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2022

ARPA CANADA'S LEGAL ARGUMENTS

IN

TRINITY BIBLE CHAPEL V. ONTARIO

THE CASE TO PROTECT CORPORATE WORSHIP IN ONTARIO

COURT OF APPEAL

ARPA CANADA

Court File No: C70528

COURT OF APPEAL FOR ONTARIO

(*Appeal in an application)*

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Applicant (Respondent in appeal)

- and –

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

Respondents (Appellants)

AND BETWEEN:

HER MAJESTY THE QUEEN IN ONTARIO

Applicant (Respondent in appeal)

- and –

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

Respondents (Appellants)

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

May 13, 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. This court's assessment of the Respondents' justificatory burden under s. 1 of the *Charter* must begin by identifying which features of our "free and democratic society" are imperilled by the orders. The constitutional costs of these orders are greater than the sum of their infringements on the fundamental freedoms of *individual* churches, pastors, or congregants. The orders also disrespect and weaken civil society institutions. A robust civil society is essential to a free and democratic society.

2. Institutional pluralism is an organizing principle under the *Charter*. This principle is reflected in the preamble and sections 1 and 2, which together safeguard the role, vitality and independence of non-state institutions and associations in our free society. Their rights represent a structural limitation on the powers of government and reflect the fact that there are other valid sources of authority and meaning in citizens' lives. Government shares "constitutional space" with these other institutions which, like government, also have responsibilities, duties, and a constitutionally protected public role during a time of crisis. The section 1 analysis in this case must appreciate the weighty compound infringements of multiple fundamental freedoms and the collective damage to institutional pluralism.

3. An emergency order that unjustifiably violates institutional pluralism undermines society's shared objective of responding well to that very emergency. It engenders an adversarial relationship between government and affected religious groups, treating the latter as mere transmission risks to be managed. By contrast, respecting religious communities' constitutional status and rights, and treating them as partners to cooperate with for the common good, preserves their goodwill and support in the common goal of fighting covid-19. A mutually respectful

relationship between government and civil society is essential to a free and democratic society.

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

   a. Gathering for religious worship fulfils purposes core to 2(a), 2(b), and 2(c), by giving effect to the nature of the church as the gathered "body of believers". It is crucial to consider the impact of impugned regulations on <u>each</u> of these fundamental freedoms *and* to weigh the "compound violations" of multiple section 2 fundamental freedoms.

   b. 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.

   c. 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 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

5. Civil society institutions, together with the government, share responsibility to serve people during a pandemic. Religious organizations are committed to contributing to the common good in these times; indeed, this is part of being a church.

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

6. Early modern thinkers such as Hobbes and Rousseau "tried in different ways to subordinate

religious claims to the sovereignty of politics." 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." Civic totalism has not triumphed in Canadian legal history, thanks in large part to the judiciary. Liberal democracy and constitutionalism qualify and limit state power. A free and democratic society is pluralist, not statist. As such, governments should pursue a policy of "maximum feasible accommodation." Such accommodation is not a "wholesale abdication of government responsibility to act in the public interest" such as Pomerance J. warns against below. Instead, maximum feasible accommodation seeks to accommodate the various institutions that contribute to society, subject only to the core duties of the state.

> William A. Galston, "Religion and the Limits of Liberal Democracy" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society* (Quebec City: MGill-Queen's University Press, 2004) 41 at 44 [*Religion and the Limits of Liberal Democracy*].
> William A. Galston, *Liberal Pluralism* (Cambridge: Cambridge University Press, 2002), at 20.
> *Ontario v. Trinity Bible Chapel et al,* 2022 ONSC 1344 at para. 171 [*Trinity Bible Chapel*].

7. "The preamble [to the *Charter*], including its reference to God, articulates the "political theory" on which the *Charter's* protections are based." That political theory sees state authority as structurally limited vis-à-vis individuals and non-government institutions, whose rights against government are subsequently spelled out.

> Mouvement laïque québécois v Saguenay (City), 2015 SCC 16 at para 147, 382 DLR (4th) 385 [*Saguenay*].

