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# *Restricting Freedom of Peaceful Assembly During Public Health Emergencies*

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## I. Introduction

As the second wave of the COVID-19 pandemic in Canada continues, so too does litigation challenging policies intended to slow the spread of the virus. A growing number of claimants have argued that these sweeping public health measures — many of them drastic and previously unimaginable — infringe various provisions of the *Canadian Charter of Rights and Freedoms*.[1] While a significant number of claims have been brought pursuant to protections that support a sustained body of jurisprudence, litigants may yet seek to explore some of the more forgotten sections of the *Charter*, particularly section 2(c)'s guarantee of freedom of peaceful assembly. In an effort to encourage the development of a body of jurisprudence on section 2(c), this article envisions how such *Charter* challenges might unfold.

I begin by considering the general framework that ought to be applied in freedom of peaceful assembly claims, adopting a modified version of Basil Alexander's proposed "substantial interference" test. Following this, I assess when restrictions on freedom of peaceful assembly will be justified pursuant to section 1 of the *Charter* under the framework adopted by the Supreme Court of Canada (the "Supreme Court") in *R v Oakes*.[2] Though such claims will in all

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

2 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes* cited to SCR].

likelihood be resolved on a case-by-case basis, I argue that restrictions on assemblies which go to the core of section 2(c) — including public demonstrations and religious services — ought to be subject to a more rigorous threshold of justification, even during public health emergencies such as the COVID-19 pandemic.

## II. The Section 2(c) Test

The Supreme Court has yet to articulate a framework within which freedom of peaceful assembly claims are to be resolved. The *Charter* challenges that have been commenced during the COVID-19 pandemic (and which will undoubtedly be followed by further litigation the longer this state of emergency lasts) have the potential to define how Canadian jurists understand this largely forgotten freedom. Until recently, there has been very little scholarship on the purpose and scope of section 2(c). Of the few articles written to date on the subject, Basil Alexander's 2018 paper is arguably the most authoritative.[3] Alexander explains that Canadian courts have historically assessed assembly-related claims through the lens of section 2(b)'s parallel guarantee of freedom of expression, leading to "stagnation" in section 2(c) jurisprudence:

> Rather than undertake a free-standing freedom of peaceful assembly analysis, Canadian judges tend to examine related claims through a freedom of expression lens. This has resulted in the existence of little to no detailed analyses under subsection 2(c) in the modern jurisprudence. In particular, the lack of focus on peaceful assembly raises concerns regarding stagnation of the law and the effectiveness of peaceful assembly as an individual freedom to safeguard demonstrations.[4]

If assemblies such as public demonstrations are to receive robust constitutional protection, Alexander warns, then an independent jurisprudential approach to freedom of peaceful assembly is needed.[5] To this end, Alexander suggests that the "substantial interference" framework used for freedom of religion and freedom of association claims could be repurposed into a section 2(c) test. Such an analysis will recognize that certain constitutional guarantees are subject to "degrees of infringement," allowing for contextually driven legal results "that better account for peaceful assembly's unique features and character."[6] Under this test, courts ask whether the interference of the freedom in question is "more than trivial or insubstantial",

3 Basil S Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8:1 Western J Leg Studies 1 [Alexander, "Freedom of Peaceful Assembly"]. See also my 2020 article in a special edition of the *Supreme Court Law Review* on the forgotten fundamental freedoms of the *Charter*, as well as Nnaemeka Ezeani's contribution to the same collection: Kristopher E G Kinsinger "Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the Charter" (2020) 98 SCLR (2d) 377 [Kinsinger, "Positive Freedoms and Peaceful Assemblies"]; Nnaemeka Ezeani, "Understanding Freedom of Peaceful Assembly in the Canadian Charter of Rights and Freedoms" (2020) 98 SCLR (2d) 351 [Ezeani, "Understanding Freedom of Peaceful Assembly"].

4 Alexander, "Freedom of Peaceful Assembly", *supra* note 3 at 2.

5 *Ibid* at 2-3.

