC 6611 at [para. 46](#) ["Application Judge"].

<sup>60</sup> Application Judge at [para. 53](#), quoting *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, 1995 CanLII 86 (SCC) at [para. 6](#).

<sup>61</sup> Application Judge at [paras. 55-68](#), citing *Trinity Bible* ([ONCA](#)).

reducing hospitalization and ICU admissions. He held that he was bound by this Court's acceptance of the same objective in *Trinity Bible* in any event.<sup>62</sup>

38. The application judge found that the Gathering Limits were rationally connected to this objective. He rejected Mr. Hillier's argument that Ontario had not adduced sufficient evidence to establish these measures could reasonably be expected to reduce transmission of COVID-19:

...the evidence available at the time demonstrated that outdoor gatherings were a risk for the spread of COVID-19, albeit much smaller than indoor gatherings. Studies at the time the Gathering Restrictions were imposed were not conclusive. As mentioned, one study available at the time of the imposition of the restrictions said ten percent of cases were caused by outdoor gatherings. I accept that the surveillance program in the spring of 2021 was unable to provide the data envisioned by Dr. Kettner. Given the state of affairs in April 2021, I accept that even a small risk of spread could create a significant burden to Ontario's overtaxed health care system. This was particularly so where new variants had not been fully analysed and the vaccine was not widely available. Restricting the gathering of people, even outdoors, was a rational means of reducing the transmission of COVID-19.<sup>63</sup>

39. Mr. Hillier does not argue that there was any error in this holding.

40. The application judge held that he was bound to apply this Court's holding in *Trinity Bible* on minimal impairment given the similarity of the arguments rejected in that case to those raised by Mr. Hillier before him.<sup>64</sup> Nonetheless, he provided his own analysis concluding that the Gathering Limits were minimally impairing of the right to freedom of assembly as required under s. 1:

While the ban was absolute as it related to activities engaged in by Mr. Hillier, some outdoor gatherings were permitted as part of the government's response to the pandemic. As described in *Trinity Bible*, there were small gatherings for religious services. Those living alone could gather with one other family and people could shop in restricted numbers. Objection was taken that the gathering limits were not universal. Aside from religious services, there were some settings where people could gather such as big box stores and arenas. As was stated by Dr. McKeown, the risks in these settings were

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<sup>62</sup> Application Judge at [paras. 72-74](#), citing *Trinity Bible* ([ONCA](#)).

<sup>63</sup> Application Judge at [para. 80](#).

<sup>64</sup> Application Judge at [para. 85](#).

weighed along with the utility of allowing people to shop or attend at arenas. This demonstrated the ban was not absolute and that the government was weighing a multiplicity of factors in arriving at the Gathering Limits. [...]

The nature of the ban and whether it meets the s.1 analysis on impairment requires the court to examine whether it was a reasonable option given the government’s objective, not that it was the best option. The objective is not to be sacrificed in this part of the analysis. The objective was to stop COVID-19. The bluntness of the restrictions reflected the risk that was being faced by the province. Under the circumstances, moving to smaller gatherings or exempting some gatherings, such as political rallies, would not have achieved the objective.<sup>65</sup>

41. At the final stage of the test, balancing of salutary and deleterious effects, the application judge acknowledged the negative effects of the Gathering Limits on peaceful assembly but concluded that “[t]he imposition of the Gathering Restrictions for approximately two months was not disproportionate to the threat facing Ontario in the spring of 2021” which was the “the greatest health crisis in a century” where “[t]he most vulnerable in society were at risk.”<sup>66</sup>

### **PART III – LAW AND ARGUMENT**

#### **A. Issues**

42. Mr. Hillier raises two issues on this appeal:

- (a) Did the application judge err by applying the wrong legal test at the minimal impairment stage of the s. 1 analysis?
- (b) Did the application judge err by “upholding a hierarchy of rights”?

#### **B. Standard of Review**

43. The issue of the appropriate legal standard to apply under s. 1 of the *Charter* is a question of law subject to a correctness standard.<sup>67</sup> However, the application of that legal standard to the

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<sup>65</sup> Application Judge at [paras. 97-98](#).

<sup>66</sup> Application Judge at [paras. 100-105](#).

<sup>67</sup> *Trinity Bible* (ONCA) at [para. 37](#).

particular facts of this case is a question of mixed fact and law that is reviewed on deferential standard and should not be overturned absent palpable and overriding error.<sup>68</sup>

**C. The Application Judge Applied the Correct Test at the Minimal Impairment Stage**

44. The application judge applied the correct legal test at the minimal impairment stage of the s. 1 analysis. He relied on well-established principles from the Supreme Court of Canada on minimal impairment and correctly identified this Court’s decision in *Trinity Bible* as the relevant authority to guide courts when determining whether COVID-19 public health measures are justified under s. 1 of the *Charter*.<sup>69</sup> Contrary to Mr. Hillier’s submissions, the application judge was not required to subject the Gathering Limits to a “more onerous” test than the one applied to other COVID-19 public health measures that have been upheld by courts across Canada.<sup>70</sup>

45. The Supreme Court of Canada has held that a degree of deference is owed to government at the minimal impairment stage.<sup>71</sup> As the Court noted in *RJR-MacDonald*, “[t]he tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad

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<sup>68</sup> *Trinity Bible* (ONCA) at [para. 37](#); *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139 at [para. 47](#); *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 at [para. 35](#); *Housen v. Nikolaisen*, 2002 SCC 33 at [paras. 8, 10, 36](#).

<sup>69</sup> Application Judge at [para. 48](#).

<sup>70</sup> Factum of the Appellant at para. 35; see, for e.g., *Beaudoin v. British Columbia*, [2021 BCSC 512](#), aff’d [2022 BCCA 427](#), leave to appeal to SCC refused, [40622](#) (10 August 2023); *Grandel v. Saskatchewan*, [2022 SKKB 209](#), aff’d [2024 SKCA 53](#); *Gateway Bible Baptist Church et al. v. Manitoba et al.*, [2021 MBQB 219](#), aff’d [2023 MBCA 56](#), leave to appeal to SCC refused, [40903](#) (14 March 2024).

