Kitchener Court File No.: **CV-21-00000095-0000**
St. Thomas Court File No.: **CV-21-08**

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Applicant (Responding Party)

- and -

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

Respondents (Moving Party)

AND BETWEEN:

HER MAJESTY THE QUEEN IN ONTARIO

Applicant (Responding Party)

- and -

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

Respondents (Moving Party)

AND:

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

Intervener.

FACTUM OF THE INTERVENER
THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

January 4, 2022

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

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I. Overview

1. Over the past two years, religious communities in Ontario have navigated unprecedented and invasive restrictions on their religious services. Never before has any branch of government in Ontario imposed such far-reaching prohibitions and limitations on in-person religious services. The impugned regulations not only infringe the fundamental freedoms of individual churches, pastors, and congregants, they also raise important questions regarding the fundamental structure of our "free and democratic society" as protected by the "supreme law" of Canada.[1]

2. Once we lay this constitutional groundwork below, we will argue that:

   a. *Charter* jurisprudence emphasizes the vitality and independence of non-state institutions and associations in a free society; the civil government is not the only important institution with responsibilities and duties during a time of crisis.

   b. Gathering for religious worship fulfils purposes core to 2(a), 2(b), and 2(c), by manifesting religious individuals' and community's identity, by expressing beliefs through worship and by expressing spiritual encouragement to spiritual family, and by giving effect to the nature of the church as the gathered "body of believers".

   c. It is crucial to consider the impact of impugned regulations on <u>each</u> of these fundamental freedoms *and* to weigh the intersectional or "compound violations" of multiple section 2 fundamental freedoms.

   d. The infringements cannot be minimally impairing if the court finds that the impugned regulations ban or significantly infringe on activity that receives explicit and direct constitutional protection while imposing less onerous restrictions on non-constitutionally protected activity of similar Covid-19 transmission risk.

   e. To demonstrably justify the regulations, it is not sufficient for government to simply point to *some* evidence that banning or significantly constraining religious assemblies will reduce Covid-19 transmission. Rather, it must *demonstrate* that the reduced transmission from such a ban is significant enough to weigh more heavily than the severe and

[1] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 52.

compound infringements of constitutional rights and the unprecedented impositions on the other free institutions of society.

II. A Free and Democratic Society is Institutionally Pluralist

3. The novel nature of Covid-19 and the government's response have left little of life untouched over the past two years. Religious individuals for whom assembled worship is an essential aspect of their religious practice have had their freedom of religion, freedom of religious expression, and freedom of peaceful assembly sharply curtailed. It is something that goes to the core of who they are and their well being as religious individuals and communities.

4. Although extraordinary times can call for extraordinary measures, such times do not alter the constitutional commitments of our province. The civil government does not become ultimate with the declaration of a state of emergency but continues to share constitutional space with other institutions – including religious institutions – integral to, and authoritative in, the lives of many Ontarians. Indeed, these very institutions may become all the more important to Ontarians during times of emergency. It is not only the civil government that has a responsibility to alleviate the burdens of the pandemic and the public health restrictions by implementing a wide array of mental health, addictions, and other supports. Religious organizations must be free to help here too; indeed, this is part of *being* a church.

A. The *Charter's* Preamble Supports Limited Government and Institutional Pluralism

5. Early modern thinkers such as Hobbes and Rousseau "tried in different ways to subordinate religious claims to the sovereignty of politics."[2] William Galston describes this tradition as an effort to return to the "civic totalism" of ancient Greece and Rome, in which "intermediate associations existed only as revocable 'concessions' of power from the sovereign political authority."[3] Civic totalism has not triumphed in Canadian legal history, thanks in large part to

[2] William Galston, "Religion and the Limits of Liberal Democracy" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society* (Quebec City: McGill-Queen's University Press, 2004) 12, at 44 (Intervenors' BOA, **TAB 6**).
[3] Galston, *supra*, at 44 (Intervenors' BOA, **TAB 6**).

the judiciary. Liberal democracy and constitutionalism qualify and limit state power. A free and democratic society is pluralist, not statist.

6. While Christian understandings of the proper relationship between civil and spiritual authority differ, a basic emphasis of Reformed Christian thought offers guidance. This foundational emphasis is that all authority belongs to God, who delegates limited authority to the different institutions in society, including the state. The state's authority is thus inherently limited by its original grant: authority is neither unlimited nor self-defined, and the state cannot arrogate to itself additional authority based on what a concerned citizenry might acquiesce to.

