

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE ATTORNEY GENERAL OF ONTARIO

Applicant (Respondent on appeal)

-and-

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

Respondents (Appellants)

A N D B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Applicant (Respondent on appeal)

-and-

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

Respondents (Appellants)

**FACTUM OF THE RESPONDENT,
THE ATTORNEY GENERAL OF ONTARIO**

THE ATTORNEY GENERAL OF ONTARIO

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**AND TO: THE ASSOCIATION FOR REFORMED
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PART I – OVERVIEW

1. Beginning in March 2020, Ontario was faced with an unprecedented public health emergency caused by COVID-19, a highly contagious and deadly disease. In response, Ontario implemented tailored, time-limited public health measures to stop the spread of the virus and prevent the healthcare system from becoming overwhelmed.
2. A critical component of Ontario’s pandemic response involved placing temporary capacity limits on gatherings involving a “religious service, rite or ceremony” (“**Religious Gatherings**”). Like other settings where people gather in close contact for extended periods of time, Religious Gatherings posed a high risk for COVID-19 transmission and were prime candidates for outbreaks. The capacity limits helped reduce community spread, decrease healthcare system burden, and save lives.
3. The appellants are two churches and their leadership. Rather than comply with public health rules, the appellants flouted them. They held multiple gatherings that far exceeded the applicable capacity limits and refused to adhere to masking and distancing requirements. Multiple injunctions were issued to stop this behaviour. None succeeded and the appellants were repeatedly found in contempt. The appellants sought to set aside the injunctions on the basis that the capacity limits infringed ss. 2(a)-(d) of the *Charter*.
4. The motion judge dismissed the appellants’ motion, finding that the Religious Gathering limits infringed the right to freedom of religion under s. 2(a), but were justified under s. 1. She held that the Religious Gathering limits were “supported by sound medical opinion” and were “eminently reasonable means of achieving public protection during the throes of a deadly pandemic.”¹

¹ *Ontario v Trinity Bible Chapel et al*, 2022 ONSC 1344 at [para 157](#) [*Trinity Bible*].

5. The appeal of the motion judge’s order should be dismissed. While the appellants have framed their appeal by reference to various alleged errors committed by the motion judge, the substance of the appellants’ position is that this Court should re-weigh the evidence and substitute its findings for those of the motion judge. That is not the proper role of this Court on appeal. As the Supreme Court of Canada recently noted, “[a]n appeal is not a retrial. Nor is it licence for an appellate court to review the evidence afresh.”² The motion judge’s findings of fact are entitled to deference and should not be overturned absent palpable and overriding error.

6. There is no basis to find that the motion judge committed any palpable and overriding error. There was ample evidence to support her findings, including from multiple experts in public health, emergency medicine, and infectious diseases. Contrary to the appellants’ assertions, all of that evidence was properly admissible. The motion judge conducted a thorough review of the evidence, applied the correct legal principles, and provided comprehensive reasons to support her findings. There is no reason to disturb those findings on appeal. The appeal should be dismissed.

PART II – SUMMARY OF THE FACTS

A. The Public Health Emergency Caused by COVID-19

7. Starting in March 2020, Ontario experienced a public health emergency caused by COVID-19.³ COVID-19 has killed over 30,000 people in Canada and over 10,000 people in Ontario alone, despite stringent public health measures.⁴

² *Barendregt v Grebliunas*, 2022 SCC 22 at [para 1](#).

³ Affidavit of Drs. Karim Ali and Zain Chagla affirmed July 5, 2021 at Ex “A,” para 3(a) [“Ali and Chagla Report”], Respondent’s Compendium at Tab 4, p 134 [“RC”].

⁴ Cross-Examination of Dr. Zain Chagla dated December 14, 2021 at Ex “F” [“Chagla Cross”], RC at Tab 7, p 267; see also the Affidavit of Dr. Matthew Hodge affirmed July 2, 2021 at para 12 [“Hodge Affidavit”], RC Tab 5, p 149.

8. COVID-19 can vary widely in its symptoms and outcomes, ranging from mild or no symptoms to hospitalization and death.⁵ Older people and those with certain medical conditions, such as heart disease, are at much higher risk of severe illness, but healthy people of any age can develop serious and even fatal complications.⁶ Some people develop long-term symptoms which are still not well understood.⁷

9. The highly transmissible nature of COVID-19 means that, without public health interventions, the virus could spread throughout the population very quickly. Even if only a small percentage of individuals who contract COVID-19 develop serious illness, a rapid increase in cases can quickly lead to thousands of patients being admitted to hospitals and intensive care units (“ICUs”), overwhelming the healthcare system.⁸

10. Overwhelming the healthcare system jeopardizes patient care, leading to greater morbidity and death, including for patients without COVID-19.⁹ Once overwhelmed, the healthcare system would face a prolonged recovery period, as the diversion of resources to COVID-19 patients creates a backlog of other medical procedures. As one of Ontario’s expert witnesses noted, in an overwhelmed healthcare system, “the harms

⁵ Hodge Affidavit at para 11, RC Tab 5, p 148.

⁶ Affidavit of Dr. David McKeown affirmed July 5, 2021 at Ex “KK” [“McKeown Affidavit”], RC Tab 6, pp 217, 223; Cross-Examination of Dr. David McKeown dated November 19, 2021 at p 18, q 61 [“McKeown Cross”], RC Tab 9, p 304; Cross-Examination of Dr. Richard Schabas dated December 10, 2021 at p 47, qq 121-122 and Ex 4, p 24 [“Schabas Cross”], RC Tab 10, p 326; Cross-Examination of Dr. Thomas Warren dated December 15, 2021 at p. 13, qq. 41-43 [“Warren Cross”], RC Tab 11, p 332.

⁷ McKeown Cross at p 115, q 378, RC Tab 9, p 310.

⁸ McKeown Affidavit at paras 75-76, RC Tab 6, p 201; Hodge Affidavit at para 16, RC Tab 5, p 151; Chagla Cross at p 25, q 52, RC Tab 7, p 258.

⁹ Hodge Affidavit at para 16, RC Tab 5, p 151; McKeown Affidavit at para 75, RC Tab 6, p 201.

caused by COVID-19 would be compounded with additional preventable deaths.”¹⁰

B. Ontario’s Public Health Measures

11. In March 2020, Ontario declared a state of emergency and began to implement public health measures to reduce the risk of COVID-19 transmission and prevent Ontario’s healthcare system from becoming overwhelmed.¹¹ The public health measures applied to businesses, organizations and events throughout the province.

12. One of the public health measures implemented by Ontario was placing capacity limits on in-person gatherings. Large gatherings present an especially high risk of COVID-19 transmission.¹² The primary method of COVID-19 transmission is by direct contact with respiratory droplets or aerosols. Transmission mainly occurs as a result of close contact of two metres or less, although it can occur over longer distances.¹³ The longer people gather in the same place, the more likely transmission is to occur.¹⁴

13. Individuals infected at a gathering often transmit the virus to other household members. As a result, large gatherings of people from different households significantly increase the risk of widespread transmission throughout the population.¹⁵

14. COVID-19 can be transmitted both indoors and outdoors, but transmission risk is higher indoors.¹⁶ Being outdoors reduces, but does not eliminate, transmission risk

¹⁰ Hodge Affidavit at para 16, RC Tab 5, p 151.

¹¹ McKeown Affidavit at para 4, RC Tab 6, p 173; *Trinity Bible, supra* at [para 22](#).

¹² McKeown Affidavit at para 64, RC Tab 6, pp 197-98.

¹³ McKeown Affidavit at para 62, RC Tab 6, p 197; Hodge Affidavit at para 18, RC Tab 5, p 152; Ali and Chagla Report at paras 4(a) and (c), RC Tab 4, pp 135-36.

¹⁴ McKeown Affidavit at para 63, RC Tab 6, p 197; Hodge Affidavit at paras 21 and 24, RC Tab 5, pp 153, 154-55; *Trinity Bible, supra* at [paras 43-44](#).

¹⁵ McKeown Affidavit at para 64, RC Tab 6, pp 197-98; Hodge Affidavit at paras 26 and 37, RC Tab 5, pp 155, 159-60.

¹⁶ McKeown Affidavit at paras 63-64, RC Tab 6, pp 197-98; Hodge Affidavit at para 19, RC Tab 5, pp 152-53; Chagla Cross at p 44, q 119, RC Tab 7, p 260; Warren Cross at p 90, q 308, RC Tab 11, p 333; Schabas Cross at p 29, qq 83-84, RC Tab 10, p 314.

because it provides additional ventilation that dilutes infectious droplets.¹⁷

15. Ontario also implemented other public health measures, such as masking and physical distancing requirements. Wearing masks helps reduce, but not eliminate, transmission risk as there is a high degree of variability in the effectiveness of different masks.¹⁸ Similarly, physical distancing can help reduce spread of COVID-19, but transmission can still occur over longer distances, particularly when there is poor ventilation. Furthermore, the efficacy of mitigation measures like masking and physical distance is “highly dependent on the degree to which participants strictly and uniformly adhere to those mandates,” which does not always occur.¹⁹

C. The Capacity Limits for Religious Gatherings

16. One of the types of gatherings subject to capacity limits were Religious Gatherings.²⁰ Religious Gatherings typically involve large gatherings of people from different households who arrive and depart at the same time and spend prolonged periods of time together in the same physical space. That is precisely the scenario that has been shown to increase the risk of COVID-19 transmission. The risk is especially high if physical distancing is not strictly observed, if the services are held indoors or in poorly ventilated areas, or if masks are not worn consistently or correctly.²¹

17. In addition, religious services are often associated with behaviours, such as singing, chanting or praying out loud, that may cause respiratory droplets and aerosols to travel longer distances, which increases the risk of COVID-19 transmission. For

¹⁷ McKeown Cross at p 107, q 348, RC Tab 9, p 307; *Trinity Bible, supra* at [para 45](#).