8. Professor ten Napel describes this political theory as "social pluralist constitutionalism" which "creates the required space for the institutions of civil society to properly perform the constitutional role they have to play in any system of limited government." He argues that these institutions "play a role in the more general separation of powers and checks and balances in the constitutional system, by creating a kind of federalism "all the way down," which allows

for sovereignty to be shared by the state and civil society associations." This is consistent with the principle in Reformed Christian thought 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.

> Hans-Martien ten Napel, *Constitutionalism, Democracy, and Religious Freedom: To Be Fully Human* (London: Routledge, 2017), at pp. 77-78.

9. The preambular reference to "the supremacy of God" signifies that the state is neither the sole nor the highest authority, nor the ultimate source of rights and freedoms. The preambular reference to "the rule of law" means that all state actors must have intelligible sources for, and limits on, their authority.

> Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005) 29 S.C.L.R. 10. [Ryder, *State Neutrality*].
> Ian T. Benson, "The Limits of Law and the Liberty of Religious Associations" in Ian T. Benson and Barry W. Busey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis Canada Inc., 2017), at xxiii, n 5.
> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para 71, 16 DLR (4th) 385 [*Secession Reference*].

10. The *Charter*'s preamble 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" (Ryder, *State Neutrality*). Law professor Abner Greene describes the state's sovereignty as "permeable" by which he means "the sources of normative authority to which people turn are plural, and therefore we should see the state's sovereignty as permeable – full of holes, rather than full" (Greene, *Against Obligation*)

Ryder, *State Neutrality, supra* para. 9 at para. 17.
Abner S. Greene, *Against Obligation. The Multiple Sources of Authority in a Liberal Democracy* (Cambridge, MA: Harvard University Press, 2012), at 20.

B. Section 1 Justification as an Expression of Institutional Pluralism

11. Section 1 only permits limits on fundamental freedoms that can be demonstrably justified "in a free and democratic society," meaning an institutionally pluralist society. In *Oakes*, Dickson 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." A "free and democratic society" is therefore robustly pluralistic.

Bracken v. Fort Erie (Town), 2017 ONCA 668, at para. 63.
R. v. Oakes, [1986] 1 S.C.R. 103 at para. 64, 53 O.R. (2d) 71 [*Oakes*].
R. v. Big M Drug Mart Ltd., 1985 1 S.C.R. 295 at para. 94, 18 DLR (4th) 321 [*Big M*].

12. The *Charter's* commitment to institutional pluralism requires government (or the courts) to adhere to disciplined state neutrality as between religious and 'secular' modes of life (*Saguenay*). There is a fundamental incompatibility between being a free and democratic society, and sacrificing, or severely constraining, religious communities' freedom to assemble. The state bears an extremely heavy burden to demonstrably justify such an infringement.

Saguenay, *supra* para. 7 at para 137.

III. Institutional Pluralism Reflected in our Current Law

13. Religious bodies 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." (Quoted with approval by Pomerance J. below, at para. 106). The Supreme Court has affirmed these points unequivocally in *Amselem* and in *Wall*. The authority to determine the manner of worship must

include the question of whether physical, in-person attendance is a religious obligation.

> *Beaudoin v. British Columbia*, 2021 BCSC 512 at para. 199 [*Beaudoin*].
> *Syndicat Northcrest v. Anselem*, 2004 SCC 47 at para. 50,241 DLR (4th) 1.
> *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 24.

14. The Supreme Court of Canada acknowledges institutional pluralism when 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" (*Secession Reference*). The vitality of non-state actors and communities is essential for societal health and a characteristic of a free and democratic society. Pomerance J. highlighted this point below: "democratic values command respect for, and accommodation of, a broad range of spiritual beliefs and practises." (*Trinity Bible Chapel*)

> *Secession Reference*, *supra* para. 9 at para. 74
> *Trinity Bible Chapel*, *supra* para. 6 at para. 84.

15. 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" (*Secession Reference*). 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.

> *Secession Reference*, *supra* para. 9 at para. 52

16. 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 does not automatically supersede other authority. It 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. The state's effective prohibition of the core function of another sphere of society, the church (which word is derived from the Greek *ecclesia*, which literally means "the assembled"), would be justified only in extreme situations, and on a case-by-case basis. In other words, it is legitimate to enact restrictions, even heavy and burdensome ones, on another independent sphere of society where demonstrably justified. It is another thing altogether to prohibit that sphere from doing its core function at all.