7. These limits on the state are affirmed in the preamble to the *Canadian Charter of Rights and Freedoms* (*"Charter"*) which invokes "the supremacy of God and the rule of law" as principles upon which Canada is founded. The former principle signifies that the state is neither the sole nor the highest authority, nor the ultimate source of rights and freedoms.[4] The latter principle means that all state actors must have intelligible sources for, and limits on, their authority.[5]

8. The preamble to the *Charter* signals "a kind of secular humility, a recognition that there are other truths, other sources of competing worldviews, of normative and authoritative communities that are profound sources of meaning in people's lives that ought to be nurtured as a counter-balance to state authority."[6]

B. Section 1 Justification as an Expression of Institutional Pluralism

9. Section 1 only permits limits on fundamental freedoms that can be demonstrably justified "in a free and democratic society," meaning an institutionally pluralist society.[7] In *Oakes*, Dickson

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[4] Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005), 29 SCLR (2d) (Intervenors' BOA, **TAB 16**); Iain T Benson, "The Limits of Law and the Liberty of Religion Associations" in Iain T Benson and Barry W Bussey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis Canada Inc, 2017), at xxiii, n 5 (Intervenors' BOA, **TAB 1**).
[5] *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para 71; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 60.
[6] Ryder, *supra*, at para 17 (Intervenors' BOA, **TAB 16**).
[7] This applies even in the case of a judicial review where the *Doré* framework is followed. See *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, at para 63.

C.J. identified the "principles essential to a free and democratic society" as "accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[8] A "free and democratic society" is therefore robustly pluralistic.

10. Religious individuals and institutions are constitutionally protected actors in the public sphere who are afforded equal treatment and benefit under the law through disciplined state neutrality towards religious vs. non-religious modes of life.[9] The state's burden to demonstrably justify a severe limit on freedom of religious assembly in this case is very high because it is fundamentally incompatible with being a free and democratic society to sacrifice completely or to severely constrain religious communities' freedom to assemble. Such constraints deeply injuring the vitality of these communities.

III. Institutional Pluralism Reflected in our Current Law

11. The foregoing basic principles of institutional pluralism continue to be reflected in our law today. Religious bodies may not exercise coercive power, yet they do have, as British Columbia Chief Justice Hinkson aptly put it, "a sphere of independent spiritual authority, at the core of which is the authority to determine their own membership, doctrines, and religious practices, including manner of worship."[10] The Supreme Court has affirmed these points unequivocally in *Amselem* and in *Wall*.[11] The authority to determine the manner of worship must include the question of whether physical, in-person attendance is a religious obligation.[12]

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[8] *R. v. Oakes*, [1986] 1 SCR 103 at para 64 [emphasis added]. See also Dickson, C.J. in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 94, where he described a "free society" as "one which can accommodate a wide variety of beliefs ... and codes of conducts."

[9] *Mouvement laïque québécois v Saguenay (City)*, [2015] SCJ No 16, at para 137.

[10] *Beaudoin v British Columbia*, 2021 BCSC 512 at para 199.

[11] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para 50; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para 24.

[12] M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 4th ed. (Toronto: Irwin Law, 2017), at 95 (Intervenors' BOA, **TAB 13**), writes that Christian assertions of the "independence of spiritual authority … have enjoyed tacit acceptance in practice" in law.

12. The Supreme Court of Canada acknowledges institutional pluralism when, for example, it writes, "a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."[13] The vitality of non-state actors and communities is essential for societal health; it is a characteristic of a free and democratic society.

13. Addressing the constitutional principle of protection for minority rights, the Supreme Court writes of "the delineation of spheres of jurisdiction… and the [limited] role of our political institutions."[14] In the Reformed Christian tradition, as in Canada's legal tradition, the delineation of spheres of jurisdiction is not just between levels of civil government, but also between the state and other spheres of society, including the church. These spheres of jurisdiction should not be seen as mutually exclusive territorial boundaries, but rather as overlapping *aspects* of life lived together.

14. The civil government's responsibility and authority with respect to religious gatherings is legitimately engaged with respect to matters of public safety (e.g., fire safety, building safety, sanitation requirements, and on this occasion, Covid-19 transmission risk). However, this state authority co-exists with the church's constitutionally protected responsibility and authority over assembled worship. Government must pursue public safety objectives in a manner that respects the core religious authority of the church.[15] The civil government shutting down the core function of another sphere of society, the church (which word is derived from the Greek *ecclesia,* which literally means "the assembled"[16]), would be justified only in extreme cases.

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[13] *Reference re Secession of Québec, supra*, at para 74 [emphasis added].
[14] *Reference re Secession of Québec*, at para 52.
[15] See Alvin Esau, "Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups," in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at 111 (Intervenors' BOA, **TAB 3**), where he writes, "When we affirm legal pluralism, we do not automatically think in *hierarchical* ways about the outside law of the state as superior and sovereign to the inside law of the church; rather, we think in more *horizontal* ways." [emphasis in original].
[16] Applicant's Motion Record, Tab 7, *Affidavit of Jacob Reaume*, June 4, 2021, at para. 88 ("**Reaume Affidavit**").