<sup>71</sup> *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at [para. 43](#); *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC) at [para. 160](#) [“*RJR-MacDonald*”]; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at [para. 37](#) [“*Hutterian Brethren*”].

merely because they can conceive of an alternative which might better tailor objective to infringement.”<sup>72</sup> In *Hutterian Brethren*, the Court held that deference is particularly appropriate when government must address complex social issues in respect of which there may be a range of reasonable alternatives to address a legislative goal:

The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit...In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.<sup>73</sup>

46. In *Trinity Bible*, this Court held that temporary limits on indoor and outdoor religious gatherings during the COVID-19 pandemic were justified under s. 1. At the minimal impairment stage, Sossin J.A. affirmed that “the operative question was whether the measures chosen fell within a range of reasonable alternatives.”<sup>74</sup> He upheld the motion judge’s finding that Ontario was “not required to justify its choices on a standard of scientific certainty.”<sup>75</sup> He further held that “Ontario was entitled to balance the objective of reducing the risk of COVID-19 transmission in congregate settings with other objectives that did not arise in the context of regulating religious gatherings, such as preserving economic activity and preserving other social benefits which that activity made possible.”<sup>76</sup>

47. The Court in *Trinity Bible* also found that, in the context of the COVID-19 pandemic, it was appropriate for the motion judge to consider the precautionary principle, which provides that

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<sup>72</sup> *RJR-MacDonald* at [para. 160](#).

<sup>73</sup> *Hutterian Brethren* at [para. 53](#).

<sup>74</sup> *Trinity Bible* (ONCA) at [paras. 23, 120](#).

<sup>75</sup> *Trinity Bible* (ONCA) at [paras. 105](#), citing *Ontario v. Trinity Bible Chapel et al.*, 2022 ONSC 1344 at [para. 144](#) [“*Trinity Bible* (ONSC)”].

<sup>76</sup> *Trinity Bible* (ONCA) at [para. 118](#).

a lack of full scientific certainty is not a reason to postpone harm reduction strategies when there are threats of serious, irreversible damage. As Sossin J.A. noted:

In my view, it was appropriate for the motion judge to consider the precautionary principle as informing whether and how the state could meet its objectives of reducing transmission risk and saving lives in a situation of scientific uncertainty. This accords with the contextual approach to the *Oakes* test generally. As stated in *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 77, “Where the court is faced with inconclusive or competing social science evidence relating the harm to the legislature’s measures, the court may rely on a reasoned apprehension of that harm.”<sup>77</sup>

48. The application judge applied these principles to the specific public health measures at issue in this case. He correctly found that this case raised similar facts and legal issues as the ones in *Trinity Bible*, as both cases involved a challenge to temporary indoor and outdoor gatherings designed to limit the spread of COVID-19. The application judge found that “the same factual issues of concern regarding the spread of COVID-19 and its impact on both the health of Ontarians and the healthcare system were at the centre of *Trinity Bible*’s analysis and Ontario’s justification for imposing the restrictions.”<sup>78</sup> While the restrictions at issue here were not identical to those in *Trinity Bible*, the same legal principles apply for determining whether the Gathering Limits were justified under s. 1 of the *Charter*.

49. Applying these principles, the application judge found that the Gathering Limits were minimally impairing. He noted that the Gathering Limits were temporary and “reserved for a time when COVID-19 was on the rise and the health care system was already reeling from the burden of over a year of COVID-19.”<sup>79</sup> He further noted that the Gathering Limits were subject

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<sup>77</sup> *Trinity Bible* (ONCA) at [para. 110](#).

<sup>78</sup> Application Judge at [para. 61](#), citing *Trinity Bible* (ONCA) at [para. 61](#).

<sup>79</sup> Application Judge at [para. 96](#).

to exceptions that permitted small religious gathering and allowed those living alone to gather with other households.<sup>80</sup> As in *Trinity Bible*, the application judge found that the government was entitled to deference when considering “how best to control the spread of COVID-19 while weighing the wider societal interest.”<sup>81</sup> He also found that alternative measures would not have been equally effective at combatting the spread of COVID-19 and concluded that the Gathering Limits “were a tailored and balanced response to an urgent public health crisis.”<sup>82</sup>

50. The test applied by the application judge is also consistent with the test applied by courts across Canada that have upheld COVID-19 public health measures as justified under s. 1 of the *Charter*.<sup>83</sup> As Sossin J.A. noted, the principles on minimal impairment that the Court applied in *Trinity Bible* are “bolstered by the findings of other courts across Canada which have considered similar restrictions at this stage of the analysis.”<sup>84</sup>

51. Mr. Hillier relies on the Supreme Court of Canada’s decision in *Ramsden* to argue that the application judge should have applied a “more onerous” test at the minimal impairment stage because the Gathering Limits were a “complete ban” on peaceful assembly.<sup>85</sup> That submission should be rejected for two reasons. First, the premise of Mr. Hillier’s argument is incorrect, as the Gathering Limits were not a “complete ban” on peaceful assembly. Second, Mr. Hillier’s submissions are based on a misreading of *Ramsden*.

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<sup>80</sup> Application Judge at [para. 97](#).

<sup>81</sup> Application Judge at [para. 98](#).

<sup>82</sup> Application Judge at [para. 99](#).

<sup>83</sup> *Beaudoin v. British Columbia*, [2021 BCSC 512](#), aff’d [2022 BCCA 427](#) at [paras. 298, 301](#), leave to appeal to SCC refused, [40622](#) (10 August 2023); *Grandel v. Saskatchewan*, [2022 SKKB 209](#), aff’d [2024 SKCA 53](#) at [paras. 103-104](#); *Gateway Bible Baptist Church et al. v. Manitoba et al.*, [2021 MBQB 219](#), aff’d [2023 MBCA 56](#) at [paras. 84, 116](#), leave to appeal to SCC refused, [40903](#) (14 March 2024).

<sup>84</sup> *Trinity Bible* (ONCA) at [paras. 120-125](#).

<sup>85</sup> Factum of the Appellant at para. 35.