6 *Ibid* at 14-15. One of the benefits of such a framework, Alexander argues, is that findings of infringement which play a limited role at the "scope-defining" stage of the s 2(c) test will still be relevant in an ensuing s 1 justification analysis. Note, however, that not all scholars agree with Alexander's proposed substantial interference test. Ezeani, for example, argues that such an appropriate "will remove several activities from the sphere of protection, at least depending on the interpretation that will be given to 'substantial interference' in the context of freedom of peaceful assembly" (Ezeani, "Understanding Freedom of Peaceful Assembly", *supra* note 3 at 374). Indeed, for Ezeani, "even the slightest interference with the sphere of

allowing for a purposive case-by-case analysis to determine whether the *Charter* has been limited.[7]

On this point, it is important to ensure that the *Charter*'s guarantee of freedom of peaceful assembly is construed neither too broadly nor too narrowly. A section 2(c) framework that is overly restrictive will make it difficult for claimants to get beyond the scope-defining stage of the analysis. For example, if section 2(c) only protects protest activity, then any number of other truth-seeking activities (such as public memorials and religious services) will fall outside of its scope. Conversely, the formulation of a test that is excessively permissive may result in most claims being substantively resolved under section 1, allowing judicial actors to resolve disputes which engage largely democratic interests. One of the enduring criticisms of section 2(b) jurisprudence is that the scope of the freedom itself is construed so broadly that virtually any non-violent activity will attract *prima facie* protection. The upshot has been what Jamie Cameron describes as a "formalistic separation of breach and justification which [thins] the freedom principle out to the point of disappearance," as courts engage in a largely policy-driven analysis of whether the content of the expression in question is "worthy" of protection.[8] Care must be taken to ensure that a similar fate does not befall section 2(c).

It is beyond the scope of this paper to offer a comprehensive assessment of the types of assemblies that could receive protection under section 2(c). At a minimum, it is clear that freedom of peaceful assembly only protects gatherings that consist of two or more participants, since an assembly by definition cannot be comprised of just one person.[9] Likewise, in order to ensure that nuisance activities such as loitering are not granted constitutionally protected status, the assemblies covered by section 2(c) ought not to include gatherings which serve no unifying purpose around which individuals will seek to associate. It is worth further noting that section 2(c) is subject to an explicit internal restriction: namely, that protected assemblies must be peaceful. As the late Peter Hogg explained, this proviso makes it clear that the scope of section 2(c) excludes violent activities such as riots.[10] As I argue elsewhere, however, this use of the word "peaceful" might also be interpreted more expansively, protecting lawful gatherings from disruption by third parties in the same way that the common law guarantees tenants the "peaceful enjoyment" of their properties. In such cases, hostile exercises of the so-called

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freedom of peaceful assembly" by the government will be sufficient to "find a Charter infringement requiring justification" (*ibid*).

7 Alexander, "Freedom of Peaceful Assembly", *supra* note 3 at 12, citing *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 60. The ruling in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*] also provides a helpful example of the substantial interference test, in which the Court unanimously accepted that a law which required the claimant members of a closed community to have their photos taken to receive drivers' licenses substantially and non-trivially interfered with their sincere religious belief that doing so would contravene the biblical commandment to not make graven images. However, a majority of the Court also held that this interference was justified under s 1, confirming that even substantial limitations of fundamental freedoms can give way to other public objectives.

8 Jamie Cameron, "A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012" (2012) 58 SCLR (2d) 163 at 172-173.

9 Indeed, were this not the case, there would be very little to distinguish the exercise of this guarantee from freedom of expression.

10 Peter W Hogg, *Constitutional Law of Canada*: *2016 Student Edition* (Toronto: Thomson Reuters, 2016) [Hogg, *Constitutional Law*] at 44-2. See also Ezeani, "Understanding Freedom of Peaceful Assembly", *supra* note 3 at 370-72 for more on s 2(c)'s requirement that protected assemblies be peaceful.