15. Civil government and religious institutions fulfil different, but equally crucial, roles in a free and democratic society. With prolonged bans or severe restrictions on peaceful assemblies for religious worship, the implicit message from the government to religious bodies was that churches' core functions are simply not worth the risk. The courts must remind the executive or legislative branches of government of their obligation to consider not only their statutory objective, but also their constitutional duties and limits in pursuing those objectives, manifested here as respect for the role of other spheres and a willingness and demonstrated effort to accommodate as much as possible.[17]

16. Churches' ability to fulfil their responsibilities and religious duties may be legitimately inconvenienced by laws or regulations of general application, subject to the state's duty under the *Charter* to accommodate religious freedom under s. 2(a). By the same token, government's ability to fulfill its responsibilities may be legitimately "inconvenienced" by its obligation to respect religious institutions and practices (as in *Multani*[18] or *Loyola*[19]). This is the nature of being a free and democratic society. In this mutually respectful relationship:

> state actors [must] be attentive to the capacity of the state to harm associational life. The state might cause harm when it acts… on behalf of a purportedly homogeneous "public interest." […] there can never be an all-encompassing "we" without an already present "them"; every consensus is, to some extent, based on antecedent acts of exclusion. It is not enough, then, to insist on mere neutrality regarding associational activities; we must be attentive to the possibility that state action will work to oppress group objects.[20]

A. The Manner and Practice of Worship is at the Core of the Church's Sphere

17. The manner and practice of worship is at the core of what it means to be religious.[21] For many religious people this means assembling together for worship. The state's interests may well

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[17] For example, Pastor Jacob Reaume's multiple unanswered offers of working on a re-opening for churches with the government. **Reaume Affidavit,** *supra*, at paras. 6-7.
[18] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.
[19] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.
[20] David Schneiderman, "Associational Rights, Religion, and the Charter" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at 72 (Intervenors' BOA, **TAB 17**).
[21] *Beaudoin*, *supra*, at para 199.

impact these assemblies but must do so carefully, weighing the constitutional importance and priority of religious practices in the life of religious citizens. For Christians, the church is not a building, but rather the in-person assembly of worshippers.[22] Corporate worship and partaking in the sacraments are the manifestation of the church's doctrines and the essence of its members' practices. All of these are based on core doctrines of the church.

18. The state may enact restrictions on such gatherings in pursuit of legitimate civic aims, provided they are demonstrably justified in a free and democratic society. To enact what amounts to a blanket ban, as Ontario has done on multiple occasions,[23] is the most severe infringement possible at law, which could be justified only if all alternative courses of action could not substantially reduce the risk of viral transmission.

B. Institutional Pluralism Should be Addressed in the Final Stage of *Oakes*

19. The constitutional theme of institutional pluralism underpins the entire section 1 analysis and is most appropriately addressed explicitly in the final stage of the *Oakes* test. Chief Justice Dickson sets the vision in describing a "second contextual element of interpretation of s. 1 … provided by the words 'free and democratic society'."[24] Dickson expands:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few … respect for cultural and group identity, and faith in social … institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[25]

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[22] The very word assembling in the Greek New Testament texts necessitates the physical meeting of believers together. There is a separate word in the Greek text that speaks of a brick-and-mortar structure called a church. But the church, i.e. the body of believers, is comprised of a group of people.

[23] See the table describing the various restrictions in the Applicant's Factum at para 24. From March 2020 until June 2020 religious gatherings were restricted to 5 people. From December 2020 until February 2021 and April 2021 until June 2021 religious gatherings were restricted to 10 people. In congregations of 100's, these amount to total prohibitions on corporate worship.

[24] *Oakes*, *supra*, at para 64.

[25] *Oakes*, *supra*, at para 64 [emphasis added].

This vision of Chief Justice Dickson is a vision of institutional pluralism, a vision of society, government and courts having deep respect for other legitimate institutions of society.

20. The phrase "faith in social institutions which enhance the participation of individuals and groups in society" is particularly noteworthy. Faith in social institutions requires a civil government to respect and trust other institutions, dialoguing with, rather than dictating to, them. This is all the more important during times of crisis, particularly when that crisis requires the enhanced participation of individuals and groups in society.[26] Faith in (rather than suspicion of) those institutions listens, accommodates, protects, and learns from them.

21. Obviously, institutional pluralism takes more work and requires greater effort on the part of the civil government. But it is more equitable. The Supreme Court warns,

> Although democratic government is generally solicitous of [fundamental human] rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection.[27]

22. A blanket ban on corporate worship services may be easier, but it is not equitable. It does not respect the other valuable and contributing institutions of society, and it is not the approach endorsed by our constitution. Thus, at the final stage of the *Oakes* analysis, when the court considers and weights the deleterious effects of the infringements with the salutary benefits, the fact that the Orders in question trench so deeply on the core of other key cultural and social institutions of society must weigh heavily on the "deleterious" side of the scale.

IV. The Fundamental Freedoms within a Free and Democratic Society

A. The Fundamental Freedoms Preserve Institutional Pluralism

23. The *Charter's* fundamental freedoms protect "social space" for an institutionally pluralistic

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[26] "The fear generated by public health messaging makes religion even more important to the health of believers. Promoting fear and then denying people their means of dealing with fear compounds the harm." Applicant's Motion Record, Tab 13, *Affidavit of Dr. Richard Schabas*, sworn May 29, 2021 at para 38.
[27] *Reference re Secession of Québec, supra*, at para 74 [emphasis added].

society against usurpation by an ever-expanding state. This is particularly so in times of emergency where the political majority risks overlooking how minorities disproportionately bear the unintended harms of the majority's well-intentioned actions. "The guarantees of freedom of conscience and religion, the freedoms of expression, assembly, and association, all speak to the aim of dispersing power to civic and religious associations while bringing groups together in the generation of public policy outcomes."[28] The Supreme Court concurs: "one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities…"[29]

24. Dickson C.J. writes that the uniting feature of the fundamental freedoms "is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation."[30] Continuing on the theme, Dickson C.J. writes:

> the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system […] underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*."[31]

25. The Supreme Court has likewise held that these individual rights manifest in religious institutions, which also receive constitutional protection.[32] The fundamental freedoms in the *Charter* protect the manifestation of Canadians' beliefs, including the peaceful assemblies of citizens for religious purposes.