52. As the application judge noted, the Gathering Limits were subject to exceptions and were time limited.<sup>86</sup> Exceptions were made to permit small religious gatherings and to allow those living alone to gather with people from other households. Most importantly, the limits on outdoor gatherings were carefully tailored and regularly modified throughout the pandemic in response to the changing public health situation. As Dr. McKeown testified, “[t]he time periods with the lowest (or strictest) gathering limits corresponded to the time periods when the rate of SARS-CoV-2 transmission in the Ontario population and the burden on the Ontario healthcare system were at their highest levels.”<sup>87</sup> The Gathering Limits were in place only for so long as was necessary to reduce the burden on the healthcare system and provide sufficient time to administer vaccines to a higher percentage of the population. Once the public health situation improved, the Gathering Restrictions were lifted.

53. The application judge also correctly noted that the s. 1 analysis is focused on the societal impact of the law, not just the impact on the individual claimant.<sup>88</sup> As noted in *Hutterian Brethren*, the s. 1 analysis must look beyond the individual circumstances of the person challenging the law:

Laws of general application affect the general public, not just the claimants before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis. A law’s constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law’s impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court’s ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be

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<sup>86</sup> Application Judge at [para. 97](#).

<sup>87</sup> McKeown Affidavit, para. 58, RC, Vol 2, Tab 2, p. 402.

<sup>88</sup> Application Judge at [para. 98](#).



envisioned.<sup>89</sup>

54. None of the cases cited by Mr. Hillier involved a temporary restriction such as the one at issue here. The evidence supports the application judge’s finding that the gathering limits were a “tailored and balanced response to an urgent public health crisis.”<sup>90</sup>

55. In any event, contrary to Mr. Hillier’s submissions, *Ramsden* did not establish a separate test for a “complete ban” on a *Charter* protected activity. There is only one test under s. 1, which is the *Oakes* test. In *Ramsden*, the Court commented that a complete ban may be “more difficult to justify” under s. 1.<sup>91</sup> Those comments are entirely consistent with the contextual approach to s. 1 under *Oakes*, which considers “whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit.”<sup>92</sup> Nothing in *Ramsden* established a separate, more onerous test. Indeed, the Supreme Court of Canada in *Ford* expressly rejected such a categorical approach to s. 1, noting that “the distinction between the negation of a right or freedom and the limitation of it is not a sound basis for denying the application of s. 1 of the *Charter*.”<sup>93</sup>

56. Nothing in the application judge’s decision is inconsistent with *Ramsden*. The application judge considered the fact that the Gathering Limits temporarily prohibited in-person political protests, but noted that “the bluntness of the restrictions reflected the risk that was being faced by the province.”<sup>94</sup> He was not overly deferential to the government, as he recognized that “deference is not a ‘blank check’ allowing government to run rough shod over individual

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<sup>89</sup> *Hutterian Brethren* at [para. 69](#).

<sup>90</sup> Application Judge at [para. 99](#).

<sup>91</sup> *Ramsden v. Peterborough (City)*, [1993] 2 SCR 1084 at [pp. 1105-1106](#) [“*Ramsden*”].

<sup>92</sup> *Hutterian Brethren* at [para. 53](#).

<sup>93</sup> *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC) at [para. 66](#).

<sup>94</sup> Application Judge at [para. 98](#).

freedoms.”<sup>95</sup> After considering all the evidence, he held that Ontario had met its burden of justifying the Gathering Limits, noting that “I cannot envision that another path would have been equally effective, including a modified ban on outdoor gatherings.”<sup>96</sup> That finding is a factual one which is entitled to deference by this Court.

57. Furthermore, the circumstances in *Ramsden* are distinguishable. *Ramsden* involved a municipal by-law that prohibited posterage on any public property at all times. The Court found that the by-law was not minimally impairing, as it restricted expression more than was necessary to achieve the by-law’s purpose, which was to “avoid littering, aesthetic blight, traffic hazards, and hazards to persons engaged in the repair and maintenance of utility poles.”<sup>97</sup> That is very different from this case, which involves temporary public health measures that were in force only during the most severe phases of a public health crisis. The Gathering Limits cannot be assessed without considering the broader context of a global pandemic that was overburdening the healthcare system and threatening the health and lives of people across Ontario, circumstances that were not present in *Ramsden*. The application judge correctly found that *Trinity Bible* – and not *Ramsden* – was the relevant authority to guide his analysis.

#### **D. The Application Judge Did Not Uphold a “Hierarchy of Rights”**

58. Mr. Hillier’s third argument on appeal is that the application judge “erred in law in upholding a hierarchy of rights established by Ontario” through the Gathering Limits. This is how Mr. Hillier describes the fact that the Gathering Limits prohibited outdoor gatherings for political purposes while allowing certain religious gatherings.

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<sup>95</sup> Application Judge at [paras. 87, 89](#), citing *Trinity Bible* (ONCA) at [paras. 102-103](#).

<sup>96</sup> Application Judge at [para. 99](#).

<sup>97</sup> *Ramsden* at [pp. 1088, 1105](#).

59. This is a new argument on appeal which this Court should not entertain. As a general rule, appellate courts will not entertain new issues on appeal.<sup>98</sup> The application judge's reasons contained no analysis of a "hierarchy of rights" because Mr. Hillier did not make this argument below, and therefore this Court would have to consider this argument as a matter of first impression. There is no exception to the rule against new arguments on appeal for constitutional claims.<sup>99</sup>

60. There is no basis to depart from the general rule against entertaining new issues on appeal in this case. In Mr. Hillier's factum in the court below, he argued that the Gathering Limits were not minimally impairing – the issue addressed above – because political gatherings were prohibited while a variety of other activities were allowed. In making this argument, he referred to religious gatherings as well as exercises of Aboriginal or treaty rights, shopping at outdoor garden centers, indoor shopping for liquor and cannabis, and activities permitted by participants in professional sports leagues pursuant to plans approved by the Chief Medical Officer of Health.<sup>100</sup> He made no argument it was uniquely constitutionally impermissible to restrict political gatherings while allowing certain religious gatherings. In rejecting Mr. Hillier's minimal impairment arguments, the application judge referred collectively to religious services and shopping,<sup>101</sup> a further indication Mr. Hillier made no special argument about a "hierarchy" of *Charter*-protected activities. No explanation has been provided for why this new issue was not raised in the court below, nor has leave been sought to raise it here.