¹⁸ McKeown Affidavit at paras 67-70, RC Tab 6, pp 198-99.

¹⁹ McKeown Affidavit at paras 69 and 73, RC Tab 6, pp 199, 200.

²⁰ McKeown Affidavit at paras 90-91, RC Tab 6, pp 206-08.

²¹ McKeown Affidavit at paras 82-86, RC Tab 6, pp 203-05; *Trinity Bible, supra* at [paras 153-154](#).

example, several studies have shown that singing likely contributed to outbreaks of COVID-19 among church attendees.²² Religious services are also typically gatherings of families and friends in the same community who know each other well and will be tempted to socialize with each other, increasing the risk of close or prolonged contact.²³

18. The risk of transmission at a Religious Gathering is not confined to those who attend those gatherings. If someone is infected with COVID-19 at a religious service, it is very likely that he or she will transmit the virus to other members of his or her household who, in turn, may transmit COVID-19 to others in the community.²⁴

19. As noted above, masks and physical distancing can help reduce the risk of COVID-19 transmission at Religious Gatherings but are insufficient to stop the spread of the virus. Similarly, holding gatherings outdoors can reduce the risk of transmission of the virus, but outdoor transmission can still occur, especially in large gatherings with inconsistent adherence to mask or physical distancing requirements.²⁵

D. The Gathering Limits Were Regularly Modified and Eventually Repealed

20. The Religious Gathering limits – like all of Ontario’s public health measures – were carefully tailored and modified throughout the pandemic to reflect the evolving public health situation, new scientific evidence, and changing risk levels.²⁶ The lowest (or strictest) capacity limits corresponded to the periods when the number of COVID-19 cases and the burden on Ontario’s healthcare system were highest. Conversely, when

²² McKeown Affidavit at para 65, RC Tab 6, p 198; Hodge Affidavit at paras 19 and 27, RC Tab 5, pp 152-53, 155-56; Ali and Chagla Report at paras 4(d)-(f), RC Tab 4, p 136.

²³ McKeown Affidavit at para 83, RC Tab 6, pp 203-04; *Trinity Bible, supra* at [paras 153-154](#).

²⁴ McKeown Affidavit at para 84, RC Tab 6, p 204.

²⁵ McKeown Affidavit at para 86, RC Tab 6, pp 204-05.

²⁶ *Trinity Bible, supra* at [para 155](#).

COVID-19 prevalence and healthcare system burden decreased, the limits were eased.²⁷

21. Ontario's tailored approach reflected the public health evidence that the risk of spreading COVID-19 is highly dependent on its prevalence. The more COVID-19 cases there are, the more likely that people at a gathering will have COVID-19 and transmit it to others. High community prevalence also increases pressures on hospital and ICU capacity, meaning that even isolated incidents of transmission can have grave public health consequences.²⁸ Consequently, the risk of a particular gathering increases as community prevalence increases.²⁹

22. Throughout most of the pandemic, the capacity limits for outdoor Religious Gatherings were higher (or less strict) than the limits for indoor Religious Gatherings, consistent with the generally higher COVID-19 transmission risk indoors. During some periods when the community prevalence of COVID-19 and the burden on the healthcare system were at their highest, however, capacity limits for both indoor and outdoor Religious Gatherings were the same because outdoor gatherings that would otherwise have posed a relatively small risk of transmission could still have had a significant impact on the overall spread of the virus and risk overwhelming the healthcare system.³⁰

23. Where appropriate, the Religious Gathering limits were also tailored geographically. Originally, the Religious Gathering limits applied on a province-wide basis but, beginning in July 2020, they were applied on a regional basis depending on the COVID-19 situation in each Public Health Unit ("PHU"). As the COVID-19

²⁷ McKeown Affidavit at para 93, RC Tab 6, p 209.

²⁸ *Trinity Bible*, *supra* at [para 156](#).

²⁹ McKeown Affidavit at para 74, RC Tab 6, pp 200-01; Hodge Affidavit at paras 23 and 25, RC Tab 5, pp 154, 155.

³⁰ McKeown Affidavit at para 94, RC Tab 6, pp 209-10.

situation worsened or improved, different restrictions applied in different PHUs.³¹

24. Throughout the pandemic, Religious Gatherings were permitted at the same or higher (and often *much* higher) numbers than other types of gatherings, such as social gatherings or outdoor public events.³² Ontario never completely banned in-person Religious Gatherings. Even at the most severe periods of risk, religious institutions were permitted to have sufficient congregants to facilitate virtual or drive-in services.³³

25. When deciding on the appropriate public health measures, Ontario had to adapt to rapidly changing circumstances and a virus that was constantly evolving.³⁴ As the pandemic went on, several variants of concern (“VOCs”) were identified that were associated with increased transmissibility, increased virulence, and decreased effectiveness of public health measures.³⁵ Ontario often had to make decisions on the basis of incomplete information and without the benefit of scientific certainty.³⁶

E. The Appellants’ Repeated Breaches of Ontario’s Public Health Regulations

(1) Church of God

26. The Church of God (Restoration) Aylmer (“**Church of God**”) is a church in Aylmer that, in January 2021, began holding gatherings beyond the applicable gathering limits and refused to comply with masking and physical distancing.³⁷ On February 12, 2021, at Ontario’s request, Thomas RSJ issued an injunction (“**Aylmer Injunction**”) restraining anyone with notice from holding a Religious Gathering in conjunction with

³¹ McKeown Affidavit at paras 8-13, RC Tab 6, pp 174-76; see also the versions of [O. Reg. 363/20](#).

³² McKeown Affidavit at para 96, RC Tab 6, p 210.

³³ *Trinity Bible*, *supra* at [para 155](#).

³⁴ McKeown Affidavit at para 61, RC Tab 6, p 196.

³⁵ McKeown Affidavit at paras 77-80, RC Tab 6, pp 201-03.

³⁶ Hodge Affidavit at paras 7-8, RC Tab 5, p 147; McKeown Affidavit at para 61, RC Tab 6, p 196; *Trinity Bible*, *supra* at [para 55](#).

³⁷ *Trinity Bible*, *supra* at [para 11](#).

the Church of God in a manner that contravened the applicable gathering limits.³⁸

27. Even after they were enjoined, the Church of God and several of its parishioners continued to breach the regulations, which resulted in them being found in contempt on three separate occasions.³⁹ They have also been charged with provincial offences for violations of the *ROA* regulations and those charges are still pending.

(2) Trinity Bible Chapel

28. Trinity Bible Chapel (“**Trinity Bible Chapel**”) is a church in Waterloo that also held multiple religious services beyond the applicable gathering limits and refused to comply with masking and physical distancing.⁴⁰ On January 22, 2021 and April 16, 2021, at Ontario’s request, Sweeney RSJ issued injunctions (“**Trinity Injunctions**”) restraining anyone with notice from holding a Religious Gathering in conjunction with Trinity Bible Chapel that contravened the applicable gathering limits.⁴¹

29. Trinity Bible Chapel and several of its parishioners continued to breach the regulations, which resulted in them being found in contempt.⁴² Several parishioners have also been charged with provincial offences under the *ROA*, which are still pending.

F. The Appellants’ Constitutional Challenge

30. On February 21, 2021, Trinity Bible Chapel brought a motion to set aside the

³⁸ 2020, S.O. 2020, c. 17. Order of Thomas RSJ dated February 12, 2021, RC Tab 2C, p 63. Thomas RSJ issued an interlocutory injunction on February 5, 2021, RC Tab 2A, p 58, which was superseded by his February 12, 2021 order.

³⁹ *R v The Church of God (Restoration) Aylmer*, 2021 ONSC 3281 (Endorsement of RSJ Thomas dated May 3, 2021), RC Tab 2E, p 69; Order of RSJ Thomas dated May 31, 2021, RC Tab 2I, p 89; *R v The Church of God (Restoration) Aylmer*, 2021 ONSC 4252 (Endorsement of RSJ Thomas dated June 11, 2021), RC Tab 2J, p 93.

⁴⁰ *Trinity Bible*, *supra* at [para 14](#); *Attorney General of Ontario v Trinity Bible Chapel et al*, 2021 ONSC 740 at [paras 18-21](#).

⁴¹ Orders of RSJ Sweeney dated January 22, 2021 and April 16, 2021, RC Tab 1A, p 3 and RC Tab 1F, p 31.

⁴² *Attorney General of Ontario v Trinity Bible Chapel et al*, [2021 ONSC 740](#).

first Trinity Injunction on grounds that the capacity limits for Religious Gathering under the *ROA* regulations unjustifiably infringed ss. 2(a), (b), (c) and (d) of the *Charter*.⁴³ On April 20, 2021, Church of God brought a motion to set aside the Aylmer Injunction, which sought on the same relief and alleged the same *Charter* breaches.⁴⁴ Given the common issues, the motions were ordered to be heard together.⁴⁵

31. The capacity limits for Religious Gathering that applied to Church of God, which is located in the Southwestern PHU, are attached at Schedule “C.” The capacity limits for Religious Gathering that applied to Trinity Bible Chapel, which is located in the Waterloo PHU, are attached at Schedule “D” (the “*Gathering Regulations*”).