B. Freedom of Expression Includes the Right to be Spiritually Encouraged in Song

26. The guarantee of the fundamental freedom of expression, protected by section 2(b) of the

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[28] Schneiderman, *supra*, at 73 (Intervenors' BOA, **TAB 17**).
[29] *Reference re Secession of Québec*, *supra*, at para 81.
[30] *Big M Drug Mart*, *supra*, at para 121.
[31] *Big M Drug Mart*, at para 122. Another unifying feature of the fundamental freedoms is the protection of the search for truth: Derek Ross, "Truth-Seeking and the Unity of the Charter's Fundamental Freedoms", (2020) 98 SCLR (2d) 63 – 107 (Intervenors' BOA, **TAB 15**).
[32] See *Loyola High School*, *supra*, at para 60 and *Mounted Police Assn. Of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para 64.

Charter, has three rationales at its core: (1) an instrument of democratic government; (2) an instrument of truth; and (3) an instrument of personal fulfillment.[33] Music, congregational singing in particular, meets both the second and third rationales in that religious music communicates transcendent truths and acts as a means to express oneself, personally and communally, through a beautiful artform in a deeply fulfilling and enriching way that meets psychological, mental, emotional, and spiritual needs.

27. The freedom of expression question here has particular theological implications for the intervener and the constituency it represents: first, the participatory nature of communal singing and second, the beneficiaries of communal singing. In Reformed theology, the worship of God in corporate song is a right and privilege of all believers gathered together, not just for the trained few. It is also a joyous duty, since all members are called to worship God in song. But secondly, Scripture also teaches that singing in corporate worship is "vertical" *and* "horizontal", i.e. that by singing together, believers not only praise God (vertical) but also encourage one another (horizontal), inspiring and uplifting one another "with psalms, hymns, and spiritual songs".[34]

28. This is all the more important during times of calamity.[35] Freedom of expression protects not just the right to sing, but to hear singing and be comforted by it.[36] To prohibit religious corporate singing (either directly, or indirectly by prohibiting the gathering together for that purpose for extended periods of time during very difficult times) is a profound violation.

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[33] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2007) (loose-leaf updated 2019, release 1) vol 2 at 43-7 – 43-8 (Intervenors' BOA, **TAB 7**), adopted by the Supreme Court of Canada in *Irwin Toy Ltd., v. Quebec (Attorney General)*, [1989] 1 SCR 927 (SCC) at 976.

[34] See The Holy Bible (ESV), Ephesians 5:18-20, where the Apostle Paul encourages the church to "not get drunk with wine, for that is debauchery, but be filled with the Spirit, addressing one another in psalms and hymns and spiritual songs, singing and making melody to the Lord with your heart, giving thanks always and for everything to God the Father in the name of our Lord Jesus Christ, submitting to one another out of reverence for Christ."

[35] See the testimony of Dr. Schabas, in particular: "The fear generated by public health messaging makes religion even more important to the health of believers. Promoting fear and then denying people their means of dealing with fear compounds the harm." Applicant's Motion Record, Tab 13, *Affidavit of Dr. Richard Schabas,* sworn May 29, 2021 at para 38.

[36] See *Mounted Police*, *supra*, at para 64 where the court says, "Freedom of expression protects both listeners and speakers" citing *R. v. National Post*, 2010 SCC 16, at para 28.

C. Freedom of Peaceful Assembly is Directly Engaged in the Case at Bar

29. The *Charter* guarantee of the fundamental freedom of peaceful assembly has received little attention in Canadian jurisprudence, often being subsumed by other fundamental freedoms.[37] In *The Law of the Canadian Constitution*, Régimbald and Newman summarize the fundamental freedom of peaceful assembly as follows:

> The dividing line concerning which right is at issue relates to what precisely is at issue: section 2(b) freedom of expression concerns the actual or attempted conveyance of meaning, section 2(c) freedom of assembly concerns the physical dimensions of assembling for protest or other constitutionally pertinent reasons, and section 2(d) freedom of association concerns the non-physical organizational dimensions of the association of individuals.[38]

30. A gathering may have an expressive or religious element, but the protection of the gathering itself properly falls under section 2(c). Section 2(c) contains the internal limit that such an assembly must be peaceful.[39] In *Roach*, Linden J.A. explains that "freedom of peaceful assembly is geared towards protecting the physical gathering together of people."[40] Thus, any argument that religious assemblies could continue by remote or virtual means is non-sensical.