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<sup>98</sup> *York Condominium Corp. No. 221 v. Mazur*, 2024 ONCA 5 at [paras. 12-13](#).

<sup>99</sup> *Guindon v. Canada*, 2015 SCC 41 at [para. 22](#).

<sup>100</sup> Factum of the Applicant in the Ont Sup Ct at paras. 80-82, RC, Vol 2, Tab 5, pp. 824-825.

<sup>101</sup> Application Judge at [para. 97](#).

61. In any event, there is no constitutional requirement that a law must have a symmetrical impact on every *Charter*-protected activity in order to be reasonable under s. 1. The application judge did not endorse a “hierarchy of rights” in his reasons. Instead, he properly applied the *Oakes* test for whether the law was a reasonable limitation on the sole *Charter* right put forward by the Applicant: freedom of assembly. The authorities relied on by Mr. Hillier for the “hierarchy of rights” concept concern entirely unrelated contexts, such as the balancing of freedom of expression and the presumption of innocence in the *judicial* development of the common law of publication bans;<sup>102</sup> whether a trial judge must decide all *Charter* issues pleaded by a plaintiff;<sup>103</sup> and whether an accused had waived their right to a jury trial by not being diligent in pursuing such a trial.<sup>104</sup>

62. This Court’s reasoning in *Trinity Bible* confirms there is no such symmetry requirement in Canadian constitutional law. In that case, this Court rejected the argument that similar restrictions on religious gatherings “cannot be minimally impairing if they ban or significantly infringe on constitutionally protected activity while imposing less onerous restrictions on non-protected activity that represents a similar level of COVID-19 transmission risk” (emphasis added).<sup>105</sup>

63. The Court explicitly held that even in the absence of a distinction between these two types of activities based on transmission risk, it was open to the government under s. 1 of the *Charter* “to balance the objective of reducing the risk of COVID-19 transmission in congregate

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<sup>102</sup> *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at [877](#).

<sup>103</sup> *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at [para. 180](#).

<sup>104</sup> *R. v. Arreak*, 2000 CanLII 10246 (NU CJ) at [paras. 22-23](#).

<sup>105</sup> *Trinity Bible* (ONCA) at [para. 117](#).

settings with other objectives ... such as preserving economic activity and preserving other social benefits which that activity made possible.”<sup>106</sup>

64. If it is open to the government to restrict constitutionally protected activities while permitting activities that are not constitutionally protected, it must also be open to the government to restrict some constitutionally protected activities but not others. It cannot be that s. 1 of the *Charter* requires the government to ban outdoor religious gatherings for the sake of consistency with its approach to political assemblies. *Trinity Bible* is a complete answer Mr. Hillier’s argument.

65. Further, Ontario’s evidence establishes (1) the difference in risk of transmission between religious gatherings and other types of gatherings; and (2) the important objective served by allowing religious gatherings despite the risk that they posed.

66. On the first point, Dr. Hodge, a public health doctor with a Ph.D. in epidemiology, testified that “Most religious gatherings in most religious traditions involve a central organizing figure who may have authority, real or perceived, to direct the behaviour of adherents of the faith ... those people would direct that anybody wishing to attend the religious observance follow certain restrictions” while this leadership structure is “less the case with protest-type gatherings.”<sup>107</sup>

67. Mr. Hillier led no evidence to the contrary despite his personal involvement in numerous protests. Instead, he admitted under cross-examination that he encouraged his supporters not to wear masks or get vaccinated against COVID-19.<sup>108</sup> The overwhelming majority of the hundreds

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<sup>106</sup> *Trinity Bible* (ONCA) at [para. 118](#).

<sup>107</sup> Transcript of Cross-Examination of Dr. Matthew Hodge on April 4, 2023 at pp. 49-51, qq. 67-71, RC, Vol 2, Tab 3, pp. 787-780 [“Hodge Cross”].

<sup>108</sup> Hillier Cross at pp. 25-26, 29-30, qq. 78-80, 97-100, RC, Vol 2, Tab 4, pp. 792-795.

of people at the outdoor gathering he attended in Stratford, Ontario on April 26, 2021 were not wearing masks and were not distanced from each other.<sup>109</sup> This is proof that, just as Dr. Hodge opined, these political protests did not have any central authority figure who effectively directed compliance with public health restrictions. On the contrary, what authority figures there were actively undermined such compliance.

68. On the second point, Dr. McKeown gave evidence on the objective served by imposing less severe restrictions on religious gatherings:

There are several reasons why Ontario imposed slightly different measures for religious gatherings. Among other things, the higher capacity limits allowed a small number of people who may not be in the same household to produce and disseminate virtual religious services to a wider community. A capacity limit of 10 people permitted a few individuals (such as readers, cantors, videographers, etc.) to assist officiants in conducting the online services that remained permitted. Ontario recognized that religious services can be a source of support, comfort and guidance for the communities they serve. Religious leaders can also provide pastoral and spiritual support during public health emergencies and other health challenges. The public health measures for religious gatherings attempted to allow religious services to continue to the extent possible so that members of religious communities could access the benefits of those services, but with strict capacity limits that mitigate the spread of COVID-19.<sup>110</sup>

69. These are important objectives which the government was entitled to pursue, as recognized by this Court in *Trinity Bible*. The *Charter* does not require that the government deprive the people of Ontario of sources of support, comfort and guidance as a pre-condition to imposing public health restrictions during a global pandemic.

#### **PART IV - ADDITIONAL ISSUES**

70. Ontario raises no additional issues on the appeal.

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<sup>109</sup> Hillier Cross at pp. 34-35, qq. 109-116, RC, Vol 2, Tab 4, pp. 797-798.

<sup>110</sup> McKeown Affidavit at para. 66, RC, Vol 2, Tab 2, p. 405.

**PART V – ORDER SOUGHT**

71. Ontario requests that the appeal be dismissed. Ontario does not seek costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

This 22<sup>nd</sup> day of May 2024

Two handwritten signatures in blue ink. The signature on the left is "Ryan Cookson" and the signature on the right is "Padraic Ryan".

