IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Beaudoin v. British Columbia,* 2021 BCSC 248

Date: 20210217
Docket: S210209
Registry: Vancouver

Between:

Alain Beaudoin, Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church, and Free Reformed Church of Chilliwack

Petitioners

And

Her Majesty the Queen in Right of the Province of British Columbia and Dr. Bonnie Henry in her Capacity as Provincial Health Officer for the Province of British Columbia

Respondents

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Petitioners:	P. Jaffe M. Moore
Counsel for the Respondents:	G. Morley E. Lapper
Place and Date of Hearing:	Vancouver, B.C. February 12, 2021
Place and Date of Judgment:	Vancouver, B.C. February 17, 2021

Introduction

[1] We are in the midst of a terrible pandemic. Our provincial government, under the guidance of the respondent Dr. Bonnie Henry, is doing its best to protect us from the ravages of the pandemic.

[2] Many are finding solace and comfort in these troubled times in their religious views and practices, and gathering together with others who share their views and practices.

[3] The petitioners protest a Ministerial Order and certain orders made by the respondent Dr. Henry in response to the COVID-19 pandemic. The orders restrict gatherings and events, including religious gatherings. The petitioners seek to have them declared to be of no force and effect as unjustifiable infringements of their, or their parishioners' *Charter* rights. They seek to have the orders quashed, and interim and final injunctions granted to enjoin the respondents from further enforcement action that would interfere with religious services, as well as an order quashing certain violation tickets issued pursuant to the impugned orders.

The Parties

[4] The petitioner Alain Beaudoin was born and resides in British Columbia. He has worked here as a residential care worker, an animal control officer and as a medic in the oil and gas industry. He has involved himself in advocacy for both what he sees as his own rights and those of others.

[5] The petitioner Brent Smith is the Pastor of the Riverside Calvary Chapel, and the petitioner Mr. Van Muyen is the Chair of the Council of Immanuel Covenant Reformed Church. They seek the same relief as Mr. Beaudoin, as do the other petitioners, which are churches whose members are or may be affected by the impugned orders.

[6] The respondents are Her Majesty the Queen in Right of the Province of British Columbia, and Dr. Bonnie Henry, the Provincial Health Officer. I was advised by counsel for the respondents that Her Majesty the Queen in Right of the Province of British Columbia is represented by the Attorney General of British Columbia, and that the style of cause should be amended to reflect that representation. I will allow such an amendment.

[7] Notwithstanding the orders impugned by the petitioners, the respondents seek an injunction from this Court to force compliance with those orders.

Orders Sought

[8] The petition is scheduled to be heard beginning March 1, 2021. It is at that time that the merits of the parties' respective positions will be heard. For now, the respondents seek an injunction in the following terms:

1. A prohibitory interlocutory injunction that no person may and, in particular, Brent Smith John Koopman, John Van Muyen and the members, directors, elders and clergy of the Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C. must not permit the following premises of the petitioner churches:

    a. 8-20178 96 Avenue, Langley, British Columbia;

    b. 35063 Page Road, Abbotsford, British Columbia; or

    c. 45471 Yale Road West, Chilliwack, British Columbia;

    or any other premises to be used for an in-person worship or other religious service, ceremony or celebration, or other "event" as defined in the January 8, 2021 Order of the Provincial Health Officer, Gatherings and Events ("the PHO Order), as amended or as repealed and replaced except:

    d. in accordance with the PHO Order;

    e. as permitted by further order of this Court; or

    f. as permitted by an agreement under s. 38 of the *Public Health Act.*

2. A prohibitory interlocutory injunction ordering that no person may and, in particular, Brent Smith John Koopman, John Van Muyen and the members, directors, elders and clergy of the Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C. (collectively, "the Religious Petitioners") must not organize, host or in any way facilitate or participate in an in-person worship or other religious service, ceremony or celebration,

wedding, baptism, funeral or other “event” as defined in an Order of the Provincial Health Officer, except:

a. in accordance with the PHO Order;

b. as permitted by the further order of this Court; or

c. as permitted by an agreement under s. 38 of the *Public Health Act.*

3. A prohibitory interlocutory injunction ordering that Brent Smith, John Koopman, John Van Muyen must not be present at an in-person worship or other religious service, ceremony or celebration, wedding, baptism, funeral or other “event” as defined in an Order of the Provincial Health Officer, except:

a. in accordance with the PHO Order;

b. as permitted by the further order of this Court; or

c. as permitted by an agreement under s. 38 of the *Public Health Act.*

4. An order authorizing any police officer with the appropriate authority in the jurisdiction in question (“the Police”) to, in their discretion, detain a person who has knowledge of this Order and of whom the Police have reasonable and probable grounds to believe that the person is intending to attend a worship or other religious service, ceremony or celebration prohibited by this Order in order to prevent the person from attending the worship or other religious service, ceremony or celebration.