32. As of April 22, 2022, all of the *ROA* regulations – including the *Gathering Regulations* – have been repealed. However, the provincial offences charges against several of the respondents for alleged breaches of the *Gathering Regulations* are still pending in separate proceedings.

G. Ontario’s Expert Evidence

33. Ontario defended the *Gathering Regulations* on the basis that they did not infringe s. 2(a), (b), (c) or (d), but even if they did, the infringement was justified under s. 1, as the *Gathering Regulations* were critical public health measures in response to COVID-19. In support of its position, Ontario tendered the evidence of three experts in the fields of public health, emergency medicine and infectious diseases.

34. Dr. David McKeown was, until he retired in November 2021, the Associate

⁴³ Notice of Motion to Set Aside the January 22, 2021 Order of RSJ Sweeny, dated February 21, 2021, Appeal Book and Compendium [“ABC”] Tab 3A. The Notice of Motion was later amended to apply to both Trinity Injunctions.

⁴⁴ Notice of Motion to Set Aside the April 16, 2021 Order of RSJ Sweeny, dated April 20, 2021, ABC, Tab 3C.

⁴⁵ Order of Sloan J. dated May 10, 2021, RC Tab 1I, p 43.

Chief Medical Officer of Health for Ontario and a certified specialist in public health and preventative medicine in Canada and the United States. He has over 35 years of experience in public health, including 12 years as Medical Officer of Health for the City of Toronto, where he led local health responses to the H1N1 pandemic, a major outbreak of Legionnaire's disease, and Canada's first West Nile Virus outbreak. During the first two years of the COVID-19 pandemic, Dr. McKeown's duties included advising the Ontario government on its public health response to the pandemic.⁴⁶

35. 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.⁴⁷

36. Dr. Zain Chagla is an infectious diseases physician and Co-Medical Director of Infection Control at St. Joseph's Healthcare in Hamilton. He has authored 16 peer-reviewed papers on COVID-19 in the areas of epidemiology, testing, serological analysis, therapeutics, infection control and vaccine efficacy.⁴⁸

37. All of Ontario's experts testified that, based on the scientific and public health evidence available at the time, the Religious Gathering limits were reasonable and appropriate public health measures to reduce COVID-19 transmission and lower the burden on Ontario's healthcare system.⁴⁹

⁴⁶ McKeown Affidavit at para 1, RC Tab 6, p 172.

⁴⁷ Hodge Affidavit at paras 1-2, RC Tab 5, pp 145-46.

⁴⁸ Ali and Chagla Report at para 2.1, RC Tab 4, pp 132-33.

⁴⁹ McKeown Affidavit at paras 82-97, RC Tab 6, pp 203-11; Hodge Affidavit at paras 26-45, RC Tab 5, pp 155-63; Ali and Chagla Report at para 5, RC Tab 4, pp 138-39.

H. The Motion Judge's Decision

38. The motion judge found that the *Gathering Regulations* infringed the right to freedom of religion under s. 2(a) of the *Charter*, but were justified under s. 1.⁵⁰ The motion judge found that it was “neither necessary nor desirable to conduct separate analyses under subsections (b), (c), and (d)” because “the interests protected by those subsections are, in this case, wholly subsumed by the s. 2(a) analysis.”⁵¹

39. With respect to s. 1, the motion judge found that “[p]ublic officials were faced with an unprecedented public health emergency” and reducing COVID-19 cases, hospitalizations and deaths was a pressing and substantial objective.⁵² She also found that a rational connection between that objective and the Religious Gathering limits was “readily established” in this case.⁵³

40. The motion judge found that the *Gathering Regulations* were minimally impairing and supported by sound medical evidence:

I have no difficulty finding that Ontario’s choices fell well within the range of reasonable alternatives. The decisions made by public officials were supported by sound medical opinion. It was imperative that Ontario take meaningful and timely steps to protect the public from the scourge of a deadly and unpredictable virus. I find that the measures employed were minimally intrusive in that they were an eminently reasonable means of achieving public protection during the throes of a deadly pandemic.⁵⁴

41. Finally, the motion judge found that the salutary effects of the *Gathering Regulations* outweighed their deleterious effects and that they were justified under s. 1:

I have little hesitation in concluding that, while numerical and percentage gathering limits infringed s. 2(a) of the *Charter*, the salutary benefits of

⁵⁰ *Trinity Bible*, *supra* at [paras 113, 173](#).

⁵¹ *Trinity Bible*, *supra* at [para 115](#).

⁵² *Trinity Bible*, *supra* at [paras 127, 131-134](#).

⁵³ *Trinity Bible*, *supra* at [para 136](#).

⁵⁴ *Trinity Bible*, *supra* at [para 157](#).

these restrictions outweighed the deleterious effects on religious freedom. Ontario has met its burden to establish that the regulations in issue are reasonable limits, demonstrably justified in a free and democratic society.⁵⁵

PART III – ISSUES AND LAW

A. Issues

42. The appellants have raised five issues on this appeal:

- (i) Did the motion judge err in relying on the evidence of Dr. McKeown?
- (ii) Did the motion judge err by relying on the evidence of Dr. Hodge?
- (iii) Did the motion judge err by not evaluating the *Gathering Regulations* through the lens of hindsight?
- (iv) Having found a breach of s. 2(a) of the *Charter*, did the motion judge err by not conducting separate analyses under s. 2(b), (c), and (d)?
- (v) Did the motion judge err in finding that the *Gathering Regulations* are justified under s. 1 of the *Charter*?

43. The respondents respectfully submit that the motion judge did not commit any of the errors alleged by the appellants.

B. The Motion Judge’s Findings Are Entitled to Deference

44. While the appellants have framed their appeal by reference to various alleged errors committed by the motion judge, the common thread running through each of the appellants’ submissions is that they are asking this Court to re-weigh the evidence and substitute its findings for those of the motion judge.

45. The motion judge’s findings of fact, including her findings related to the expert evidence, are entitled to deference and should not be overturned absent palpable and overriding error.⁵⁶ As the Supreme Court of Canada recently noted, “[a]n appeal is not a

⁵⁵ *Trinity Bible*, *supra* at [para 173](#).

⁵⁶ *Hacopian-Armen Estate v Mahmoud*, 2021 ONCA 545 at [paras 27, 71](#).

retrial. Nor is it licence for an appellate court to review the evidence afresh.”⁵⁷ The motion judge conducted a thorough review of the evidence, applied the correct legal principles, and provided comprehensive reasons to explain her findings. There is no basis to find that she committed a palpable and overriding error.

C. Dr. McKeown Was a Participant Expert

46. The appellants’ submission that the motion judge erred “by admitting and heavily relying on the opinion evidence of Dr. McKeown” should be rejected.⁵⁸ The appellants did not object to the admissibility of Dr. McKeown’s evidence in the court below and this Court should not give effect to an objection that is only being raised for the first time on appeal. In any event, the objection is meritless as Dr. McKeown was a participant expert whose opinion evidence was admissible for the truth of its contents.

47. This Court has held that “if no objection is made to the admissibility of evidence in a civil trial, an objection on appeal will usually be unsuccessful.”⁵⁹ As a general rule, “a party to a civil action cannot appeal on the basis of some aspect of trial procedure to which it did not object or sit on an objection only to raise it once it learns of an unfavourable result.”⁶⁰ The failure to object to the admissibility of evidence in the court below is “usually fatal to an appeal on that point.”⁶¹

48. When a party does not object to the admissibility of evidence in the court below, the court should not entertain such an objection on appeal unless that party can show

⁵⁷ *Barendregt v Grebliunas*, 2022 SCC 22 at [para 1](#).

⁵⁸ Appellants’ Factum at para 34.

⁵⁹ *Hoang v Vicentini*, 2016 ONCA 723 at [para 45](#), citing *Marshall v Watson Wyatt & Co.*, 57 O.R. (3d) 813 (C.A.) at [para 15](#); see also *R v Bero*, [2000] O.J. No. 4199 (C.A.) at [para 12](#).

⁶⁰ *Harris v Leikin Group Inc.*, 2014 ONCA 479 at [para 53](#); *Parliament v Conley*, 2021 ONCA 261 at [para 63](#) [*Parliament*]; *Saskatchewan v Racette*, 2020 SKCA 2 at [paras 33-37](#).

⁶¹ *Parliament*, *supra* at [para 64](#).

that “a substantial wrong or miscarriage of justice has occurred.”⁶² The burden on the objecting party is a high one. As Doherty J.A. has noted, “an appellant who can show no more than a possibility that evidence may have been excluded had it been challenged has not established an error in law or a miscarriage of justice.”⁶³

49. The appellants did not object to the admissibility of Dr. McKeown’s evidence before the motion judge. To the contrary, they attempted *to rely* on that evidence to support their position that Ontario had not satisfied its burden under s. 1 of the *Charter*.⁶⁴ The motion judge did not accept the appellants’ position. Now, having been unsuccessful in the court below, the appellants have changed their position in the hopes of reaching a different result. They have provided no explanation for waiting until this appeal to raise their new objection.

50. The courts have held that “lawyers should not be permitted to deliberately refrain from objecting at trial in order to gain an advantage for a client; and then, on appeal, to repudiate that decision because the advantage failed to materialize.”⁶⁵ That is precisely what is happening here. There is no reasonable basis to find that the motion judge erred by relying on evidence to which the appellants did not object or that a substantial wrong or miscarriage of justice occurred.