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Ryan Cookson and Padraic Ryan  
Of counsel for the Respondent, the Attorney General of Ontario

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

**Randy Hillier**

Appellant  
(Applicant)

-and-

**His Majesty the King in Right of the Province of Ontario**

Respondent  
(Respondent)

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**CERTIFICATE**

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1. I, *Padraic Ryan*, solicitor of the Respondent's, certify the no order under subrule 61.09(2) is required.
2. The Respondent, His Majesty the King in Right of the Province of Ontario, estimates that 50 minutes will be required for the Respondent's argument, not including reply.
3. I certify that the factum complies with subrule (5.1).
4. The number of words contained in Parts I to V is 8,607.
5. By signing this certificate, I confirm that I am satisfied as to the authenticity of every authority listed in Schedule A.

Date: May 22, 2024



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Padraic Ryan  
Ministry of the Attorney General  
Constitutional Law Branch  
Civil Law Division

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████████████████████





**SCHEDULE A – LIST OF AUTHORITIES****CASES**

1. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#)
2. *Beaudoin v. British Columbia (Attorney General)*, [2022 BCCA 427](#)
3. *Beaudoin v. British Columbia*, [2021 BCSC 512](#)
4. *Brent Smith, et al. v. Attorney General of British Columbia, et al.*, [2023 CanLII 72130 \(SCC\)](#)
5. *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007 SCC 30](#)
6. *Canada (Director of Investigation and Research) v. Southam Inc.*, [\[1997\] 1 SCR 748](#)
7. *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023 SCC 17](#)
8. *Dagenais v. Canadian Broadcasting Corp.*, [\[1994\] 3 SCR 835](#)
9. *Ford v. Quebec (Attorney General)*, [1988 CanLII 19 \(SCC\)](#)
10. *Gateway Bible Baptist Church et al. v. Manitoba et al.*, [2021 MBQB 219](#)
11. *Gateway Bible Baptist Church et al. v. Manitoba et al.*, [2023 MBCA 56](#)
12. *Gateway Bible Baptist Church, et al. v. His Majesty the King in Right of the Province of Manitoba, et al.*, [2024 CanLII 20245 \(SCC\)](#)
13. *Grandel v. Government of Saskatchewan*, [2024 SKCA 53](#)
14. *Grandel v. Saskatchewan*, [2022 SKKB 209](#)
15. *Guindon v. Canada*, [2015 SCC 41](#)
16. *Hillier v. His Majesty the King in Right of The Province of Ontario*, [2023 ONSC 6611](#)
17. *Housen v. Nikolaisen*, [2002 SCC 33](#)
18. *Ontario (Attorney General) v. Trinity Bible Chapel*, [2023 ONCA 134](#).
19. *Ontario v. Trinity Bible Chapel et al.*, [2022 ONSC 1344](#)
20. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995 CanLII 86 \(SCC\)](#)
21. *R. v. Arreak*, [2000 CanLII 10246 \(NU CJ\)](#)

22. *Ramsden v. Peterborough (City)*, [\[1993\] 2 SCR 1084](#)
23. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995 CanLII 64 \(SCC\)](#)
24. *Trinity Bible Chapel, et al. v. Attorney General of Ontario, et al.*, [2023 CanLII 72135 \(SCC\)](#)
25. *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, [2023 ONCA 139](#)
26. *York Condominium Corp. No. 221 v. Mazur*, [2024 ONCA 5](#)

## SCHEDULE B – LEGISLATION

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

### **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**

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.

**[Reopening Ontario \(A Flexible Response to COVID-19\) Act, 2020, S.O. 2020, c. 17](#)**

**Orders continued**

2 (1) The orders made under section 7.0.2 or 7.1 of the Emergency Management and Civil Protection Act that have not been revoked as of the day this subsection comes into force are continued as valid and effective orders under this Act and cease to be orders under the Emergency Management and Civil Protection Act.

Exception

(2) Subsection (1) does not apply to the order filed as Ontario Regulation 106/20 (Order Made Under the Act — Extensions and Renewals of Orders).

Clarification

(3) For greater certainty, an order that is in force is continued under subsection (1) even if, on the day that subsection comes into force, the order does not apply to any area of the Province.

**Power to amend orders**

4 (1) The Lieutenant Governor in Council may, by order,

(a) subject to subsections (2) and (5), amend a continued section 7.0.2 order in a way that would have been authorized under section 7.0.2 of the Emergency Management and Civil Protection Act if the COVID-19 declared emergency were still in effect and references in that section to the emergency were references to the COVID-19 pandemic and its effects;

(b) amend an order continued under section 2 to address transitional matters relating to the termination of the COVID-19 declared emergency, the enactment of this Act or the continuation of orders under section 2.

**Limitation on amendments**

(2) An amendment may be made under clause (1) (a) only if,

(a) the amendment relates to one or more of the subject matters listed in subsection (3); or

(b) the amendment requires persons to act in compliance with any advice, recommendation or instruction of a public health official.

**Same**

(3) The subject matters referred to in clause (2) (a) are the following:

1. Closing or regulating any place, whether public or private, including any business, office, school, hospital or other establishment or institution.
2. Providing for rules or practices that relate to workplaces or the management of workplaces, or authorizing the person responsible for a workplace to identify staffing priorities or to develop, modify and implement redeployment plans or rules or practices that relate to the workplace or the management of the workplace, including credentialing processes in a health care facility.
3. Prohibiting or regulating gatherings or organized public events.

**Definition of “credentialing process”**

(4) In paragraph 2 of subsection (3),

“credentialing process” means the activities, processes, procedures and proceedings for appointing and reappointing health care staff and determining the nature and scope of privileges assigned to them.