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 p. 111.
Exhibit Book, Tab 1, Affidavit of Jacob Reaume, at para. 88.

17. 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 hold the executive and legislative branches of government accountable to their constitutional duties and limits, manifested here as respect for the role of other spheres of society.

Exhibit Book, Tab 1, Affidavit of Jacob Reaume, at paras. 6-7

18. Churches' ability to fulfil their religious duties and societal responsibilities may be legitimately inconvenienced by laws or regulations of general application. By the same token, government's ability to fulfill its responsibilities may be inconvenienced by its duty to accommodate and respect religious institutions and practices under ss. 2 and 15 of the *Charter*

(as in *Multani* or *Loyola*). This is the nature of a free and democratic society.

> *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, 264 DLR (4th) 577.
> *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, 382 DLR (4th) 195 [*Loyola*].

19. 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.
>
> David Schneiderman, "Associational Rights, Religion, and the Charter" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at p.72 [*Associational Rights*].

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

20. The manner and practice of worship is at the core of what it means to be religious (*Beaudoin*). For many religious people this means assembling for *communal* worship, being *physically present with their spiritual brothers and sisters*, and receiving the sacraments – which involves *physically* eating *the same* bread and drinking *the same* wine from the *same* table. This cannot be achieved by livestream. Government must account for constitutional importance and priority of religious practices in the life of religious citizens. For Christians, the church is not a building or a legal entity, but the *ecclesia*, the gathered people (*contra* the court below, at para. 81, which describes the church as "religious but non-human entities").

> *Beaudoin*, *supra* para. 13 at para. 199.

21. The state may enact restrictions on religious gatherings, provided the restrictions are demonstrably justified in a free and democratic society. On multiple occasions Ontario enacted a near-total ban on worship. For example, from March 2020 until June 2020, religious gatherings were restricted to 5 people. From December 2020 until February 2021 and from

April 2021 until June 2021 religious gatherings were restricted to 10 people, even outdoors (*Trinity Bible Chapel*). For congregations of hundreds, theses amount to total prohibitions on corporate worship. Such extreme restrictions can be justified only if the government can demonstrate that all alternative courses of action could not substantially reduce the risk of viral transmission.

Trinity Bible Chapel, supra para. 6 at para. 35.

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

22. The constitutional theme of institutional pluralism is, to borrow a phrase from Justice Fitch of the British Columbia Court of Appeal, "hard baked" into the entire section 1 analysis. In appropriate cases, the concept should be addressed explicitly in the final stage of the *Oakes* test. Chief Justice Dickson describes the purpose of this final stage as follows:

> 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.
>
> *Oakes, supra* para. 11 at para. 71 (emphasis added).

23. This final stage of the Oakes test is set within a broader vision, the "second contextual element of interpretation of s. 1 … provided by the words 'free and democratic society'."

> 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.
>
> *Oakes, supra* para. 11 at para 64 (emphasis added).

24. This is a vision of institutional pluralism – a vision of society where both government and courts demonstrate an abiding respect for other legitimate institutions of society. Dickson C.J.'s phrase "faith in social institutions which enhance the participation of individuals and groups in society" is particularly noteworthy. Faith in social institutions requires that civil government respect, trust, protect, and cooperate with other institutions, dialoguing with, rather than dictating to, them. This is all the more important during a crisis. At the court below, Pomerance J. recognized the importance of Dickson CJC's vision of institutional pluralism: "[i]nstitutional pluralism recognizes the complementary roles assumed by church and state and calls for *mutual respect between their spheres of authority*." (*Trinity Bible Chapel*).

    Exhibit Book, Affidavit of Dr. R. Schabas, Tab 7 at para 38.
    Trinity Bible Chapel, *supra* para. 6 at para. 87, emphasis added.

25. The government must undertake the planning and effort necessary to preserve pluralism, even though it makes achieving its objectives more difficult. The Supreme Court warns, "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" (*Secession Reference*).

    Secession Reference, *supra* para. 9 at para 74.