31. While there are undoubtedly religious beliefs at issue in this case, ARPA Canada submits that the crux is not religious beliefs or associations *per se*, but the right to *peacefully assemble in person* in accordance with sincerely held religious beliefs, in order to carry out mandatory religious practices. There is overlap between the fundamental freedoms in this case, as religious freedom under section 2(a) has been interpreted to include the right "to manifest

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[37] Peter Hogg notes, for example, that picketing has been protected under 2(b) Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2007) vol 2 at 44-2 (Intervenors' BOA, **TAB 8**).
[38] Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017) at p 645 (Intervenors' BOA, **TAB 14**) [emphasis added].
[39] Nnaemeka Ezeani, "Understanding Freedom of Peaceful Assembly in the Canadian Charter of Rights and Freedoms", (2020) 98 SCLR (2d) 351-376, at para 45 (Intervenors' BOA, **TAB 4**). Enzeani notes that "An assembly will not fail the peaceful test simply because the conduct of the individuals has the potential to annoy or offend third parties or hinder their activities. This position is appropriate because it is difficult for people to converge without some annoyance to third parties, especially where the assembly occurs in a public space."
[40] *Roach v. Canada (Minister of State for Multiculturalism and Citizenship*, [1994] 2 FC 406 (FCA) at para 69, in dissent but not on this point.

religious belief by worship and practice".[41] This overlap, however, should not obscure the fact that the *Charter* grants separate and meaningful protection to freedom of assembly. The section 2*(c)* rights of *all* religious individuals who would otherwise have attended in-person services are infringed by the regulations which prohibit or severely restrict peaceful religious assemblies. This case requires a distinct and robust examination of the fundamental freedom of peaceful assembly guaranteed by section 2(c).

32. In a Supreme Court Law Review article on freedom of assembly, Nnaemeka Ezeani suggests "governments might as a result of the outbreak of [a] virus place restrictions on the gathering of … groups to curtail the spread. Freedom of assembly may be valuable in at least providing a way we could scrutinize the restrictions placed by the government were they to become too stringent."[42] Ezeani quotes law professor John Inazu on the importance of freedom of assembly as distinct from expression and association:

> Many group expressions are only intelligible against the lived practices that give them meaning. The ritual and liturgy of religious worship often embody deeper meaning than an outside observer would ascribe them. The political significance of a women's pageant in the 1920's would be lost without knowing why these women are gathered.[43]

33. Each of the examples mentioned by Inazu are manifestations of institutional pluralism protected by the *Charter*. Individuals may hold political beliefs, but they are worth little without the freedom to associate as an advocacy group and physically assemble in protest. Likewise, religious beliefs may be held by individuals, but they are worth little without the freedom to associate as a church and physically assemble together to manifest those beliefs.

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[41] *Big M Drug Mart Ltd*, *supra*, at para 94.
[42] Ezeani, *supra*, at para. 24 (Intervenors' BOA, **TAB 4**). At footnote 58, Ezeani goes into more analysis of how s. 2(c) would be implicated, explicitly in a Covid-19 context. See also Kristopher Kinsinger, "Restricting Freedom of Peaceful Assembly During Public Health Emergencies," *Constitutional Forum constitutionnel*, Vol. 30, No. 1, 2021, 19-28 (Intervenors' BOA, **TAB 10**).
[43] John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly,* (New Haven, CT: Yale University Press, 2012) at pp 2-3 (Intervenors' BOA, **TAB 9**). Cited in Ezeani, *ibid*, at para 28.

D. The Court Should Address "Compound Violations" of Fundamental Freedoms

34. Where more than one fundamental freedom is infringed, the court must give due weight and attention to each, as well as to the intersectional impact upon all of them collectively. In this case, the compound violation of sections 2(a), 2(b) and 2(c) requires attention. The court must analyse the compound violation with a view to the constitutional imperative of preserving institutional pluralism. Professor Dwight Newman opines,

> What could appear to be a trivial infringement of one freedom might actually be more appropriately recognized as a more substantial infringement in the context of an intersectionality of different freedoms […] The possibility of such intersectional freedom infringement is a further reason to carry out independent development of each of the freedoms recognized within the section 2 fundamental freedoms clause -- only in doing so can we fully identify the full depth of impacts on human freedom arising from certain state actions."[44]

35. Another Supreme Court Law Review article argues that an approach that decides a constitutional case by only analysing a single infringement, despite others alleged,

> unfairly puts the onus on claimants to pick their "best" *Charter* right or freedom and rely entirely on it. […] However, each and every *Charter* right or freedom raised should be given due attention because each one protects a distinct (though, at times, overlapping) good and each right or freedom has its own test. […] we cannot know whether the violations are justified unless the full analysis is completed.[45]

36. The Supreme Court acknowledges this in *Mounted Police*, ruling that freedom of association does not derive from freedom of religion but "stands as an *independent* right with *independent* content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests".[46]

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[44] Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms", (2019), 91 SCLR (2d) 107 – 122, at para 34-35 (Intervenors' BOA, **TAB 11**). See also Professor Jamie Cameron, who writes, "Minimizing the severity of the violation [by addressing only one freedom] demonstrated a lack of insight into the scope and severity of the breach and how it engaged section 2's guarantees as an integral whole…[This] can diminish the significance and severity of compound violations." Jamie Cameron, "Big M's Forgotten Legacy of Freedom", (2020) 98 SCLR (2d) 15 – 45, at para 41-42 (Intervenors' BOA, **TAB 2**).