"heckler's veto" may even place a positive obligation on state actors to ensure that claimants are able to exercise their section 2(c) entitlements free from coercion or constraint.[11]

Beyond these base requirements, Alexander's proposed substantial interference test indicates that activities which go to the core of freedom of peaceful assembly will attract a greater degree of constitutional protection.[12] While Alexander notes that more judicial analysis is needed to determine the sort of gatherings that will constitute "core" assemblies, recent scholarship has identified the facilitation of truth-seeking as one of the core animating purposes of the fundamental freedoms guaranteed by the *Charter*. Derek Ross, for example, argues in a 2020 article that truth-seeking unifies section 2's distinct guarantees by protecting not only individual interests but also the interests of society in promoting diversity and pluralism, preventing "illiberal regime[s] which [perceive their] leaders' knowledge as complete and perfect" from "compelling citizens to adopt [the state's moral] commitments as their own".[13] On this point, Ross contends that freedom of peaceful assembly helps to ensure "that voices which could not be heard individually can be amplified and thus effectively conveyed to society at large."[14] As Ross notes, the activities protected by section 2(c) "serve both the communicators' needs … and society's interests in addressing concerns [related to the advance of truth] that are hidden and unknown."[15] In other words, peaceful assembly is one of the most important means by which protected minority groups are able to participate in public life. These observations are echoed by Nnaemeka Ezeani in another 2020 paper, remarking that the freedom "applies to dissenting groups who should be within their rights when they assemble for their common purpose, provided they do so peacefully and without trampling on other basic liberties."[16] .

Based on the above, I contend that section 2(c) will be engaged when the following conditions are met: first, the claimant must have sought to participate in a gathering of two or more people for a common purpose; second, this gathering must have been peaceful (i.e., non-violent) in nature; and third, interference with this gathering must have been neither trivial nor insubstantial.[17] It is irrelevant whether the assembly in question took place on public or private

11 Kinsinger, "Positive Freedoms and Peaceful Assemblies", *supra* note 3 at 393-94. The "heckler's veto" is a term used to describe dissenting voices which are so overpowering that they effectively hold a veto over whether a speaker will be permitted to express themselves. The archetypal example is of a politician who is unable to finish a speech after being drowned out by a heckling member of their audience.

12 Alexander, "Freedom of Peaceful Assembly", *supra* note 3 at 15-16.

13 Derek BM Ross, "Truth-Seeking and the Unity of the Charter's Fundamental Freedoms" (2020) 98 SCLR (2d) 63 at 80.

14 *Ibid* at 90.

15 *Ibid* at 91.

16 Ezeani, "Understanding Freedom of Peaceful Assembly", *supra* note 3 at 365, citing John D Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (New Haven: Yale University Press, 2012) at 4. In this way, Ezeani explains, peaceful assemblies may be relied on by claimants to further the exercise of other fundamental freedoms guaranteed by s 2 (*ibid* at 363, 366-68). See also Halsbury's Laws of Canada (online), *Constitutional Law of Canada (Charter of Rights)*, "Fundamental Freedoms: Freedom of Assembly" (VI.3) at HCHR-42 "Freedom of assembly" (2019 Reissue).

17 As I argue at length elsewhere, exercises of the "heckler's veto" by third parties may result in a positive obligation being placed on state actors to ensure that claimants are able to exercise their constitutional entitlements free from coercion or constraint: see Kinsinger, "Positive Freedoms and Peaceful Assemblies", *supra* note 3 at 387, 393.

property.[18] Under this test, there is a strong case to be made that public health restrictions on physical gatherings during a pandemic will result in a *prima facie* restriction on section 2(c). In such a scenario, some impacted activities (e.g., public demonstrations, religious services, etc.) will clearly go further to the core of the affected freedom than others (e.g., dinner parties, social gatherings, etc.) and thus result in a greater degree of limitation. That said, it will likely be unnecessary to distinguish too rigidly between these different types of assemblies at the scope-defining stage of the analysis. There is ample room under section 1 to recognize that a higher threshold of justification ought to apply to core exercises of freedom of peaceful assembly, an issue to which I now turn.