26. A blanket ban on corporate worship disrespects religious institutions and contradicts the spirit and letter of the *Charter*. Thus, at the final stage of the *Oakes* analysis, any measurable benefits derived specifically from near-total prohibition of religious gatherings must be weighed against the fact that the orders in question trench so deeply on the core of other key social institutions.

IV. The Fundamental Freedoms within a Free and Democratic Society

A. The Fundamental Freedoms Preserve Institutional Pluralism

27. The *Charter's* fundamental freedoms structurally limit state authority and protect "social space" for an institutionally pluralistic 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 fundamental freedoms "all speak to the aim of dispersing power to civic and religious associations while bringing groups together in the generation of public policy outcomes" (*Associational Rights*). 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…" (*Secession Reference*).

> Schneiderman, *Associational Rights*, *supra* para. 19 at p. 73.
> *Secession Reference*, *supra* para. 9 at para. 81.

28. Dickson C.J. held that the uniting feature of the fundamental freedoms is the notion of the centrality of individual conscience" and concluded that governmental intervention compelling or constraining the conscience's manifestations is inappropriate. Continuing on the theme, he writes:

> the centrality of the rights associated with freedom of individual conscience both to the 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*.
>
> *Big M*, *supra* para. 11 at para. 122.

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

Loyola, *supra* para. 18 at para 60. 382.

B. Congregational Singing is Constitutionally Protected Religious Expression

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

Peter W. Hogg, *Constitutional Law of Canada,* 5th ed., vol. 2 (loose-leaf updated 2019, release 1) (Toronto: Thomson Reuters Canada, 2007), at p. 43-7-43-8.
Irwin Toy Ltd., v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at p. 976, 58 DLR (4th) 577.

31. The freedom of expression question has theological implications for the intervener and its constituency related to the participatory nature of and the beneficiaries of communal singing. In Reformed theology, worshiping God in corporate song is a right and privilege of all believers gathered together, not just the trained few. As Pomerance J noted, in the court below, Scripture teaches that congregational singing is "vertical" *and* "horizontal". By singing together, believers not only praise God (vertical) but also encourage one another (horizontal), uplifting one another "with psalms, hymns, and spiritual songs". As Pomerance J observes, "The experience of 200 people united in song and prayer will generate a different spiritual resonance than 20 people united in song and prayer. … Religious services do not draw the same bright line between the stage and the audience. The observers perform and the performers observe in an interactive and symbiotic fashion."

The Holy Bible (ESV), Ephesians 5:18-20

Trinity Bible Chapel, *supra* para. 6 at para. 103-104.

32. This is all the more important during times of calamity. Freedom of expression protects not just the right to sing, but to hear singing and be comforted by it. As Pomerance J also noted, "the state does not hold a monopoly on helping people cope with the stress of the pandemic." To prohibit congregational singing is a profound violation of s. 2(a) and (b).

Exhibit Book, Affidavit of Dr. R. Schabas, Tab 7 at para. 38.
Trinity Bible Chapel, *supra* para. 6 at para. 87
Mounted Police Association. of Ontario v. Canada (Attorney General), 2015 SCC 1, at para. 64, 380 DLR (4th) 1 [*Mounted Police*].
R. v. National Post, 2010 SCC 16, at para. 28, 318 DLR (4th) 1 [*National Post*].

C. Freedom of Peaceful Assembly is Directly Engaged

33. The *Charter* guarantee of the fundamental freedom of peaceful assembly has received little attention in Canadian jurisprudence, often being subsumed by other fundamental freedoms. Régimbald and Newman explain 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.
>
> Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017) at p. 645 [*Law of the Constitution*].

34. 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. In *Roach*, Linden J.A. explains that "freedom of peaceful assembly is geared towards protecting the physical gathering together of people." Thus, any argument that religious assemblies could continue by remote or virtual means is non-sensical.

Nnaemeka Ezeani, "Understanding Freedom of Peaceful Assembly in the Canadian Charter of Rights and Freedoms", (2020) 98 S.C.L.R. (2d) 351-376 at para 45 [*Understanding Freedom*].
Roach v. Canada (Minister of State for Multiculturalism and Citizenship), [1994] 2 FC 406 (FCA) at para. 69.