[45] André Schutten, "Recovering Community: Addressing Judicial Blindspots on Freedom of Association", (2020) 98 SCLR (2d) 399 – 430 at para 27 (Intervenors' BOA, **TAB 18**).

[46] *Mounted Police*, *supra*, at para 49 [emphasis added].

37. This Court should apply the practice of criminal law courts when remedying multiple *Charter* breaches. As two criminal law scholars explain, "It is well established that courts are not to consider breaches of *Charter* rights in a vacuum. Rather, they should take into account the cumulative effect of multiple *Charter* breaches".[47] Where there are multiple *Charter* breaches of legal rights (in particular, sections 8, 9, and 10), courts routinely weigh the seriousness of the *cumulative* effect of the violations.[48]

38. Courts have also given particular consideration to the multiple *Charter* violations in a context where a criminal investigation interacts with the media. In a lower Court decision, overturned on appeal but not on this point, Benotto J. articulated the underpinnings of the broad protections against search and seizure for the media, intersecting sections 2(b) and 8:

> It is because of the fundamental importance of a free press in a democratic society that special considerations arise in applications to search media premises or to seize material from journalists […] the damaging effect of the search on the freedom and functioning of the press is highly relevant to the assessment of the reasonableness of the search.[49]

39. The Supreme Court has also closely tied section 2(b) and section 3 of the *Charter* together in *Figueroa v. Canada (Attorney General)*, invalidating a provision of the *Canada Elections Act* that prescribed that a minimum of 50 candidates were necessary to maintain registered party status.[50] The intersection of these two constitutional protections made the Charter violation that much more egregious. In an analogous way, the damaging effect of the regulations on *religious* assemblies in particular (in contrast to assembling merely for entertainment, for example) is highly relevant to the assessment of the sufficiency of the justification of the regulation.

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[47] James Fontana and David Keeshan, *The Law of Search and Seizure in Canada*, 11th ed. (2019), Ch 24, sec 5 (Intervenors' BOA, **TAB 5**).
[48] See, for example, *R. v. Simpson*, (1993), 79 CCC (3d) 482 (Ont CA) at 507, where Doherty J.A. ruled evidence inadmissible due to "the double-barrelled infringement of the appellant's constitutional rights." And see *R. v. Young*, (1993), 79 CCC (3d) 559 (Ont CA) at 566, where Carthy J.A., excluding evidence for infringements of ss. 8, 9, and 10(b), commented, "the number of violations combined to form a larger pattern of disregard for the appellant's Charter rights."
[49] *National Post v. Canada*, [2004] 178 O.J. (Sup. Ct.), at para 45 [emphasis added].
[50] *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, at paras 26-29.

40. The cumulative effect of the compound *Charter* infringements, particularly of section 2(a) and 2(c) of the *Charter* in this case, is a "double-barrelled infringement" of the Applicants' constitutional freedoms and ought to be weighed as such. The prohibition or severe limitations, not on peaceful assemblies generally, but on *religious* assemblies in particular – "communities of faith, the autonomous existence of which is indispensable for pluralism in a democratic society."[51] – requires judicial attention and redress. The appropriate place within the section 1 analysis to weigh the cumulative effect of compound *Charter* infringements is in the fourth stage of the *Oakes* analysis, the weighing of the deleterious effects verses the salutary effects. Chief Justice Dickson describes the purpose of this last stage of the *Oakes* analysis this way:

> The inquiry into [deleterious] effects must, however, go further [than the mere infringement of rights]. … Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of … the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance … it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.[52]

41. When the severity of the infringements of multiple fundamental freedoms is as extreme as in the case at bar, and considering the principles of institutional pluralism discussed above, this last stage of the *Oakes* analysis must be given serious consideration.

V. Minimal Impairment and Proportionality in a Free and Democratic Society

42. The impugned regulations can only be upheld if they are minimally impairing and proportionate.[53] This intervener makes submissions only on specific and discrete aspects of the minimal impairment and the balancing stages of the *Oakes* test.

A. Minimal Impairment Requires Prioritizing Constitutionally Protected Activity

43. In the second step of the *Oakes* proportionality analysis, the emphasis is on the right being breached. That is, "the government must show that the measures at issue impair the [*Charter*]

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[51] *Mounted Police*, *supra*, at para 64.
[52] *Oakes*, *supra*, at para 71 [emphasis added].
[53] *Loyola*, *supra*, at paras 37-38.

right…as little as reasonably possible in order to achieve the legislative objective."[54]

44. It should be fatal to the government's demonstrable justification burden at the minimal impairment stage if the court concludes that the Covid-19 transmission risk of banned or severely restricted religious assemblies (if practiced with equivalent public health safeguards) are no greater than the Covid-19 transmission risk in equivalent non-religious gatherings (formal, spontaneous, or informal) which the impugned regulations permit to continue.