**Orders that may not be amended**

(5) Amendments may not be made under clause (1) (a) to the following orders:

1. Ontario Regulation 75/20 (Drinking Water Systems and Sewage Works).
2. Ontario Regulation 76/20 (Electronic Service).
3. Ontario Regulation 80/20 (Electricity Price for RPP Consumers).
4. Ontario Regulation 114/20 (Enforcement of Orders).
5. Ontario Regulation 120/20 (Order Under Subsection 7.0.2 (4) of the Act — Access to COVID-19 Status Information by Specified Persons).
6. Ontario Regulation 129/20 (Signatures in Wills and Powers of Attorney).
7. Ontario Regulation 132/20 (Use of Force and Firearms in Policing Services).
8. Ontario Regulation 141/20 (Temporary Health or Residential Facilities).
9. Ontario Regulation 190/20 (Access to Personal Health Information by Means of the Electronic Health Record).
10. Ontario Regulation 192/20 (Certain Persons Enabled to Issue Medical Certificates of Death).

11. Ontario Regulation 210/20 (Management of Long-Term Care Homes in Outbreak).
12. Ontario Regulation 240/20 (Management of Retirement Homes in Outbreak).
13. Ontario Regulation 241/20 (Special Rules Re Temporary Pandemic Pay).
14. Ontario Regulation 345/20 (Patios).

**Amendments may change requirements, extend application**

(6) For greater certainty, an amendment made under clause (1) (a) may do the following, subject to subsection (2):

1. Impose more onerous or different requirements, including in different parts of the Province.
2. Extend the application of the order being amended, including the geographic scope of the order and the persons it applies to.

**Amendments may be retroactive**

(7) An amendment, if it so provides, may be retroactive to a date specified in the amending order that is on or after the day subsection (1) came into force.

**Regulations to define “public health official”**

(8) The Lieutenant Governor in Council may make regulations defining “public health official” for the purposes of clause (2) (b).

**Termination of COVID-19 declared emergency**

17 Unless it has been terminated before this section comes into force, the COVID-19 declared emergency is terminated and Ontario Regulation 50/20 (Declaration of Emergency) is revoked.

***Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9***

**Declaration of emergency**

7.0.1 (1) Subject to subsection (3), the Lieutenant Governor in Council or the Premier, if in the Premier's opinion the urgency of the situation requires that an order be made immediately, may by order declare that an emergency exists throughout Ontario or in any part of Ontario. 2006, c. 13, s. 1 (4).



**O. Reg 363/20 (Stages of Reopening) as of April 1-2, 2021**

**Stages**

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

**Interpretation**

3. In this Order,

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

**SCHEDULE 1  
STAGE 1 AREAS**

**Shutdown Zone of Stage 1**

1. No areas are in the Shutdown Zone of Stage 1.

**Grey Zone of Stage 1**

2. The following areas are in the Grey Zone of Stage 1:

0.1 City of Hamilton Health Unit.

1. City of Toronto Health Unit.

1.1 Lambton Health Unit.

2. Peel Regional Health Unit.

2.1 Sudbury and District Health Unit.

3. Thunder Bay District Health Unit.

**SCHEDULE 1  
STAGE 1 AREAS**

**Shutdown Zone of Stage 1**

1. The following areas are in the Shutdown Zone of Stage 1:

1. Brant County Health Unit.
2. Chatham-Kent Health Unit.
3. City of Hamilton Health Unit.
4. City of Ottawa Health Unit.
5. City of Toronto Health Unit.
6. The District of Algoma Health Unit.
7. Durham Regional Health Unit.
8. The Eastern Ontario Health Unit.
9. Grey Bruce Health Unit.
10. Haldimand-Norfolk Health Unit.
11. Haliburton, Kawartha, Pine Ridge District Health Unit.
12. Halton Regional Health Unit.
13. Hastings and Prince Edward Counties Health Unit.
14. Huron Perth Health Unit.
15. Kingston, Frontenac and Lennox and Addington Health Unit.
16. Lambton Health Unit.
17. Leeds, Grenville and Lanark District Health Unit.
18. Middlesex-London Health Unit.
19. Niagara Regional Area Health Unit.
20. North Bay Parry Sound District Health Unit.
21. Northwestern Health Unit.
22. Oxford Elgin St. Thomas Health Unit.
23. Peel Regional Health Unit.

24. Peterborough County — City Health Unit.
25. Porcupine Health Unit.
26. Renfrew County and District Health Unit.
27. Simcoe Muskoka District Health Unit.
28. Sudbury and District Health Unit.
29. Thunder Bay District Health Unit.
30. Timiskaming Health Unit.
31. Waterloo Health Unit.
32. Wellington-Dufferin-Guelph Health Unit.
33. Windsor-Essex County Health Unit.
34. York Regional Health Unit.

#### Grey Zone of Stage 1

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

### SCHEDULE 2 STAGE 2 AREAS

#### **Red Zone of Stage 2**

1. The following areas are in the Red Zone of Stage 2:
  1. Brant County Health Unit.
  2. Chatham-Kent Health Unit.
  3. Revoked: O. Reg. 224/21, s. 2 (1).
  4. City of Ottawa Health Unit.
  5. Durham Regional Health Unit.
    - 5.1 The Eastern Ontario Health Unit.

6. Halton Regional Health Unit.
7. Leeds, Grenville and Lanark District Health Unit.
  - 7.1 Middlesex-London Health Unit.
8. Niagara Regional Area Health Unit.
9. Northwestern Health Unit.
10. Peterborough County — City Health Unit.
11. Simcoe Muskoka District Health Unit.
  - 11.1 Timiskaming Health Unit.
12. Waterloo Health Unit.
13. Windsor-Essex County Health Unit.
14. York Regional Health Unit.

SCHEDULE 2  
STAGE 2 AREAS

**Red Zone of Stage 2**

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

SCHEDULE 3  
STAGE 3 AREAS

**Green Zone of Stage 3**

1. The following areas are in the Green Zone of Stage 3:

1. Grey Bruce Health Unit.
2. Hastings and Prince Edward Counties Health Unit.
3. Revoked: O. Reg. 215/21, s. 2 (1).
4. Revoked: O. Reg. 190/21, s. 3 (1).

**Yellow Zone of Stage 3**

2. The following areas are in the Yellow Zone of Stage 3:

1. The District of Algoma Health Unit.
2. Haliburton, Kawartha, Pine Ridge District Health Unit.
3. Huron Perth Health Unit.
4. Kingston, Frontenac and Lennox and Addington Health Unit.
5. North Bay Parry Sound District Health Unit.
6. Porcupine Health Unit.
7. Renfrew County and District Health Unit.
8. Revoked: O. Reg. 220/21, s. 2.