## III. The Section 1 Analysis for Freedom of Peaceful Assembly

The well-trodden section 1 *Oakes* framework designed to allow governments to demonstrably justify restrictions on *Charter* protections is typically divided into four stages: first, the impugned law must pursue a pressing and substantial objective; second, the law must be rationally connected to this objective; third, the law must impair the *Charter* in question as minimally as (reasonably) possible in the pursuit of its objective; and fourth, the deleterious effects that emanate from the law's restriction of the *Charter* must be proportionate to the salutatory benefits that will result if its objective is achieved.[19] At these latter stages, restrictions on non-core section 2 activities are likely to attract a less rigorous standard of justification under section 1, as the Supreme Court held with regard to freedom of expression in *R v Keegstra*.[20] While courts should heed Cameron's warnings against adopting an overly contextual and hence unwieldly justification analysis, the *ratio decidendi* from *Keegstra* has a certain intuitive merit to it, so long as restrictions on core section 2 activities are conversely subjected to a higher justification threshold. In the context of freedom of peaceful assembly, such core activities will largely consist of gatherings that pursue a truth-seeking purpose, including public demonstrations — such as the protests against racial injustice which took place across Canada throughout 2020 — and religious services, the latter of which will also be subject to potential freedom of religion claims under section 2(a). In the remainder of this paper, I apply the four branches of the *Oakes* test to limitations on section 2(c), using restrictions which have been imposed on this freedom during the COVID-19 pandemic as a benchmark.

### 1. Pressing and Substantial Objective

The first branch of the *Oakes* test requires the government to demonstrate that the objective pursued by an impugned law is "of sufficient importance to warrant overriding a constitutionally protected right or freedom."[21] While this initial question is arguably the easiest for

18 See *ibid* at 387.

19 *Oakes*, *supra* note 2 at paras 62-72. I am obviously assuming that any proportionality analysis in a s 2(c) claim against COVID-19 restrictions will be resolved under the *Oakes* framework, rather than the parallel s 1 framework for administrative policies and decisions adopted by the Supreme Court in *Doré v Barreau du Québec*, 2012 SCC 12. In any event, where there is a question about which particular framework should apply, the application of either test should lead to the same substantive result, as the Ontario Superior Court indicated in *Christian Medical and Dental Society v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at paras 60-62.

20 *R v Keegstra*, [1990] 3 SCR 697 at 762, 114 AR 81 [*Keegstra*].

21 *Oakes*, *supra* note 2 at 138, citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 352, 18 DLR (4th) 321.

the government to satisfy, its answer will determine the standard by which an impugned law is justified in the remainder of the section 1 analysis. In other words, determining *what* a law's objective is — not just whether that objective itself is pressing and substantial — is crucial, and it is accordingly a question to which section 2(c) claimants challenging COVID-19 restrictions must direct very close attention. Conspiracy theorists notwithstanding, virtually no one disputes that combatting the spread of a virus which has ravaged populations the world over — and which has hit immunocompromised and long-term care populations especially hard — is a pressing and substantial objective.[22] That said, the precise legal objectives being pursued in the fight against COVID-19 vary from province to province. Some provincial governments (such as those in the Maritimes, which have enacted harsh restrictions on activities such as interprovincial travel) appear to be pursuing an objective of keeping the number of new cases as close to zero as possible, while others (such as those in Alberta and Saskatchewan, which have sought to avoid onerous restrictions on daily activities) have apparently abandoned the notion that transmission of the virus can be completely curtailed.[23] Governments in provinces such as Ontario fall somewhere between these two extremes, where the objective of COVID-19 restrictions appears to be minimizing virus transmission as much as possible without completely shutting down the provincial economy, thereby suggesting that some transmission of the virus is acceptable, even if the government's precise calculus in this regard is unclear.[24] In these cases, acceptable transmission of the virus will likely be assessed with regard to the relative degree of risk posed by certain activities, with lower risk activities being permitted before those that pose a higher risk of transmission.

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22 As of the writing of this essay, there are approximately 80,000 individuals living in long-term care homes in Ontario: of these, approximately 11,750 have tested positive COVID-19 (≈14.7% of the total population) and almost 3,000 (≈3.75%) have died as a result of the disease. See: Financial Accountability Office of Ontario, "Long Term Care Homes Program: A Review of the Plan to Create 15,000 New Long-Term Care Beds in Ontario" (30 October 2019) at 1, online (pdf): <https://www.fao-on.org/web/default/files/publications/FA1810%20Long-term%20Care%20Bed%20Expansion%20Analysis/Long-term-care-homes%20program.pdf>; Government of Ontario, "COVID-19 cases: Long-term care homes" (last visited 7 January 2021), online: *COVID-19 Ontario* <https://covid-19.ontario.ca/data/long-term-care-homes>.