5. An order that the parties to this proceeding and any other persons affected by this Order may apply to this Court for a variation of the Order and that, unless the court otherwise orders, any application to vary must be brought on notice to the parties in accordance with the *Supreme Court Civil Rules*. B.C. Reg. 168/2009.

6. The order is to remain in force until varied or until final determination of the Petition on the merits and expiry of all applicable appeal periods.

The Impugned Orders

[9] The Ministerial Order that is challenged by the petitioners was made under the *COVID-19 Related Measures Act,* SBC 2020, c. 8.

[10] The orders that are challenged by the petitioners have been made pursuant to ss. 30, 31, 32 and 39(3) of the *Public Health Act*, S.B.C. 2008, c. 28. Those sections provide that:

> **30**(1) A health officer may issue an order under this Division only if the health officer reasonably believes that
>
> (a) a health hazard exists,
>
> (b) a condition, a thing or an activity presents a significant risk of causing a health hazard,
>
> (c) a person has contravened a provision of the Act or a regulation made under it, or
>
> (d) a person has contravened a term or condition of a licence or permit held by the person under this Act.
>
> (2) For greater certainty, subsection (1) (a) to (c) applies even if the person subject to the order is complying with all terms and conditions of a licence, a permit, an approval or another authorization issued under this or any other enactment.
>
> **31**(1) If the circumstances described in section 30 *[when orders respecting health hazards and contraventions may be made]* apply, a health officer may order a person to do anything that the health officer reasonably believes is necessary for any of the following purposes:
>
> (a) to determine whether a health hazard exists;
>
> (b) to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard;
>
> (c) to bring the person into compliance with the Act or a regulation made under it;
>
> (d) to bring the person into compliance with a term or condition of a licence or permit held by that person under this Act.
>
> (2) A health officer may issue an order under subsection (1) to any of the following persons:
>
> (a) a person whose action or omission
>
> (i) is causing or has caused a health hazard, or

(ii) is not in compliance with the Act or a regulation made under it, or a term or condition of the person's licence or permit;

(b) a person who has custody or control of a thing, or control of a condition, that

(i) is a health hazard or is causing or has caused a health hazard, or

(ii) is not in compliance with the Act or a regulation made under it, or a term or condition of the person's licence or permit;

(c) the owner or occupier of a place where

(i) a health hazard is located, or

(ii) an activity is occurring that is not in compliance with the Act or a regulation made under it, or a term or condition of the licence or permit of the person doing the activity.

32(1) An order may be made under this section only

(a) if the circumstances described in section 30 *[when orders respecting health hazards and contraventions may be made]* apply, and

(b) for the purposes set out in section 31 (1) *[general powers respecting health hazards and contraventions]*.

(2) Without limiting section 31, a health officer may order a person to do one or more of the following:

(a) have a thing examined, disinfected, decontaminated, altered or destroyed, including

(i) by a specified person, or under the supervision or instructions of a specified person,

(ii) moving the thing to a specified place, and

(iii) taking samples of the thing, or permitting samples of the thing to be taken;

(b) in respect of a place,

(i) leave the place,

(ii) not enter the place,

(iii) do specific work, including removing or altering things found in the place, and altering or locking the place to restrict or prevent entry to the place,

(iv) neither deal with a thing in or on the place nor dispose of a thing from the place, or deal with or dispose of the thing only in accordance with a specified procedure, and

(v) if the person has control of the place, assist in evacuating the place or examining persons found in the place, or taking preventive measures in respect of the place or persons found in the place;

(c) stop operating, or not operate, a thing;

(d) keep a thing in a specified place or in accordance with a specified procedure;

(e) prevent persons from accessing a thing;

(f) not dispose of, alter or destroy a thing, or dispose of, alter or destroy a thing only in accordance with a specified procedure;