51. In any event, the objection to Dr. McKeown’s opinion evidence has no merit. The appellants argue that Dr. McKeown’s opinion evidence is inadmissible because he did not provide an Acknowledgement of Expert’s Duty under Rule 53.03 of the *Rules of*

⁶² *Parliament, supra* at [para 66](#).

⁶³ *R v Bero*, [2000] O.J. No. 4199 (C.A.) at [para 13](#).

⁶⁴ Factum of the Moving Parties before the Superior Court of Justice at paras 57, 61-62. [“Moving Parties’ Factum”], RC Tab 3, pp 118-19, 120.

⁶⁵ *Saskatchewan v Racette*, 2020 SKCA 2 at [para 36](#), citing *Foley v Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2002 ABCA 297 at [para 65](#).

Civil Procedure.⁶⁶ However, Dr. McKeown was a participant expert who was not required to comply with Rule 53.03. As a participant expert, his opinion evidence was admissible for the truth of its contents.⁶⁷

52. In *Westerhof v. Gee Estate*, this Court held that a witness with special skill or knowledge may give opinion evidence about events in which the witness directly participated without complying with Rule 53.03:

[A] witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation *may give opinion evidence for the truth of its contents without complying with rule 53.03* where:

- the opinion to be given is based on the witness's observation of or participation in the events at issue; and
- the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.⁶⁸

53. Dr. McKeown's opinion evidence satisfies the criteria from *Westerhof*. First, Dr. McKeown is "[a] witness with special skill, knowledge, training, or experience." As noted above, Dr. McKeown was the Associate Chief Medical Officer of Health for Ontario during the first two years of the COVID-19 pandemic. He has over 35 years of experience in public health and is a certified specialist in public health and preventative medicine in Canada and the United States.⁶⁹ He was amply qualified to give opinions on public health issues related to COVID-19.

54. Second, Dr. McKeown testified that he directly participated in reviewing and

⁶⁶ Appellants' Factum at para 36. As this was a motion, subrule 53.03(2.1) applies via Rule 39.01(7).

⁶⁷ *Westerhof v Gee Estate*, 2015 ONCA 206 at [para 60](#) [*Westerhof*].

⁶⁸ *Westerhof*, *supra* at [para 60](#) [Emphasis added].

⁶⁹ McKeown Affidavit at para 1, RC Tab 6, p 172.

assessing information related to COVID-19 as part of his role:

[A]s Associate Chief Medical Officer of Health, my responsibilities include monitoring the spread of COVID-19 and advising the Ontario government on its policy response to the pandemic. In that role, I continuously review and assess information related to COVID-19, including published peer-reviewed literature, “scientific grey literature” (i.e. literature published outside of traditional peer-reviewed publishing channels), and publications from PHO. That information informs the advice that I provide, along with others in the office of the Chief Medical Officer of Health, to the Ontario government.⁷⁰

55. Third, Dr. McKeown testified that he formed his opinions related to COVID-19 as part of the ordinary exercise of his knowledge, training and experience while he was advising the Ontario government on its pandemic response:

I review information and provide advice [to the Ontario government] related to COVID-19 as part of the ordinary exercise of my knowledge, training and experience as Associate Chief Medical Officer of Health.⁷¹

56. Dr. McKeown was not cross-examined on any of those statements.

57. Dr. McKeown’s evidence did not stray beyond the bounds of a participant expert: all of the opinions in his affidavit related to COVID-19 and public health policy related to events in which he directly participated. His opinion evidence was not only admissible; it was highly relevant to the issues in dispute and the motion judge made no error in relying on that evidence.

D. Dr. Hodge’s Evidence Was Credible and Reliable

58. The appellants submit that “[the motion judge’s] decision to give significant weight to Dr. Hodge’s evidence was a palpable and overriding error.”⁷² Contrary to the appellants’ submissions, there is no reason to interfere with the motion judge’s weighing of the expert evidence.

⁷⁰ McKeown Affidavit at para 60, RC Tab 6, p 196.

⁷¹ McKeown Affidavit at para 60, RC Tab 6, p 196.

⁷² Appellants’ Factum at para 49.

59. In support of their submission that Dr. Hodge's evidence should be given less weight, the appellants rely on Dr. Hodge's testimony on one peripheral issue, namely, his estimate of the percentage of COVID-19 cases that were being captured by testing. Dr. Hodge estimated that around 90% of COVID-19 cases in Ontario were captured by testing, while Dr. Chagla estimated that the percentage of cases captured by testing was likely much lower.⁷³ The appellants claim that this inconsistency "calls into question [Dr. Hodge's] credibility and impartiality."⁷⁴ The appellants do not claim that the inconsistency calls into question the credibility or impartiality of Dr. Chagla.

60. The appellants' made the same argument in the court below and the motion judge found Dr. Hodge's evidence to be credible and reliable.⁷⁵ It was open to her to make that finding. Rather than focusing on one narrow point of disagreement, the motion judge considered the evidence as a whole, which is exactly what she was supposed to do.⁷⁶ Her finding that Dr. Hodge's evidence was "most informative in explaining the challenges faced by those with responsibility for public health decision making"⁷⁷ is entitled to deference. Furthermore, as the Supreme Court of Canada noted in *Carter v. Canada (Attorney General)*, "pointing out conflicting evidence...is not sufficient to establish a palpable and overriding error."⁷⁸

61. While the motion judge's reasons did not address the specific inconsistency identified by the appellants, this Court has held that "a trial judge is *not* required to

⁷³ Chagla Cross at pp 11-15, qq 14-25, RC Tab 7, pp 252-56; Hodge Cross at pp 32-35, qq 66-68, RC Tab 8, pp 299-302.

⁷⁴ Appellants' Factum at para 44.

⁷⁵ Moving Parties' Factum at paras 90-91, RC Tab 3, p 125; *Trinity Bible, supra* at [paras 40, 146](#).

⁷⁶ *R v Tweedle*, 2016 ONCA 983 at [para 10](#).

⁷⁷ *Trinity Bible, supra* at [para 146](#).

⁷⁸ *Carter v Canada (Attorney General)*, 2015 SCC 5 at [para 109](#).

discuss *all* the evidence or to answer *every* argument advanced by counsel” (emphasis in original).⁷⁹ The motion judge provided clear and cogent reasons for why she accepted Dr. Hodge’s evidence. Her reasons are more than sufficient.⁸⁰

62. In any event, even if this Court were to re-weigh the evidence, the appellants’ objection should be rejected on its merits. The fact that two experts disagree on one peripheral issue is not a reason to discount the rest of their evidence. Experts disagree on issues within their fields of expertise all the time. This is particularly true when dealing with a novel virus like COVID-19, as Dr. Chagla noted: “There’s been a lot of discrepancy [among public health experts] and it comes from different places and different kinds of clinical experiences...[so] not everyone agrees.”⁸¹

63. Moreover, the appellants’ characterization of the purported inconsistency is, at best, exaggerated. Both experts agreed that the number of cases captured by testing was inherently uncertain and that different experts use different data when estimating the proportion of cases that go unreported.⁸² Two experts giving different estimates on such an uncertain topic is not surprising. There is nothing in Dr. Hodge’s answers that warrants disregarding his evidence.

E. The *Gathering Regulations* Should Not be Evaluated Based on Hindsight

64. When assessing whether the *Gathering Regulations* were justified under s. 1, the motion judge held that “[h]indsight is not the lens through which to assess government action in this case.”⁸³

⁷⁹ *R v A (A)*, 2015 ONCA 558 at [para 120](#).

⁸⁰ *R v GF*, 2021 SCC 20 at [para 69](#); *R v Sheppard*, 2002 SCC 26 at [para 26](#).

⁸¹ Chagla Cross at p 88, q 253, RC Tab 7, p 261.

⁸² Chagla Cross at pp 12, 14, and 88-89, qq 15, 21, and 253-258, RC Tab 7, pp 253, 255, 261-62; Hodge Cross at pp 25 and 29-30, qq 48 and 61, RC Tab 8, pp 294, 296-97.

⁸³ *Trinity Bible*, *supra* at [para 6](#).

65. Applying that standard, the motion judge accepted Dr. McKeown’s evidence that Ontario often had to act without the benefit of perfect information:

[T]he state of the pandemic is constantly changing and Ontario’s policy response must adapt to those changing circumstances. When determining which health protection measures should be implemented to mitigate the spread of the virus, Ontario attempted to use the best information available at the time about the transmissibility of COVID-19, which was also subject to change as research about the virus is being updated regularly.⁸⁴

66. The motion judge further noted that one factor that informed Ontario’s public health policy was the precautionary principle, which recognizes that public health officials had to respond to the pandemic without the benefit of scientific certainty. She held that, “[c]learly, Ontario was not required to wait for scientific unanimity on the properties of the pandemic before taking steps to prevent illness and death. We would still be waiting for that chimeric marker were it the catalyst for action.”⁸⁵

67. The appellants submit that the motion judge erred by not conducting the *Charter* analysis through the lens of hindsight. Specifically, they argue that the *Gathering Regulations* should be assessed, not based on what was known when they were in force, but rather based on “new information” that has become available after they were modified or even after they were repealed.⁸⁶

68. The appellants’ argument should be rejected. The motion judge correctly held that the constitutionality of government acts should be evaluated based on the information that was reasonably available at the time the acts took place. The appellants’ approach would set an impossibly high standard for governments to meet to justify a

⁸⁴ McKeown Affidavit at para 61, RC Tab 6, p 196.