23 See, e.g., *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, in which an individual claimant and the Canadian Civil Liberties Association argued, *inter alia*, that Newfoundland and Labrador's COVID-19 travel ban (which effectively prevents non-residents from entering the province) unjustifiably restricts ss 6(1) and 7 of the *Charter*. The Court devoted a considerable portion of its reasons on s 1 to assessing the objective being pursued by the provincial government through the travel ban. The Court found that, because Newfoundland and Labrador has seen a relatively low number of COVID-19 cases, the purpose of the policy was to "protect those in [the province] from illness and death arising from the importation and spread of COVID-19 by travelers" by "[controlling] the spread of COVID-19 from an area of high infection to an area of low infection" (*ibid* at paras 435-36). For a journalistic assessment of those provinces which have enacted comparatively less onerous COVID-19 restrictions, see James Keller, "Provinces with least-strict COVID-19 restrictions this summer saw sharp case spikes in second wave, data show" (1 January 2021), online: *The Globe and Mail* <https://www.theglobeandmail.com/canada/alberta/article-university-of-oxford-data-show-provinces-with-lax-covid-19/>.

24 Government of Ontario, "COVID-19 response framework: keeping Ontario safe and open" (3 November 2020, updated 23 December 2020), online: *COVID-19 Ontario* <https://www.ontario.ca/page/covid-19-response-framework-keeping-ontario-safe-and-open>. See also Katherine DeClerq, "Ontario premier says he will not make 'snap decision' on lockdowns despite calls from hospitals" (17 December 2020), online: *CTV News Toronto* <https://toronto.ctvnews.ca/ontario-premier-says-he-will-not-make-snap-decision-on-lockdowns-despite-calls-from-hospitals-1.5235606>.

**2. Rational Connection**

As with the first stage of the *Oakes* framework, it is not overly difficult for the government to satisfy the requirement that an impugned law be rationally connected to a pressing and substantial objective. The inquiry at this stage is not whether the law is sufficiently tailored to its objective, but rather whether it is "arbitrary, unfair or based on irrational considerations."[25] In the case of COVID-19 restrictions on peaceful assemblies, this will once again be a question that is likely resolved in the government's favour. The medical consensus is that COVID-19 spreads in settings where infected individuals are able to transmit the virus through exhaled droplets or aerosols.[26] Since individuals may become infected but present no symptoms, gatherings where people are in close proximity with one another are considered to pose a higher risk of transmission; the wearing of personal protective equipment such as face coverings is further believed to help mitigate this risk.[27] If it were somehow possible to prevent an entire population from meeting with anyone outside of their respective households for the duration of the virus's incubation period, then transmission would presumably fall to zero. Such a policy is probably not feasible in Canada and would in any event likely fail at one of the final two branches of the *Oakes* test. The point here is simply that virtually any COVID-19 restriction on physical gatherings, irrespective of its severity, will likely be found to be rationally connected to the objective of minimizing or eliminating transmission of the virus. Claimants would do well to accordingly reduce the time they spend making submissions on this stage of the section 1 analysis and instead focus their attention on the final two branches of the proportionality test, considered below.

**3. Minimal Impairment**

The main focus of a section 2(c) challenge to COVID-19 restrictions on physical gatherings is likely to be on the "minimum impairment" stage of the section 1 analysis. The key question that is asked at this stage of the *Oakes* test is whether the legislative objective in question can be achieved through a policy that is less restrictive of the engaged *Charter* protections(s).[28] Courts are inclined to extend a healthy dose of deference to governments when it comes to questions of minimal impairment: impugned laws must only be found to fall "within a range of reasonable alternatives" in order to survive this stage of the proportionality analysis.[29] Courts may not strike down a law simply because they can "conceive of an alternative which might better tailor objective to infringement."[30] However, the test is nonetheless a rigorous one: the impugned law must be "carefully tailored" toward its goals such that there are no other "alternative, less drastic means of achieving the objective in a real and substantial manner."[31] This latter question is in part an evidentiary one, and the government must be prepared to explain

25 *Oakes*, *supra* note 2 at 139.