45. It appears that the government's pressing and substantial objective for the impugned regulations was to reduce total Covid-19 transmission risk to a certain (unstated) target level. The regulations have reduced the number and scale of scenarios in which people physically come into contact with others. As a matter of basic logic, it cannot be minimally impairing for government to permit non-constitutionally protected activity to continue while banning constitutionally protected activity, where the reduction of risk could be achieved through restrictions of non-constitutionally protected activity. Demonstrable justification requires government to pursue its pressing and substantial objectives by restricting non-constitutionally protected activity *before* restricting constitutionally protected activity. Religious assemblies and practices have constitutional protection.[55] Other activities may be worthy of promotion or protection, but not at the expense of those activities afforded express *Charter* protection.

46. In the case at bar, the government chose at times to completely prohibit religious assemblies or to severely limit or restrict them. In evaluating whether this restriction is minimally impairing, the question is whether government could achieve substantially the same end (i.e. equivalent reduction in the spread of Covid-19) in a manner that does not so drastically impair this right. The court should ask not only: (1) Do bans on religious assemblies reduce the risk of viral spread? and (2) Would anything less than a total ban substantially reduce the risk of viral spread? But

[54] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160.
[55] *Big M Drug Mart*, *supra*, at para 94.

also: (3) *Are there other non-Charter-protected activities contributing to viral spread that could be further restricted before outright banning Charter-protected activities*?

47. There may be legitimate economic or other reasons for government to decide not to ban certain community, social, or commercial activities. But the fact that these activities were permitted, but worship services of the same size were not, demonstrates that the relevant freedoms are not minimally impaired. The *Charter* precludes restricting enumerated rights as the government's 'first choice.'

B. Total Prohibitions are Outside the "Range of Reasonable Alternatives"

48. In *RJR MacDonald*, Justice McLachlin, as she then was, for the majority writes,

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection... If the law falls within a range of reasonable alternatives, the courts will not find it overbroad … [citations omitted]. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.[56]

49. When it comes to reducing the risk of virus transmission, some level of risk has to be tolerated in a free and democratic society. The question then is, can a "not-zero-risk approach" be substantially achieved with less intrusive means? And, logically, the answer would be yes. A capacity limit of 50% reduces risk, lowering that to 30% may reduce the risk more. Other measures that may reduce risk include: screening for symptoms, advising those who have traveled recently to not come, encouraging the vulnerable to take extra precautions, implementing physical distancing requirements, masking while indoors, and limiting length of time indoors. Each of the measures reduce the risk even more such that, the risk is so minimized as to be very close to zero. The government must demonstrate what more is achieved through a complete ban that could not be achieved through these measures.

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[56] *RJR-MacDonald*, *supra*, at para 160.

50. The second point here is the consideration of the range of reasonable alternatives. Admittedly, the Public Health Officer has to draw a line somewhere. That's what the range of reasonable alternatives accommodates: is it 30% capacity or 35% or 25%? The court doesn't have to get into the minutia of those differences, even though a 35% capacity limit is obviously less restrictive than a 30% capacity limit. Here, deference to the decision-maker is permitted. But what cannot be considered on the "range" is a *total* prohibition of a constitutionally protected activity. It is something else entirely. Again, Justice McLauchlin, as she then was, writes:

> it will be more difficult to justify a complete ban on a [fundamental freedom] than a partial ban [citations omitted]. The distinction between a total ban … and a partial ban … is relevant to the margin of appreciation which may be allowed the government under the minimal impairment step of the analysis. … A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that *only* a full prohibition will enable it to achieve its objective.[57]

51. When it comes to reducing the risk of virus transmission, some level of risk has to be tolerated in a free and democratic society. The Ontario PHO did not, and could not, employ a *zero* risk approach. Then logically, the government cannot show that only a full prohibition on religious assemblies for long periods of time would achieve a less-than-zero risk scenario.

C. The Complete Denial of Assembly for Some Mitigation of Risk is not Proportionate

52. The deleterious impact of the impugned regulations which, from time to time actually or effectively banned corporate worship,[58] includes the complete denial of the freedom of the Applicants, of Reformed Christians, and others whose religious beliefs compel assembling in-person for worship and/or sacraments.[59] For these individuals, the impact of the regulations in issue is not merely to change the *mode* in which they conduct their religious practices, but in fact makes it impossible for them to perform their mandatory religious practices.

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[57] *RJR-MacDonald*, *supra*, at para 163, [emphasis added].
[58] See the table describing the various restrictions in the Applicant's Factum at para 24. From March 2020 until June 2020 religious gatherings were restricted to 5 people. From December 2020 until February 2021 and April 2021 until June 2021 religious gatherings were restricted to 10 people. In congregations of 100's, these amount to total prohibitions on corporate worship.
[59] **Reaume Affidavit,** *supra*, at para 80; Applicant's Motion Record, Tab 9, *Affidavit of H. Hildebrandt,* sworn June 4, 2021, at para 60.