⁸⁵ *Trinity Bible*, *supra* at [para 145](#).

⁸⁶ Appellants’ Factum at paras 60-63.

breach under s. 1 of the *Charter*. Not only would government decision makers need to consider information that was reasonably available at the time the legislation was enacted, they would also need to consider what information might arise in the future that could impact that s. 1 analysis. Section 1 should not require governments to predict the future in order to comply with the *Charter*.

69. The courts have upheld the principle that government acts should be assessed at the time the acts took place. For example, when assessing whether police breached an accused's rights under s. 8 of the *Charter*, the Supreme Court of Canada noted:

[T]he decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be. Just as the Crown cannot rely on after-the-fact justifications for the search, the decision about how to conduct it cannot be attacked on the basis of circumstances that were not reasonably known to the police at the time [the evidence] must not be viewed 'through the lens' of hindsight.⁸⁷

70. The same principle should apply here. The *Gathering Regulations* should be assessed based on the real-world conditions that Ontario faced at each stage of the pandemic, not based on a hypothetical world in which the government had the benefit of perfect foresight.

71. The cases cited by the appellants are distinguishable from this case. All of them involve legislation that was in force at the time of the constitutional challenge.⁸⁸ Thus, in those cases, the impugned government act was *ongoing*. That is different from this case, where the *Gathering Regulations* were in place for a limited period in response to the public health situation that existed at the time. The motion judge was correct to assess each *Gathering Regulations* based on the time when it was in force.

⁸⁷ *R v Cornell*, 2010 SCC 31 at [para 23](#).

⁸⁸ Appellants' Factum at para 57.

72. In any event, even if the *Gathering Regulations* were assessed in hindsight, that would not assist the appellants. The appellants have not identified the “new information” that they claim would undermine the motion judge’s findings. If anything, evidence that has come to light since the capacity limits were lifted has provided *more* support for the efficacy of Ontario’s public health measures. Dr. McKeown noted that the implementation of those public health measures was “shortly followed by a substantial decrease in the number of COVID-19 cases and hospitalizations.”⁸⁹ He concluded that “[t]he public health measures implemented by Ontario had a significant impact on decreasing the transmission of COVID-19 across the province and reducing the strain on the healthcare system.”⁹⁰

73. The motion judge accepted Dr. McKeown’s evidence on that point:

There is good reason to believe that the measures had their intended effect of reducing Covid-19 transmission rates, and attendant illness...*I defer to Dr. McKeown's medical opinion that restrictions did have a salutary impact on infection rates.* It is his opinion that, were it not for the restrictions, many more people would have suffered extreme illness and died.⁹¹

74. Thus, if the *Gathering Regulations* were assessed in hindsight, the evidence to justify Ontario’s public health measures would have been even stronger.

F. There Was No Need to Consider ss. 2(b), (c) and (d) of the Charter

75. Having found a breach of s. 2(a) of the *Charter*, the motion judge was correct in finding that it was neither “necessary nor desirable to conduct separate analyses under subsections (b), (c) and (d).”⁹² The motion judge found that the “factual matrix

⁸⁹ McKeown Affidavit at para 55, RC Tab 6, p 194.

⁹⁰ McKeown Affidavit at para 55, RC Tab 6, p 194.

⁹¹ *Trinity Bible, supra* at [paras 161, 163](#) [Emphasis added].

⁹² *Trinity Bible, supra* at [para 115](#).

underpinning the various *Charter* claims was largely indistinguishable.”⁹³ She held that all of the moving parties’ allegations related to a “single compendious act,” namely, the imposition of capacity limits on Religious Gatherings.⁹⁴ The appellants did not challenge any of the restrictions that applied to non-religious gatherings, such as those that applied to “social gatherings” or “organized public events.”

76. The motion judge concluded that no value would be added to the *Charter* analysis by “repeating or repackaging the analysis under different constitutional headings” because “the interests protected by [ss. 2(b), (c) and(d)] are, in this case, wholly subsumed by the s. 2(a) analysis.”⁹⁵

77. The motion judge’s decision not to conduct separate *Charter* analyses under ss. 2(b), (c) and (d) was consistent with the approach followed by the Supreme Court of Canada in *Trinity Western*. After finding a breach of s. 2(a), the Court declined to conduct separate analyses of alleged breaches of ss. 2(b), 2(d), and 15:

The factual matrix underpinning a Charter claim in respect of any of these protections is largely indistinguishable.... In our view, the religious freedom claim is sufficient to account for the expressive, associational, and equality rights of TWU’s community members in the analysis.⁹⁶

78. As the motion judge noted, the same reasoning applies in this case.⁹⁷ Other courts, including this one, have followed the same approach in similar cases.⁹⁸ That approach is also consistent with the well-established principle that courts should decline

⁹³ *Trinity Bible*, *supra* at [para 115](#).

⁹⁴ *Trinity Bible*, *supra* at [para 117](#).

⁹⁵ *Trinity Bible*, *supra* at [para 115](#).

⁹⁶ *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at [paras 76-78](#).

⁹⁷ *Trinity Bible*, *supra* at [para 115](#).

⁹⁸ See, e.g., *Figueiras v Toronto Police Services Board*, 2015 ONCA 208 at [para 78](#); *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 at [para 213](#), appeal to MBCA filed [*Gateway Bible*].

to address constitutional issues unless it is necessary to do so.⁹⁹

79. There is no merit to the appellants’ argument that failing to conduct separate analyses of s. 2(b), (c) and (d) “skewed” the proportionality analysis under s. 1.¹⁰⁰

Declining to conduct separate analyses under ss. 2(b), (c) and (d) did not adversely affect the proportionality analysis in *Trinity Western* or any of the other cases that have followed the same approach. The same is true here.

80. When conducting the proportionality analysis, the motion judge considered all of the relevant salutary and deleterious effects of the Religious Gathering limits, including the appellants’ ability to “facilitate dissemination of religious content” and to “engage in religious activity as a collective in-person congregation.”¹⁰¹ She properly weighed those factors against the salutary effects of the gathering limits, which she described as “amongst the most compelling imaginable – the protection of human life in the fact of an unprecedented and unpredictable virus, carrying a threat of devastating health consequences.”¹⁰² The motion judge was alive to all of the relevant considerations and there is no reason to disturb her findings.

G. The Motion Judge Did Not Err in Her Section 1 Analysis

(1) The motion judge correctly applied a deferential approach to s. 1

81. The appellants allege that the motion judge erred by applying an “excessively deferential” standard in her s. 1 analysis.¹⁰³ Contrary to the appellants’ assertion, the motion judge’s finding that deference is warranted in the context of “an unprecedented

⁹⁹ *Phillips v Nova Scotia (Westray Mine Inquiry)*, [1995] 2 SCR 97 at [para 6](#); *R v Banks*, 2007 ONCA 19 at [para 25](#).

¹⁰⁰ Appellants’ Factum at para 73.

¹⁰¹ *Trinity Bible*, *supra* at [para 167](#).

¹⁰² *Trinity Bible*, *supra* at [para 160](#).

¹⁰³ Appellants’ Factum at para 87.

public health emergency” is well supported by the caselaw.¹⁰⁴

82. The Supreme Court has held that a high degree of deference should be shown a law that “is part of a complex regulatory scheme and is aimed at an emerging and challenging problem.”¹⁰⁵ In *Hutterian Brethren*, the Court noted that considerable deference is warranted when dealing with “complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.”¹⁰⁶

83. In *JTI MacDonald*, the Supreme Court emphasized that deference should be shown when the legislative regime must balance a number of competing objectives:

There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives.¹⁰⁷

84. Several courts have applied a deferential approach to s.1 when upholding public health measures during the COVID-19 pandemic. In *Gateway Bible*, the Manitoba Court of Queen’s Bench upheld Religious Gathering limits under s. 1, noting that “courts should be wary of second guessing those who are managing a pandemic on the basis of their democratic responsibility or their properly delegated authority, particularly when

¹⁰⁴ *Trinity Bible*, *supra* at [para 127](#).

¹⁰⁵ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at [paras 37](#) and [56](#) [*Hutterian*]; *Quebec (Attorney General) v A*, 2013 SCC 5 at [para 439](#) [*Quebec*].

¹⁰⁶ *Hutterian*, *supra* at [para 53](#).

¹⁰⁷ *Canada v JTI-Macdonald Corp.*, 2007 SCC 30 at [para 43](#) [*JTI*]. See also *Newfoundland v NAPE*, 2004 SCC 66 at [para 96](#) [*NAPE*].

there may be divergent opinions or schools of scientific thought.”¹⁰⁸

85. Similarly, in *Taylor*, the Newfoundland and Labrador Supreme Court noted that deference was warranted when assessing COVID-19 travel restrictions:

[I]t is not an abdication of the court’s responsibility to afford [public health officials] an appropriate measure of deference in recognition of (1) the expertise of [their] office and (2) the sudden emergence of COVID-19 as a novel and deadly disease. It is also not an abdication of responsibility to give due recognition to the fact that [public health officials] ... face a formidable challenge under difficult circumstances.¹⁰⁹

86. The motion judge found that the circumstances of this case are precisely those in which a deferential approach to s. 1 is appropriate. She noted that it was “difficult to imagine a more compelling and challenging equation” than protecting public health in the face of the COVID-19 pandemic while balancing competing interests and risks across a diverse population:

Ontario was called upon to protect public health, while respecting a host of other interests and considerations. Restrictive measures aimed at curbing transmission of the virus would necessarily impact on social, commercial, and religious activities. *The task at hand called for a careful balancing of competing considerations, informed by an evolving body medical and scientific opinion.*¹¹⁰

87. The motion judge adopted Joyal C.J.’s comments in *Gateway Bible* that the court must “be guided not only by the rigours of the existing legal tests, but as well, by a requisite judicial humility that comes from acknowledging that courts do not have the specialized expertise to casually second guess the decisions of public health officials, which decisions are otherwise supported in the evidence.”¹¹¹

¹⁰⁸ *Gateway Bible*, supra at [paras 281](#) and [291-292](#); *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at [paras 457-58](#) [*Taylor*].