**Orange Zone of Stage 3**

3. The following areas are in the Orange Zone of Stage 3:

1. Revoked: O. Reg. 224/21, s. 3.
2. Haldimand-Norfolk Health Unit.
3. Revoked: O. Reg. 225/21, s. 2.
4. Oxford Elgin St. Thomas Health Unit.
5. Wellington-Dufferin-Guelph Health Unit.

**SCHEDULE 3  
STAGE 3 AREAS**

**Green Zone of Stage 3**

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

**Yellow Zone of Stage 3**

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

**Orange Zone of Stage 3**

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

**O. Reg 240/21, amending O. Reg 363/20 (Stages of Reopening)**

**1. Schedules 1, 2 and 3 to Ontario Regulation 363/20 are revoked and the following substituted:**

SCHEDULE 1  
STAGE 1 AREAS

**Shutdown Zone of Stage 1**

1. The following areas are in the Shutdown Zone of Stage 1:

1. Brant County Health Unit.
2. Chatham-Kent Health Unit.
3. City of Hamilton Health Unit.
4. City of Ottawa Health Unit.
5. City of Toronto Health Unit.
6. The District of Algoma Health Unit.
7. Durham Regional Health Unit.
8. The Eastern Ontario Health Unit.
9. Grey Bruce Health Unit.
10. Haldimand-Norfolk Health Unit.
11. Haliburton, Kawartha, Pine Ridge District Health Unit.
12. Halton Regional Health Unit.
13. Hastings and Prince Edward Counties Health Unit.
14. Huron Perth Health Unit.
15. Kingston, Frontenac and Lennox and Addington Health Unit.
16. Lambton Health Unit.
17. Leeds, Grenville and Lanark District Health Unit.
18. Middlesex-London Health Unit.

19. Niagara Regional Area Health Unit.
20. North Bay Parry Sound District Health Unit.
21. Northwestern Health Unit.
22. Oxford Elgin St. Thomas Health Unit.
23. Peel Regional Health Unit.
24. Peterborough County — City Health Unit.
25. Porcupine Health Unit.
26. Renfrew County and District Health Unit.
27. Simcoe Muskoka District Health Unit.
28. Sudbury and District Health Unit.
29. Thunder Bay District Health Unit.
30. Timiskaming Health Unit.
31. Waterloo Health Unit.
32. Wellington-Dufferin-Guelph Health Unit.
33. Windsor-Essex County Health Unit.
34. York Regional Health Unit.

**Grey Zone of Stage 1**

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

**SCHEDULE 2  
STAGE 2 AREAS****Red Zone of Stage 2**

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

**SCHEDULE 3  
STAGE 3 AREAS****Green Zone of Stage 3**

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

**Yellow Zone of Stage 3**

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

**Orange Zone of Stage 3**

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

**Commencement**

**2. This Regulation comes into force on the later of April 3, 2021 and the day it is filed.**



**O. Reg 82/20 (Rules for Areas in Stage 1) as of April 3-6, 2021**

SCHEDULE 4

ORGANIZED PUBLIC EVENTS, CERTAIN GATHERINGS IN SHUTDOWN ZONE

**Gatherings, Stage 1 areas**

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

...

(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

...

**O. Reg. 295/21 (Rules for Areas in Stage 1), amending O. Reg 82/20 (Rules for Areas in Stage 1)**

**2. Clause 1 (1) (c) of Schedule 4 to the Regulation is amended by striking out “of more than 5 people”.**

**O. Reg 344/21 (Rules for Areas in Stage 1), amending O. Reg 82/20 (Rules for Areas in Stage 1)**

**3. Clause 1 (1) (c) of Schedule 4 to the Regulation is revoked and the following substituted:**

(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

**O. Reg 82/20 (Rules for Areas in Stage 1) as of April 17-18, 2021**

SCHEDULE 4  
ORGANIZED PUBLIC EVENTS, CERTAIN GATHERINGS IN SHUTDOWN ZONE

**Gatherings, Stage 1 areas**

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

**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.

**O. Reg 441/21 (Stages of Reopening), amending O. Reg 363/20 (Stages of Reopening)**

**1. The English version of the title to Ontario Regulation 363/20 is revoked and the following substituted:**

**STEPS OF REOPENING**

**2. Section 1 of the Regulation is revoked and the following substituted:**

**Steps**

1. The areas listed in Schedule 1 are at Step 1 of reopening.

**3. Schedule 1 to the Regulation is revoked and the following substituted:**

**SCHEDULE 1**

**AREAS IN THE SHUTDOWN ZONE, AREAS AT STEP 1**

**Shutdown Zone**

1. No areas are in the Shutdown Zone.

**Step 1**

2. The following areas are at Step 1:

1. Brant County Health Unit.
2. Chatham-Kent Health Unit.
3. City of Hamilton Health Unit.
4. City of Ottawa Health Unit.
5. City of Toronto Health Unit.
6. The District of Algoma Health Unit.
7. Durham Regional Health Unit.
8. The Eastern Ontario Health Unit.
9. Grey Bruce Health Unit.
10. Haldimand-Norfolk Health Unit.
11. Haliburton, Kawartha, Pine Ridge District Health Unit.

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

**4. Schedules 2 and 3 to the Regulation are revoked.**

**Commencement**

**5. This Regulation comes into force on the later of June 11, 2021 and the day this Regulation is filed.**

**O. Reg 295/21 (Rules for Areas in Stage 1), amending O. Reg 82/20 (Rules for Areas in Stage 1)**

**1. Section 4 of Schedule 3 to Ontario Regulation 82/20 is amended by adding the following subsections:**

(3.1) A group of persons may use an outdoor recreational amenity together only if they are all members of the same household or one other person from outside that household who lives alone or a caregiver for any member of the household.

(3.2) Clause (3) (a) does not require the persons described in subsection (3.1) to maintain a physical distance of at least two metres from each other while in the amenity.