26 Derek K Chu et al, "Physical distancing, face masks, and eye protection to prevent person-to-person transmission of SARS-CoV-2 and COVID-19: a systematic review and meta-analysis" (2020) 395 Lancet 1973 at 1973-74.

27 *Ibid*; see also Allyson M Pollock & James Lancaster, "Asymptomatic transmission of covid-19" (2020) 371 BMJ 1.

28 *Oakes*, *supra* note 2 at 139; *Carter v Canada*, 2015 SCC 5 at para 102 [*Carter*].

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

30 *Ibid*.

31 *Ibid*; *Hutterian Brethren, supra* note 7 at para 55.

whether any "significantly less intrusive measure which appears as effective" was considered, and, if so, why it was ultimately rejected.[32]

The evidence regarding community spread of COVID-19 is sparse and evolving. In many instances, cases cannot be traced back to any particular source or setting. This will present a challenge as courts seek to assess whether restrictions on in-person gatherings are minimally impairing.[33] Nevertheless, the data which have been made available are suggestive of possible trends that may influence judicial assessments of the "minimum impairment" question under the *Oakes* test. In Ontario, for example, long-term care facilities have accounted for the highest number of daily outbreaks, followed by workplaces, retirement homes, hospitals, and schools; other outbreak settings, such as weddings and religious services, have recorded lower numbers of outbreaks.[34] The inference that one may plausibly draw from these data is that different settings each carry their own unique risk of transmission. One may not find this surprising. Religious assemblies in Ontario, for example, have been required to observe strict building capacity limits since June 2020; in many municipalities, these assemblies were also subject to mandatory face covering bylaws, later superseded by a provincewide face covering mandate.[35] Likewise, despite the initial fear of some health professionals, the 2020 protests against racial injustice did not *appear* to result in any COVID-19 outbreaks.[36] In cities where many of these demonstrations occurred, public health leaders strongly advised participants to wear face coverings and observe physical distancing guidelines.[37] The general medical consensus has

32 *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 119, 159 DLR (4th) 385.

33 For example, Ontario has recorded the following case statistics as of 7 January 2021: 83,634 as a result of close contact (i.e., "an infected person that [an individual was] physically close to"; 38,542 as a result of community spread (i.e., where a positive case cannot be traced to its source); 38,434 from outbreak settings (i.e., where a positive case can be traced to a "shared space or setting"); 4,108 as a result of travel (i.e., where someone has travelled outside of the province within 14 days before their symptoms began); and 257 identified as "other" (i.e., where "[i]nformation on the source of infection is currently pending or unspecified": Government of Ontario, "COVID-19 case data: All Ontario" (last visited 7 January 2021), online: *COVID-19 Ontario* <https://covid-19.ontario.ca/data>.

34 Ontario recorded the following active outbreaks by setting as of 7 January 2021: 228 in long-term care homes; 241 in workplaces (e.g., farms, retail, etc.); 142 in retirement homes; 68 in hospitals; 103 in group living (e.g., group home, shelter, correctional facility, etc.); 127 in education settings, including child care; 63 in recreational settings, of which 25 were specifically traced to "other recreation" settings such as weddings and religious services: see *ibid* for a more detailed breakdown of these statistics.

35 Ontario Ministry of Health, "COVID-19 Advice: Religious Services, Rites or Ceremonies – Version 2" (21 August 2020), online (pdf): *Government of Ontario* <http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/advice_religious_services.pdf>; see, e.g., The Regional Municipality of Waterloo, by-law No 20-052, *A By-law to Amend bylaw 20-035, A By-law to Require the Wearing of Face Coverings in Enclosed Public Places During the COVID-19 Pandemic* (23 September 2020); *Rules for Areas in Stage 3*, O Reg 364/20, s 2(4).