¹⁰⁹ *Taylor*, supra at [paras 456-59](#) and [463-64](#).

¹¹⁰ *Trinity Bible*, supra at [para 127-128](#) [Emphasis added].

¹¹¹ *Gateway Bible*, supra at [para 292](#); *Trinity Bible*, supra at [para 128](#).

88. The Appellants argue, as they did before the motion judge, that public health measures enacted by way of legislation and regulation do not attract the same level of deference.¹¹² This proposition is entirely at odds with binding Supreme Court jurisprudence in which the “*Oakes* test sees a very clear role for deference in the s. 1 calculus.”¹¹³ The motion judge was correct to reject this argument.

89. Ultimately, the motion judge correctly found that the management of the COVID-19 pandemic presented a “textbook recipe for deferential review”:

It is frankly difficult to imagine a more compelling and challenging equation. Reasonable people may disagree on precisely where the balance should be struck. Just as the claimants say that limits were too restrictive, others have complained that they were not restrictive enough. The question of what is “just right” will, to some extent, lie in the eye of the beholder. *This mix of conflicting interests and perspectives, centered on a tangible threat to public health, is a textbook recipe for deferential review.*¹¹⁴

(2) The motion judge did not err in rejecting the appellants’ submission that outdoor gatherings posed no risk of transmission

90. The appellants allege, as they did before the motion judge, that the risk of outdoor transmission was negligible at best and thus the outdoor capacity limits cannot be justified under s. 1 of the *Charter*.¹¹⁵ The motion judge explicitly considered and rejected this argument on the basis that the appellants’ claims about the risks of outdoor gatherings were not a fair characterization of the evidence:

It is said [by the appellants] that, on the evidence presented, there is no justification for any gathering limits outdoors, as the risk outdoors is negligible at best. On this basis, it is said that the restrictions cannot be minimally impairing... *I do not see this as a fair characterization of the evidence in this case.* It is true that all experts opined that the risk of

¹¹² Appellants’ Factum at paras 91-92.

¹¹³ *Trinity Bible*, supra at paras [125-26](#); *Hutterian*, supra at [paras 37, 53, 56](#); *JTI*, supra at [para 43](#); *NAPE*, supra at [para 96](#); *Quebec*, supra at [para 439](#).

¹¹⁴ *Trinity Bible*, supra at [para 128](#) [Emphasis added].

¹¹⁵ Appellants’ Factum at paras 74-79; *Trinity Bible*, supra at [para 134](#).

transmission outdoors was lower than the risk of transmission indoors. However, Ontario’s experts contended that *there was nonetheless a risk outdoors, particularly if other precautions such as physical distancing were not respected, and high-risk activities such as singing and loud prayer were taking place.*¹¹⁶

91. She went on to note that the outdoor Religious Gathering limits were important to prevent dire consequences for Ontario’s health care system:

At the time outdoor limits were imposed, the public health system was overburdened and approaching a breaking point. At times when community risk was elevated, the health care system was sufficiently fragile that even a small number of infections could have dire consequences. During those periods, *even lower risk activities such as outdoor gatherings could increase pressure on the health care system.*¹¹⁷

92. There was ample evidence in the record to support the motion judge’s findings.¹¹⁸ At best, the appellants’ position is that there was some conflicting evidence on the degree to which outdoor gatherings posed a risk of transmission. However, as the Supreme Court of Canada has noted, “pointing out conflicting evidence...is not sufficient to establish a palpable and overriding error.”¹¹⁹

93. Moreover, as the motion judge correctly noted, when considering whether the *Gathering Regulations* were justified under s. 1, she was not required to resolve every scientific controversy, but rather determine whether Ontario’s public health measures fell within the range of reasonable alternatives:

My role is not that of an armchair epidemiologist. I am neither equipped nor inclined to resolve scientific debates and controversy surrounding

¹¹⁶ *Trinity Bible, supra* at [para 148-49](#) [Emphasis added].

¹¹⁷ *Trinity Bible, supra* at [para 150](#) [Emphasis added].

¹¹⁸ McKeown Affidavit at paras 75-76, 85, 93-95, RC Tab 6, pp 201, 204, 209-10; Hodge Affidavit at para 19, RC Tab 5, pp 152-53; Chagla Cross at pp 95-96, q 270, RC Tab 7, pp 263-64; Schabas Cross at pp 29-31, qq 83-88, RC Tab 10, pp 314-16; McKeown Cross at p 108, qq 351-353, RC Tab 9, p 308; Warren Cross at p 90, q 309, RC Tab 11, p 333.

¹¹⁹ *Carter v Canada (Attorney General)*, 2015 SCC 5 at [para 109](#).

Covid-19. The question before me is not whether certain experts are right or wrong. The question is whether it was open to Ontario to act as it did, and whether there was scientific support for the precautionary measures that were taken.¹²⁰

94. When applying that standard, the motion judge found that the *Gathering Regulations* “were an eminently reasonable means of achieving public protection during the throes of a deadly pandemic.”¹²¹ The appellants have failed to meet the high bar required to interfere with those factual findings.

(3) The motion judge did not err in finding that Religious Gatherings were distinguishable from retail settings

95. The appellants repeat their argument from the court below that there was no justification for placing different limits on Religious Gatherings than on retail settings because “workers in retail settings faced the equal or greater risk of infection than churchgoers.”¹²² The motion judge considered and rejected this argument as unsupported by the evidence.¹²³ She accepted Dr. McKeown’s evidence that the Religious Gatherings present different risks and, therefore, required different measures:

Risk factors are very different in the retail setting where attendance is transient, and people do not tend to linger. While staff are on site for prolonged periods, employers are bound by statute to employ measures to keep staff safe. Perhaps most importantly, the retail experience does not contemplate the same potential for infectious droplets to be passed from person to person.¹²⁴

96. The appellants attempt to undermine this finding by claiming that the *Gathering Regulations* required churches to employ measures to keep their parishioners safe.¹²⁵

¹²⁰ *Trinity Bible, supra* at [para 6](#).

¹²¹ *Trinity Bible, supra* at [para 157](#).

¹²² Appellants’ Factum at para 80.

¹²³ *Trinity Bible, supra* at [paras 152-154](#).

¹²⁴ *Trinity Bible, supra* at [para 153](#); McKeown Affidavit at paras 101-104, RC Tab 6, p 212-13.

¹²⁵ Appellants’ Factum at para 82.

The specific measures such as masking and distancing mandated by the *Gathering Regulations* are not comparable to the broad duty imposed on employers to “take every precaution reasonable in the circumstances for the protection of a worker.”¹²⁶

97. It was also open to the motion judge to accept Dr. McKeown’s evidence with respect to transmission risk factors. Again, the appellants ask this Court to re-weigh the expert evidence. These factual findings, however, are entitled to deference and should not be overturned absent palpable and overriding error, of which there is none.

(4) The motion judge did not err in considering the health of Ontarians

98. Finally, the motion judge did not err in considering that “[t]he measures protected the constitutional rights of [individual members of the public] to life and security of the person.”¹²⁷ The Supreme Court recently held that the s. 1 proportionality analysis presents the court with “an opportunity to consider the competing interests of vulnerable groups” and took into account the ss. 7, 15, and 28 *Charter* rights of women and children affected by an accused’s actions.¹²⁸ Similarly, it was open to the motion judge to consider the potential impact of the *Gathering Regulations* on other Ontarians’ health in assessing whether they were proportionate limits on freedom of religion.

PART IV – ORDER REQUESTED

99. The respondent respectfully requests an order dismissing the appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 11TH DAY OF JULY, 2022

Josh Hunter *Ryan Cookson* *Maia Stevenson* *Sean Kissick*
 Josh Hunter Ryan Cookson Maia Stevenson Sean Kissick

¹²⁶ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, [s. 25\(2\)\(h\)](#) [Emphasis added].

¹²⁷ *Trinity Bible*, *supra* at [para 160](#).

¹²⁸ *R v Brown*, 2022 SCC 18 at [paras 67-71](#).