53. The beliefs of many Christians, including Reformed Christians, are that corporate, assembled worship is a requirement for the church of Christ. Corporate worship requires in-person presence that cannot be achieved through virtual means. A virtual livestream can be observed or watched by a congregant, but Reformed theology holds that a congregant is not to be merely an observer of corporate worship, but an active participant, most obviously through joining together in singing, prayer, and receiving the sacrament of the Lord's Supper (also called "communion"). All of these are to be done corporately – that is, together as an assembled body. This strikes at the heart of *Charter* protections in sections 2(a) and 2(c) and is of the greatest severity.

54. In addition to the sum of fundamental freedom infringements on individual worshippers and churches, the impugned regulations do serious "macro harm" to institutional pluralism and "the vibrant civil society on which our democracy rests."[60] An entire category of constitutionally-protected societal actors are banned from assembly, thus deeply injuring their vitality and leading to significant downstream harms. On the micro level, this deprives Ontarians of their religious institutions during a period of greater, not lesser, need for comfort and guidance.[61] On a macro level, it sidelines mediating institutions that are crucial in maintaining a healthy civil society and a constitutionally limited government. The risk of a slide towards statism is greatest during times of emergency; it is precisely during those times that it is most crucial to uphold constitutional guarantees of institutional pluralism. Ontario is rendered deeply less free and democratic by the challenged portion of the impugned regulations, and unnecessarily so.

55. The mere fact that there has been *some* Covid-19 transmission in "religious settings" does not demonstrably justify a blanket ban on gathered corporate worship.[62] While such evidence might be sufficient to satisfy the government's burden to establish a rational connection, it is

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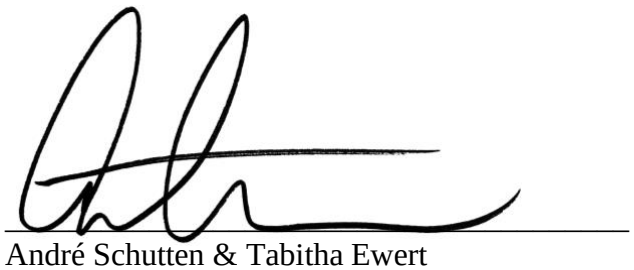
[60] *Mounted Police, supra,* at para 49.
[61] We note that the Waterloo Chief of Police recognized this need in at least one context, standing with over 12,000 others in an outdoor gathering despite a provincial Order prohibiting outdoor gatherings over 5 people. **Reaume Affidavit,** *supra,* at paras. 10-12.
[62] There is a difference between reducing a *risk* of COVID-19 transmission and reducing COVID-19 transmission.

not sufficient to satisfy the government's proportionality burden under section 1, which is a matter of weighing the deleterious and beneficial impacts of the impugned regulations.

56. Although civil government has legitimate and important responsibilities with respect to protecting citizens' health from various threats, government does not exercise sole responsibility for protecting or promoting health. In a free and democratic society, even – perhaps especially – during a pandemic, private institutions and individuals also have a legitimate and important role to play in enhancing various aspects of health. The church, for example, is much better equipped than the state to address the spiritual, mental, emotional, and social health of Canadians, particularly that of their membership. The outright bans and severe restrictions on religious assemblies for corporate worship and sacraments has downstream effects, negatively impacting the mental, emotional, relational, and spiritual health of many Ontarians.[63] Churches have, for two millennia, worked to address and alleviate these public health challenges through counselling, poverty alleviation, shelters, substance abuse groups and more. These institutions must be free to also prevent such deleterious effects upstream through maintaining their core communal, and constitutionally protected, religious practices.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of January, 2022.



André Schutten & Tabitha Ewert
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[63] See, for example, the profound negative, life-threatening impacts of the corporate worship restrictions on individuals and the profound positive impacts of corporate, assembled worship in Applicant's Motion Record, Tab 8, *Affidavit of Craig Williams*, sworn June 4, 2021, at paras. 4-17.

VI. Table of Cases & Legislation

	Cases
1	*Beaudoin v British Columbia*, 2021 BCSC 512
2	*Bracken v. Fort Erie (Town)*, 2017 ONCA 668
3	*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49
4	*Figueroa v. Canada (Attorney General)*, 2003 SCC 37
5	*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26
6	*Irwin Toy Ltd., v. Quebec (Attorney General)*, [1989] 1 SCR 927
7	*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12
8	*Mounted Police Assn. Of Ontario v. Canada (Attorney General)*, 2015 SCC 1
9	*Mouvement laïque québécois v Saguenay (City)*, [2015] SCJ No 16
10	*Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6
11	*National Post v. Canada*, [2004] 178 O.J.
12	*R v Big M Drug Mart Ltd*, [1985] 1 SCR 295
13	*R. v. National Post*, 2010 SCC 16
14	*R. v. Oakes*, [1986] 1 SCR 103
15	*R. v. Simpson*, (1993), 79 CCC (3d) 482
16	*R. v. Young*, (1993), 79 CCC (3d) 559
17	*Reference re Secession of Quebec*, [1998] 2 SCR 217
18	*RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199.
19	*Roach v. Canada (Minister of State for Multiculturalism and Citizenship*, [1994] 2 FC 406
20	*Syndicat Northcrest v. Amselem*, 2004 SCC 47

	Legislation and Regulations
1	*The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s.52.