**2. Clause 1 (1) (c) of Schedule 4 to the Regulation is amended by striking out “of more than 5 people”.**

**Commencement**

3. This Regulation comes into force on the later of April 17, 2021 and the day it is filed.



**O. Reg 344/21 (Rules for Areas in Stage 1), amending O. Reg 82/20 (Rules for Areas in Stage 1)**

- 3. Clause 1 (1) (c) of Schedule 4 to the Regulation is revoked and the following substituted:**
- (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

**O. Reg 168/22 (Revoking Various Regulations)**

**Revocations**

**1. The following regulations are revoked:**

- 1. Ontario Regulation 82/20.**
- 2. Ontario Regulation 240/20.**
- 3. Ontario Regulation 263/20.**

**O. Reg 264/21 (Declaration of Emergency)**

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

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

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

**O. Reg 265/21 (Stay-At-Home Order)****Terms of Order**

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

**Application**

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

**SCHEDULE 1****Requirement to remain in residence**

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

**Work, school and child care**

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

**Obtaining goods and services**

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

11. Obtaining government services, social services and supports, mental health support services or addictions support services.

**Assisting others**

12. Delivering goods or providing care or other support or assistance to an individual who requires support or assistance, or receiving such support or assistance, including,

- i. providing care for an individual in a congregate care setting, and
- ii. accompanying an individual who requires assistance leaving their residence for any purpose permitted under this Order.

13. Taking a child to the child's parent or guardian or to the parent or guardian's residence.

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

**Health, safety and legal purposes**

15. Doing anything that is necessary to respond to or avoid an imminent risk to the health or safety of an individual, including,

- i. protecting oneself or others from domestic violence,
- ii. leaving or assisting someone in leaving unsafe living conditions, and
- iii. seeking emergency assistance.

16. Exercising, including,

- i. walking or moving around outdoors using an assistive mobility device, or
- ii. using an outdoor recreational amenity that is permitted to be open.

17. Attending a place as required by law or in relation to the administration of justice.

18. Exercising an Aboriginal or treaty right as recognized and affirmed by section 35 of the Constitution Act, 1982.

**Multiple residences and moving**

19. Travelling to another residence of the individual if,

- i. the individual intends to be at the residence for less than 24 hours and is attending for one of the purposes set out in this Order, or
- ii. the individual intends to reside at the residence for at least 14 days.

20. Travelling between the homes of parents, guardians or caregivers, if the individual is under their care.
21. Making arrangements to purchase or sell a residence or to begin or end a residential lease.
22. Moving residences.

**Travel**

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

**Gatherings**

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

**Animals**

26. Obtaining goods or services that are necessary for the health or safety of an animal, including obtaining veterinary services.
27. Obtaining animal food or supplies.
28. Doing anything that is necessary to respond to or avoid an imminent risk to the health or safety of an animal, including protecting an animal from suffering abuse.
29. Walking or otherwise exercising an animal.

(2) Despite subsection (1), no person shall attend a business or place that is required by law to be closed, except to the extent that temporary access to the closed business or place is permitted by law.

(3) This Order does not apply to individuals who are homeless.

(4) If this Order allows an individual to leave their residence to go to a place, it also authorizes them to return to their residence from that place.

(5) The requirement in subsection (1) to remain at an individual's residence does not prevent the individual from accessing outdoor parts of their residence, such as a backyard, or accessing indoor or outdoor common areas of the communal residences in which they reside that are open, including lobbies.

(6) For greater certainty, nothing in this Order permits a business or place to be open if it is required by law to be closed.

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

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

**O. Reg 381/21 (Extensions of Orders), amending O. Reg 25/21 (Extensions of Orders)**

**1. The Table to section 1 of Schedule 1 to Ontario Regulation 25/21 is revoked and the following substituted:**

TABLE

Item	Column 1 Order in Council and date made	Column 2 Previously applicable revocation date	Column 3 Current revocation date
1.	Order in Council filed as O. Reg. 8/21 (Enforcement of COVID-19 Measures), made on January 12, 2021	June 2, 2021	June 16, 2021
2.	Order in Council filed as O. Reg. 55/21 (Compliance Orders for Retirement Homes), made on February 5, 2021	June 2, 2021	June 16, 2021
3.	Order in Council filed as O. Reg. 271/21 (Work Redeployment for Local Health Integration Networks and Ontario Health), made on April 9, 2021	June 2, 2021	June 16, 2021
4.	Order in Council filed as O. Reg. 272/21 (Transfer of Hospital Patients), made on April 9, 2021	June 2, 2021	June 16, 2021
5.	Order in Council filed as O. Reg. 288/21 (Closure of Public Lands for Recreational Camping), made on April 15, 2021	June 2, 2021	June 16, 2021
6.	Order in Council filed as O. Reg. 293/21 (Persons Entering Ontario From Manitoba or Quebec), made on April 16, 2021	June 2, 2021	June 16, 2021
7.	Order in Council filed as O. Reg. 304/21 (Work Redeployment for Independent Health Facilities), made on April 21, 2021	June 2, 2021	June 16, 2021
8.	Order in Council filed as O. Reg. 305/21 (Regulated Health Professionals), made on April 21, 2021	June 2, 2021	June 16, 2021
9.	Order in Council filed as O. Reg. 317/21 (Agreements Between Health Service Providers and Retirement Homes), made on April 23, 2021	June 2, 2021	June 16, 2021



**O. Reg 454/21 (Revoking Various Regulations)**

**Revocations**

**1. The following regulations are revoked:**

- 1. Ontario Regulation 264/21.**
- 2. Ontario Regulation 291/21.**

**RANDY HILLIER v HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF  
ONTARIO**

**Court File No.: COA-23-CV-1377**

**COURT OF APPEAL FOR ONTARIO**  
Proceeding commenced at Toronto

**FACTUM OF THE RESPONDENT**

**THE ATTORNEY GENERAL  
OF ONTARIO**

Civil Law Division  
Constitutional Law Branch

[REDACTED]  
[REDACTED]

Padraic Ryan / Ryan Cookson  
LSO Nos. 61687J/ 61448D

[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]

Counsel for the Respondent