RESPONDENT'S CERTIFICATE RESPECTING TIME

We estimate that 3.0 hours will be needed for the Respondent's oral argument of the appeal. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario, this 11th day of July, 2022

Maia Stevenson

**Per Josh Hunter, Ryan Cookson, Maia
Stevenson and Sean Kissick**

Counsel for the Respondent,
the Attorney General of Ontario

SCHEDULE “A” – AUTHORITIES CITED

1. *Ontario v Trinity Bible Chapel et al*, [2022 ONSC 1344](#)
2. *Barendregt v Grebliunas*, [2022 SCC 22](#)
3. *AG of Ontario v Trinity Bible Chapel et al*, [2021 ONSC 740](#)
4. *Hacopian-Armen Estate v Mahmoud*, [2021 ONCA 545](#)
5. *Hoang v Vicentini*, [2016 ONCA 723](#)
6. *Marshall v Watson Wyatt & Co*, [\(2002\) 57 O.R. \(3d\) 813 \(C.A.\)](#)
7. *R v Bero*, [\[2000\] O.J. No. 4199 \(C.A.\)](#)
8. *Harris v Leikin Group Inc*, [2014 ONCA 479](#)
9. *Parliament v Conley*, [2021 ONCA 261](#)
10. *Saskatchewan v Racette*, [2020 SKCA 2](#)
11. *Foley v Alberta (Administrator, Motor Vehicle Accident Claims Act)*, [2002 ABCA 297](#)
12. *Westerhof v Gee Estate*, [2015 ONCA 206](#)
13. *R v Tweedle*, [2016 ONCA 983](#)
14. *Carter v Canada (Attorney General)*, [2015 SCC 5](#)
15. *R v A (A)*, [2015 ONCA 558](#)
16. *R v G F*, [2021 SCC 20](#)
17. *R v Sheppard*, [2002 SCC 26](#)
18. *R v Cornell*, [2010 SCC 31](#)
19. *Law Society of British Columbia v Trinity Western University*, [2018 SCC 32](#)
20. *Figueiras v Toronto (Police Services Board)*, [2015 ONCA 208](#)
21. *Gateway Bible Baptist Church v Manitoba*, [2021 MBQB 219](#)
22. *Phillips v Nova Scotia (Westray Mine Inquiry)*, [\[1995\] 2 S.C.R. 97](#)
23. *R v Banks*, [2007 ONCA 19](#)

24. *Alberta v Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#)
25. *Quebec (Attorney General) v A*, [2013 SCC 5](#)
26. *Canada (Attorney General) v JTI-Macdonald Corp*, [2007 SCC 30](#)
27. *Newfoundland (Treasury Board) v NAPE*, [2004 SCC 66](#)
28. *Taylor v Newfoundland and Labrador*, [2020 NLSC 125](#)
29. *R v Brown*, [2022 SCC 18](#)

SCHEDULE “B” – LEGISLATION CITED

Rules of Civil Procedure, [R.R.O. 1990, Reg. 194](#)

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

Evidence by Affidavit

Generally

39.01

...

Expert Witness Evidence

(7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1). O. Reg. 259/14, s. 8.

...

Expert Witnesses

Experts’ Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48; O. Reg. 170/14, s. 17.

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert’s name, address and area of expertise.
2. The expert’s qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
 - iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.

Occupational Health and Safety Act, [R.S.O. 1990, c. O.1](#)

Duties of employers

25 (1) An employer shall ensure that,

- (a) the equipment, materials and protective devices as prescribed are provided;
- (b) the equipment, materials and protective devices provided by the employer are maintained in good condition;
- (c) the measures and procedures prescribed are carried out in the workplace;
- (d) the equipment, materials and protective devices provided by the employer are used as prescribed; and
- (e) a building, structure, or any part thereof, or any other part of a workplace, whether temporary or permanent, is capable of supporting any loads that may be applied to it,
 - (i) as determined by the applicable design requirements established under the version of the Building Code that was in force at the time of its construction,
 - (ii) in accordance with such other requirements as may be prescribed, or
 - (iii) in accordance with good engineering practice, if subclauses (i) and (ii) do not apply. R.S.O. 1990, c. O.1, s. 25 (1); 2011, c. 11, s. 9.

Idem

(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

- (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;
- (b) in a medical emergency for the purpose of diagnosis or treatment, provide, upon request, information in the possession of the employer, including confidential business information, to a legally qualified medical practitioner and to such other persons as may be prescribed;
- (c) when appointing a supervisor, appoint a competent person;
- (d) acquaint a worker or a person in authority over a worker with any hazard in the work and in the handling, storage, use, disposal and transport of any article, device, equipment or a biological, chemical or physical agent;

(e) afford assistance and co-operation to a committee and a health and safety representative in the carrying out by the committee and the health and safety representative of any of their functions;

(f) only employ in or about a workplace a person over such age as may be prescribed;

(g) not knowingly permit a person who is under such age as may be prescribed to be in or about a workplace;

(h) take every precaution reasonable in the circumstances for the protection of a worker;

(i) post, in the workplace, a copy of this Act and any explanatory material prepared by the Ministry, both in English and the majority language of the workplace, outlining the rights, responsibilities and duties of workers;

(j) prepare and review at least annually a written occupational health and safety policy and develop and maintain a program to implement that policy;

(k) post at a conspicuous location in the workplace a copy of the occupational health and safety policy;

(l) provide to the committee or to a health and safety representative the results of a report respecting occupational health and safety that is in the employer's possession and, if that report is in writing, a copy of the portions of the report that concern occupational health and safety; and

(m) advise workers of the results of a report referred to in clause (l) and, if the report is in writing, make available to them on request copies of the portions of the report that concern occupational health and safety;

(n) notify a Director if a committee or a health and safety representative, if any, has identified potential structural inadequacies of a building, structure, or any part thereof, or any other part of a workplace, whether temporary or permanent, as a source of danger or hazard to workers. R.S.O. 1990, c. O.1, s. 25 (2); 2017, c. 34, Sched. 30, s. 1 (1).

Idem

(3) For the purposes of clause (2) (c), an employer may appoint himself or herself as a supervisor where the employer is a competent person. R.S.O. 1990, c. O.1, s. 25 (3).

Same

(3.1) Any explanatory material referred to under clause (2) (i) may be published as part of the poster required under section 2 of the Employment Standards Act, 2000. 2009, c. 23, s. 2.

Same

(4) Unless otherwise prescribed, clause (2) (j) does not apply with respect to a workplace at which five or fewer workers are regularly employed. 2021, c. 34, Sched. 15, s. 4.

Same

(5) Clause (2) (n) does not apply to an employer that owns the workplace. 2017, c. 34, Sched. 30, s. 1 (2).

**SCHEDULE “C” – SOUTHWESTERN PHU GATHERING
REGULATIONS**

	Date	Legislation	Indoor Religious Gatherings	Other Indoor Gatherings	Outdoor Religious Gatherings	Other Outdoor Gatherings
1.	March 18, 2020 to March 27, 2020	<u>O.Reg. 52/20</u>	50 people.	50 people.	50 people.	50 people.
2.	March 28, 2020 to June 11, 2020	<u>O.Reg. 52/20</u> , Sch. 1, s. 1	5 people (10 for funerals).	5 people.	5 people (10 for funerals).	5 people.
3.	June 12, 2020 to July 16, 2020	<u>O.Reg. 52/20</u> , Sch. 1, ss. 2 and 6-7	30% of room capacity.	10 people.	50 people.	10 people.
4.	July 17, 2020 to September 18, 2020	<u>O.Reg. 364/20</u> , Sch. 3, ss. 1 and 3-4	30% of room capacity.	50 people.	100 people.	100 people.
5.	September 19, 2020 to December 25, 2020	<u>O.Reg. 364/20</u> , Sch 3, ss. 1 and 3-4	30% of room capacity.	10 people (50 people in places operated by a business or organization).	100 people.	25 people (100 people in places operated by a business or organization).
6.	December 26, 2020 to February 15, 2021	<u>O.Reg. 82/20</u> , Sch. 4, ss. 1-2	10 people.	Single household only plus one person who lives alone.	10 people.	10 people.
7.	February 16, 2021 to February 28, 2021	<u>O.Reg. 263/20</u> , Sch. 3, ss. 1 and 4-5	30% of room capacity.	5 people.	100 people.	25 people.

	Date	Legislation	Indoor Religious Gatherings	Other Indoor Gatherings	Outdoor Religious Gatherings	Other Outdoor Gatherings
8.	March 1, 2021 to March 28, 2021	O.Reg. 364/20 , Sch. 3, ss. 1 and 3-4	30% of room capacity.	10 people (50 people in places operated by a business or organization).	100 people.	25 people (100 people in places operated by a business or organization).
9.	March 29, 2021 to April 2, 2021	O.Reg. 364/20 , Sch. 3, ss. 1 and 3-4	30% of room capacity.	10 people (50 people in places operated by a business or organization).	No limit, but must maintain physical distancing.	25 people (100 people in places operated by a business or organization).
10.	April 3, 2021 to April 16, 2021	O.Reg. 82/20 , Sch. 4, ss. 1-2	15% of room capacity.	Not allowed.	Number that can maintain physical distancing.	5 people.
11.	April 17, 2021 to April 18, 2021	O.Reg. 82/20 , Sch. 4, ss. 1-2	15% of room capacity.	Not allowed.	Number that can maintain physical distancing.	Not allowed.
12.	April 19, 2021 to April 22, 2021	O.Reg. 82/20 , Sch. 4, ss. 1-2	10 people.	Not allowed.	10 people.	Not allowed.
13.	April 23, 2021 to May 21, 2021	O.Reg. 82/20 , Sch. 4, ss. 1-2	10 people.	Not allowed.	10 people.	Not allowed.
14.	May 22, 2021 to June 10, 2021	O.Reg. 82/20 , Sch. 4, ss. 1-2	10 people.	Not allowed.	10 people.	5 people.
15.	June 11, 2021 to June 29, 2021	O.Reg. 82/20 , Sch. 9, ss. 1-2	15% of room capacity.	Not allowed.	Number that can maintain physical distancing.	10 people.