35. The crux of this case is not religious beliefs or associations *per se*, but the right to *peacefully assemble in person* in accordance with sincerely held religious beliefs. There is overlap between the fundamental freedoms in this case, as religious freedom has been interpreted to include the right "to manifest religious belief by worship and practice" (*Big M*). This overlap, however, should not obscure the fact that the *Charter* specifically protects freedom of assembly. The section 2*(c)* rights of *all* religious individuals who would otherwise have attended in-person services are infringed by regulations that prohibit peaceful religious assemblies. This case therefore requires a robust examination of freedom of peaceful assembly.

> *Big M*, *supra* para. 11 at para. 94.

36. Nnaemeka Ezeani suggests that where governments restrict gatherings to limit viral 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." (*Understanding Freedom*). 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.
>
> *Understanding Freedom*, *supra* para. 34 at para. 28

> *Understanding Freedom*, *supra* para. 34 at para. 24.

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

37. The intervener notes the submissions of the Appellants (factum, paras. 66-73) on this point. To avoid duplication, we make submissions here only as it relates to institutional pluralism.

38. 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." Thus, the exploration of compound violations is a useful exercise in order to "fully identify the full depth of impacts on human freedom arising from certain state actions". Courts have recognized that where a right protects multiple interests, the court should consider them all because "a law that has deleterious effects on multiple protected interests will weigh differently in the balance than a law that impacts only one."

> Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms", (2019), 91 S.C.L.R. (2d) 107 – 122, at paras. 34-35.
> *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 at para. 262

39. It is often at the intersection of fundamental freedoms that institutional pluralism finds its protection. As Professor Jamie Cameron has noted, if courts minimize the severity of a section 2 violation by addressing only one freedom, they risk missing "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." For example, inhibiting by statute a small political party reveals a compound violation of section 2(b) and 2(d), undermining the free institutions of political parties and the important role they play in a free and democratic society. Likewise, a compound violation of section 2(a) and 2(c) as it relates to the free institutions of houses of worship or a compound violation of section 2(b) and section 8 as it relates to the free institution of the press risk undermining these fundamental institutions in a free and democratic society.

> Jamie Cameron, "Big M's Forgotten Legacy of Freedom", (2020) 98 S.C.L.R. (2d) 15 – 45, at paras. 41-42.

40. On the latter example, Benotto J. noted the intersecting impact on s. 2(b) and s. 8 with respect to police searches of media entities in *National Post v. Canada* (overturned on appeal, but not on this point):

> 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.
>
> *National Post v. Canada*, 69 O.R. (3d) 427 at para. 45, [2004] 178 O.J. (ONSC).

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 in question on *religious* assemblies (in contrast to assembling merely for entertainment, for example) is highly relevant to the assessment of the sufficiency of the justification of the regulation.

41. Pomerance J. intuitively recognized the compound nature of limiting a religious gathering where she differentiates (at para. 104) a church service—an activity attracting 2(a) *and* 2(c) protection – from other public gatherings such as theatrical plays.

Trinity Bible Chapel, *supra* para. 6 at para 104.

42. 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: weighing deleterious versus salutary effects. As Dickson C.J. explains, "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" (*Oakes*). If the deleterious effects of a measure on a free institution of society is too severe, the measure will not be justified.

Oakes, *supra* para. 11 at para 71.

43. The cumulative effect of compound *Charter* violations is not an arithmetic exercise, but a qualitative one. The point is not that the impugned regulations created a series of relatively severe infringements which then snowball into an even larger infringement. Rather, it is that the government trod heavily upon all of the appellants' fundamental freedoms in a way that engages the core of these freedoms and strikes at the heart of institutional pluralism. It is through this lens that this Court should view the impugned regulations.

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

44. The impugned regulations can only be upheld if they are minimally impairing and proportionate (*Loyola*). This intervener makes submissions only on specific and discrete aspects of the minimal impairment and the final balancing stages of the *Oakes* test.

> *Loyola*, *supra* para. 18 at paras. 37-38

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

45. 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.
>
> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at para. 160, 127 DLR (4th) 1 [*RJR-MacDonald*].