36 Ashley Legassic, "Health officials say no COVID-19 outbreaks related to Black Lives Matter Protest" (3 July 2020), online: *iHeart Radio* <https://www.iheartradio.ca/virginradio/victoria/covid-19-updates/health-officials-say-no-covid-19-outbreaks-related-to-black-lives-matter-protests-1.12882662>. Similar demonstrations in the United States similarly did not result in any substantial uptick in COVID-19 transmission: Matt Berger, "Why the Black Lives Matter Protests Didn't Contribute to the COVID-19 Surge" (8 July 2020), online: *Heathline* <https://www.healthline.com/health-news/black-lives-matter-protests-didnt-contribute-to-covid19-surge>.

37 Chase Banger, "Masks required at Black Lives Matter solidarity march, but health officials worry COVID-19 could spread" (2 June 2020), online: *CTV News Kitchener* <https://kitchener.ctvnews.ca/masks-required-at-black-lives-matter-solidarity-march-but-health-officials-worry-covid-19-could-spread-1.4965776>.

been that where such measures are followed, a comparative reduction in the transmission of COVID-19 should be expected. Consequently, it is reasonable to suppose that restrictions on *core* assemblies (e.g., religious assemblies or protests against systemic injustice) that observe these best practices will demand a markedly higher bar for justification under the minimal impairment branch of the *Oakes* test, at least if presented evidence suggests or confirms that these gatherings are not substantially contributing to the spread of COVID-19.

**4. Proportionate Effects**

Depending on whether COVID-19 restrictions on physical assemblies are found to be minimally impairing, a reviewing court may or may not proceed to the fourth and final stage of the *Oakes* framework, the "proportionate effects" stage. That said, litigants challenging these measures on the basis of section 2(c) should be prepared to make substantive submissions on this branch of the section 1 test, which consists of a holistic assessment of "the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good."[38] As Hogg put it, the question to be asked is "whether the Charter infringement is too high a price to pay for the benefit of the law."[39] This is a comparatively normative undertaking, and as such appropriate deference should be given to the relevant legislature's assessment.[40] At the same time, however, courts must also ensure that they remain alive to the impact of the impugned law on claimants: as Abella J noted in her forceful dissent in *Hutterian Brethren*, it is entirely appropriate to ask at the proportionate effects stage "how deeply" the *Charter* protection has been restricted, and "the degree to which the impugned limitation will advance its underlying objective".[41]

As noted above, COVID-19 restrictions on core assemblies will result in a more severe limitation of section 2(c), and as such will require persuasive evidence that the public benefit to be gained from their continuation is worth the cost that is conversely imposed on claimants. As time goes on, the relative deleterious weight of such restrictions will almost certainly increase. This ought not be a controversial argument: a lockdown that prohibits or otherwise severely limits peaceful assemblies for four weeks, for example, will weigh less heavily at the final stage of the proportionality analysis than a potentially indefinite lockdown which has lasted several months. Even if the initial section 2(c) challenges that are brought against such measures do not succeed, at some point it should be expected that the balance will shift in favour of these claimants.

## IV. Conclusions

It is difficult to predict how a hypothetical section 2(c) *Charter* challenge against COVID-19 restrictions might unfold. Litigation will undoubtedly turn on the facts of each particular case. That said, there are good reasons to conclude that ongoing restrictions on core activities protected by section 2(c) should attract a higher threshold for justification under section 1.

38 *Carter*, *supra* note 28 at para 122.

39 Hogg, *Constitutional Law*, *supra* note 10 at 38-43; *Hutterian Brethren*, *supra* note 31 at para 77.

40 *R v KRJ*, 2016 SCC 31 at para 790.

41 *Hutterian Brethren*, *supra* note 7 at para 152, citing Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 UTLJ 383 at 393.

Indeed, a compelling argument can be made that limitations on core assemblies which observe evidence-based practices shown to reduce the transmission of COVID-19 (such as physical distancing and the wearing of face coverings) may in some cases fail to satisfy the minimal impairment or proportionate effects branches of the *Oakes* test. If governments hope to prevent COVID-19 restrictions on physical assemblies from being overturned, they will need to ensure that they continue to proffer compelling and non-speculative evidence in support of these policies.