	Date	Legislation	Indoor Religious Gatherings	Other Indoor Gatherings	Outdoor Religious Gatherings	Other Outdoor Gatherings
16.	June 30, 2021 to July 15, 2021	O.Reg. 263/20 , Sch. 3, ss. 1 and 4-5	25% of room capacity.	5 people.	No limit, but must maintain physical distancing.	25 people.
17.	July 16, 2021 to October 24, 2021	O.Reg. 364/20 , Sch. 3, ss. 1 and 6-7	Each room limited to number that can maintain physical distancing in that room.	25 people.	No limit, but must maintain physical distancing.	100 people.
18.	October 25, 2021 to October 26, 2021	O.Reg. 364/20 , Sch. 3, ss. 1 and 6-7	Each room limited to number that can maintain physical distancing in that room. No limit if all attendees provide proof of full vaccination.	25 people.	No limit.	100 people.
19.	October 27, 2021 to December 18, 2021	O.Reg. 364/20 , Sch. 3, ss. 1 and 6-7	Each room limited to number that can maintain physical distancing in that room. No limit if all attendees provide proof of full vaccination.	25 people.	No limit.	100 people for social gatherings. No limit for organized public events.

	Date	Legislation	Indoor Religious Gatherings	Other Indoor Gatherings	Outdoor Religious Gatherings	Other Outdoor Gatherings
20.	December 19, 2021 to January 4, 2022	O.Reg. 364/20 , Sch. 3, ss. 1 and 6-7	Each room limited to number that can maintain physical distancing in that room. No limit if all attendees provide proof of full vaccination.	10 people for social gatherings. 25 people for organized public events.	No limit.	25 people for social gatherings. No limit for organized public events.
21.	January 5, 2022 to January 30, 2022	O.Reg. 263/20 , Sch. 3, ss. 1 and 4-5	50% of room capacity.	5 people.	No limit, but must maintain physical distancing.	10 people for social gatherings. No limit for organized public events, but must wear mask or face covering.
22.	January 31, 2022 to February 16, 2022	O. Reg. 364/20 , Sch. 3, ss. 1 and 6-7	50% of room capacity.	10 people for social gatherings. 25 people for organized public events.	The number that can maintain physical distancing.	25 people for social gatherings. No limit for organized public events.
23.	February 17, 2022 to February 28, 2022	O. Reg. 364/20 , Sch. 3, ss. 1 and 6-7	The number that can maintain physical distancing.	50 people.	No limit.	100 people for social gatherings. No limit for organized public events.
24.	March 1, 2022 to April 26, 2022	O. Reg. 364/20 , Sch. 4	No limit.	No limit.	No limit.	No limit.

	Date	Legislation	Indoor Religious Gatherings	Other Indoor Gatherings	Outdoor Religious Gatherings	Other Outdoor Gatherings
25.	April 27, 2022 to date	None – all regulations revoked.	N/A	N/A	N/A	N/A

**SCHEDULE “D” – WATERLOO PHU GATHERING
REGULATIONS**

	Date	Legislation	Indoor Religious Gatherings	Other Indoor Gatherings	Outdoor Religious Gatherings	Other Outdoor Gatherings
1.	March 18, 2020 to March 27, 2020	<u>O.Reg. 52/20</u>	50 people.	50 people.	50 people.	50 people.
2.	March 28, 2020 to June 11, 2020	<u>O.Reg. 52/20</u> , Sch. 1, s. 1	5 people (10 for funerals).	5 people.	5 people (10 for funerals).	5 people.
3.	June 12, 2020 to July 16, 2020	<u>O.Reg. 52/20</u> , Sch. 1, ss. 2 and 6-7	30% of room capacity.	10 people.	50 people.	10 people.
4.	July 17, 2020 to September 18, 2020	<u>O.Reg. 364/20</u> , Sch. 3, ss. 1 and 3-4	30% of room capacity.	50 people.	100 people.	100 people.
5.	September 19, 2020 to November 22, 2020	<u>O.Reg. 364/20</u> , Sch 3, ss. 1 and 3-4	30% of room capacity.	10 people (50 people in places operated by a business or organization).	100 people.	25 people (100 people in places operated by a business or organization).
6.	November 23, 2020 to December 25, 2020	<u>O.Reg. 263/20</u> , Sch. 3, ss. 1 and 4-5	30% of room capacity.	5 people.	100 people.	25 people.
7.	December 26, 2020 to February 15, 2021	<u>O.Reg. 82/20</u> , Sch. 4, ss. 1-2	10 people.	Single household only plus one person who lives alone.	10 people.	10 people.
8.	February 16, 2021 to March 28, 2021	<u>O.Reg. 263/20</u> , Sch. 3, ss. 1 and 4-5	30% of room capacity.	5 people.	100 people.	25 people.

	Date	Legislation	Indoor Religious Gatherings	Other Indoor Gatherings	Outdoor Religious Gatherings	Other Outdoor Gatherings
9.	March 29, 2021 to April 2, 2021	O.Reg. 263/20 , Sch. 3, ss. 1 and 4-5	30% of room capacity.	5 people.	No limit, but must maintain physical distancing.	25 people.
10.	April 3, 2021 to April 16, 2021	O.Reg. 82/20 , Sch. 4, ss. 1-2	15% of room capacity.	Not allowed.	Number that can maintain physical distancing.	5 people.
11.	April 17, 2021 to April 18, 2021	O.Reg. 82/20 , Sch. 4, ss. 1-2	15% of room capacity.	Not allowed.	Number that can maintain physical distancing.	Not allowed.
12.	April 19, 2021 to April 22, 2021	O.Reg. 82/20 , Sch. 4, ss. 1-2	10 people.	Not allowed.	10 people.	Not allowed.
13.	April 23, 2021 to May 21, 2021	O.Reg. 82/20 , Sch. 4, ss. 1-2	10 people.	Not allowed.	10 people.	Not allowed.
14.	May 22, 2021 to June 10, 2021	O.Reg. 82/20 , Sch. 4, ss. 1-2	10 people.	Not allowed.	10 people.	5 people.
15.	June 11, 2021 to June 29, 2021	O.Reg. 82/20 , Sch. 9, ss. 1-2	15% of room capacity.	Not allowed.	Number that can maintain physical distancing.	10 people.

	Date	Legislation	Indoor Religious Gatherings	Other Indoor Gatherings	Outdoor Religious Gatherings	Other Outdoor Gatherings
16.	June 30, 2021 to July 11, 2021	O.Reg. 263/20, Sch. 1 , s. 2(2) and Sch. 3 , ss. 1 and 4-5 Waterloo MOH Letter of Instruction	15% of room capacity.	Not allowed.	Number that can maintain physical distancing.	10 people.
17.	July 12, 2021 to July 15, 2021	O.Reg. 263/20 , Sch. 3, ss. 1 and 4-5	25% of room capacity.	5 people.	No limit, but must maintain physical distancing.	25 people.
18.	July 16, 2021 to October 24, 2021	O.Reg. 364/20 , Sch. 3, ss. 1 and 6-7	Each room limited to number that can maintain physical distancing in that room.	25 people.	No limit, but must maintain physical distancing.	100 people.
19.	October 25, 2021 to October 26, 2021	O.Reg. 364/20 , Sch. 3, ss. 1 and 6-7	Each room limited to number that can maintain physical distancing in that room. No limit if all attendees provide proof of full vaccination.	25 people.	No limit.	100 people.

	Date	Legislation	Indoor Religious Gatherings	Other Indoor Gatherings	Outdoor Religious Gatherings	Other Outdoor Gatherings
20.	October 27, 2021 to December 18, 2021	O.Reg. 364/20 , Sch. 3, ss. 1 and 6-7	Each room limited to number that can maintain physical distancing in that room. No limit if all attendees provide proof of full vaccination.	25 people.	No limit.	100 people for social gatherings. No limit for organized public events.
21.	December 19, 2021 to January 4, 2022	O.Reg. 364/20 , Sch. 3, ss. 1 and 6-7	Each room limited to number that can maintain physical distancing in that room. No limit if all attendees provide proof of full vaccination.	10 people for social gatherings. 25 people for organized public events.	No limit.	25 people for social gatherings. No limit for organized public events.
22.	January 5, 2022 to January 30, 2022	O.Reg. 263/20 , Sch. 3, ss. 1 and 4-5	50% of room capacity.	5 people.	No limit, but must maintain physical distancing.	10 people for social gatherings. No limit for organized public events, but must wear mask or face covering.
23.	January 31, 2022 to February 16, 2022	O. Reg. 364/20 , Sch. 3, ss. 1 and 6-7	50% of room capacity.	10 people for social gatherings. 25 people for organized public events	The number that can maintain physical distancing.	25 people for social gatherings. No limit for organized public events.

	Date	Legislation	Indoor Religious Gatherings	Other Indoor Gatherings	Outdoor Religious Gatherings	Other Outdoor Gatherings
24.	February 17, 2022 to February 28, 2022	O. Reg. 364/20 , Sch. 3, ss. 1 and 6-7	The number that can maintain physical distancing.	50 people.	No limit.	100 people for social gatherings. No limit for organized public events.
25.	March 1, 2022 to April 26, 2022	O. Reg. 364/20 , Sch. 4	No limit.	No limit.	No limit.	No limit.
26.	April 27, 2022 to date	None – all regulations revoked	N/A	N/A	N/A	N/A

ONTARIO
COURT OF APPEAL

**FACTUM OF THE ATTORNEY
GENERAL OF ONTARIO**

**THE ATTORNEY GENERAL
OF ONTARIO**

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**Josh Hunter, Ryan Cookson,
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