46. When it comes to reducing the risk of virus transmission, some level of risk must be tolerated in a free and democratic society. The question is whether a "not-zero-risk approach" can be substantially achieved with less intrusive means. A capacity limit of 50% reduces risk, and a limit of 30% may reduce the risk more. Other measures may also reduce risk: screening for symptoms, advising those who have traveled recently to attend, implementing physical

distancing requirements, wearing masks, and limiting length of time indoors. As such measures accumulate, the transmission risk approaches zero, without effectively banning worship. The government must demonstrate that significantly greater risk reduction – over and above the risk reduction achieved by several less restrictive measures - can be achieve by a ban.

47. Of course, the government must draw a line somewhere. That is precisely what the range of reasonable alternatives accommodates: is it 30% capacity or 35% or 25%? Deference to the decision-maker on such details is permitted and expected. But what cannot be considered part of the "range of reasonable alternatives" is a ***total*** prohibition of a constitutionally protected activity. That is something else entirely. Again, Justice McLachlin, 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.
>
> *RJR-MacDonald*, *supra* para. 45 at para. 163.

48. Ontario did not, and could not, employ a *zero* risk approach. Therefore, the government cannot justify a full prohibition on religious assemblies as necessary to achieve zero transmission risk. 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 also: (3) *Are there other non-Charter-protected activities contributing to viral spread that could be further restricted before outright banning Charter-protected activities*?

B. The Complete Denial of Assembly is not Proportionate

49. The deleterious impact of the impugned regulations includes the complete denial of the freedom of the Appellants, of Reformed Christians, and others whose religious beliefs compel assembling in-person for worship and/or sacraments. For these individuals, the regulations do merely not change their *mode* of religious worship; rather, the regulations ban their religious worship. This strikes at the heart of *Charter* protections in sections 2(a) and 2(c) and is of the greatest severity.

50. In addition to the sum of fundamental freedom infringements on individual worshippers and churches, the impugned regulations undermine institutional pluralism and weaken "the vibrant civil society on which our democracy rests" (*Mounted Police*). On the micro level, the regulations deprived Ontarians of their religious institutions at a time they needed them most. On a macro level, the regulations sidelined mediating institutions that are crucial in maintaining a healthy civil society and a constitutionally limited government.

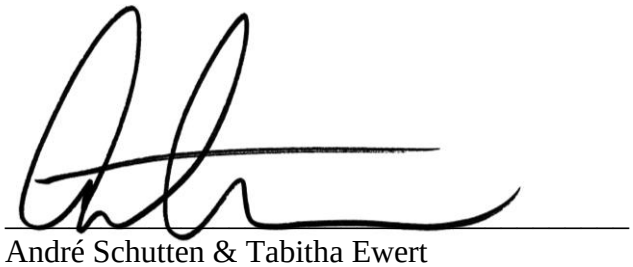
> *Exhibit Book*, Tab 1, Affidavit of Jacob Reaume, at para.80
> *Exhibit Book*, Tab 3, Affidavit of Henry Hildebrandt, at para. 60.
> *Mounted Police*, *supra* para.32 at para. 49.
> *Exhibit Book*, Tab 1, Affidavit of Jacob Reaume, at paras. 10-12.

51. Civil government does not possess sole responsibility for protecting or promoting health. In a free and democratic society, social institutions and communities 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, especially the churches' own members. The outright bans and severe restrictions on religious assemblies harmed the mental, emotional, relational, and spiritual health of many Ontarians. Churches have, for two millennia, worked to address and alleviate 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.

*Exhibit Boo*k, Tab 2, Affidavit of Craig Williams at paras. 4-17.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 13th day of May, 2022.



André Schutten & Tabitha Ewert
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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 Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62
4	*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49
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*, 69 O.R. (3d) 427.
12	*Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344
13	*R v Big M Drug Mart Ltd*, [1985] 1 SCR 295
14	*R. v. National Post*, 2010 SCC 16
15	*R. v. Oakes*, [1986] 1 SCR 103
16	*Reference re Secession of Quebec*, [1998] 2 SCR 217
17	*RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199.
18	*Roach v. Canada (Minister of State for Multiculturalism and Citizenship*, [1994] 2 FC 406
19	*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.