(g) provide to the health officer or a specified person information, records, samples or other matters relevant to a thing's possible infection with an infectious agent or contamination with a hazardous agent, including information respecting persons who may have been exposed to an infectious agent or hazardous agent by the thing;

(h) wear a type of clothing or personal protective equipment, or change, remove or alter clothing or personal protective equipment, to protect the health and safety of persons;

(i) use a type of equipment or implement a process, or remove equipment or alter equipment or processes, to protect the health and safety of persons;

(j) provide evidence of complying with the order, including

(i) getting a certificate of compliance from a medical practitioner, nurse practitioner or specified person, and

(ii) providing to a health officer any relevant record;

(k) take a prescribed action.

(3) If a health officer orders a thing to be destroyed, the health officer must give the person having custody or control of the thing reasonable time to request reconsideration and review of the order under sections 43 and 44 unless

(a) the person consents in writing to the destruction of the thing, or

(b) Part 5 *[Emergency Powers]* applies.

[…]

39(3) An order may be made in respect of a class of persons.

[11] Section 43 of the *Public Health Act* permits an affected party to apply for the reconsideration or variance of the order of a public health officer, and the petitioners began such an application with respect to the impugned orders on January 29, 2021, but that application remains unresolved.

[12] The January 8, 2021 Order of the Provincial Health Officer, regarding Gatherings and Events is simply a renewal and reiteration of a verbal order made on November 7, 2020. That Order prohibits certain "events":

> 1. No person may permit a place to be used for an event except as provided for in this Order.
>
> …
>
> 3. No person may organize or host an event except as provided for in this Order.
>
> 4. No person may be present at an event except as provided for in this Order.

[13] In the Order, ""event" refers to an in-person of gathering of people in any place whether private or public, inside or outside… including… a worship or other religious service, ceremony or celebration".

[14] Dr. Brian Emerson is the Acting Deputy Health Officer for the Province. In his affidavit sworn February 2, 2021, he summarized the order in these terms:

> The current January 8th Gathering and Events order maintains the prohibition on in-person religious services, but does permit drive-in events with more than 50 patrons present as long as people only attend in a vehicle, no more than 50 vehicles are present, people stay in their vehicles except to use washroom facilities, when outside their vehicles they must maintain a distance of two metres from any other attendees, and no food or drink is sold. The January 8th order also provides exceptions for weddings, baptisms, and funerals (to a maximum of 10 people) and permits private prayer/reflection in religious settings.

The Petitioner's Concerns

[15] Although phrased in various ways, the concerns of the petitioners are fairly summarized in a letter dated November 28, 2020 from the respondent Immanuel Covenant Reformed Church, which states, in part:

> The default position of the Christian church concerning civil government is to submit to its lawful authority in all civil matters. Throughout Scripture, but most directly in Romans 13:1-7 and 1 Peter 2:13-17, God commands Christians to be subject to the civil government as the civil government is appointed by God and exists for the good of all. We are called to submit to civil authority in all civil matters regardless of whether we personally agree or disagree with their directives or judgements.
>
> However, this duty to obey our civil authorities ends when they command that we engage in behavior contrary to God's Word or when they prohibit

> what God commands us to do. Ultimately, we must obey God rather than men (Acts 5:29).
>
> We firmly believe that this public health order violates God's Word for two biblical reasons. First, all Christians are called to assemble, in-person, for regular corporate worship services. Christians not only gather together for worship out of love toward God, but also because it is *essential* to our spiritual health and because we are *commanded* to do so (Psalm 65:4; Psalm 84:1; Psalm 95:1, 2; Psalm 111:1; Psalm 122:1; Acts 2:46; Ephesians 5:19; Colossians 3:16; 1 Timothy 4:13; Hebrews 10:23-25). We are called to worship God in the way that He has commanded in Scripture including, though not limited to, hearing the preaching of the Word, partaking of the sacraments of baptism and communion, singing His praises, praying together, confessing His name, exercising church discipline, and fellowship with other Christians. Although some of these aspects of worship can be performed online, many of them cannot.
>
> [Emphasis in the original]

[16] Cameron Pollard is the treasurer of the Valley Heights Community Church in Chilliwack, British Columbia. Although that church is not one of the petitioners, it is one of the objects of this injunction application. It is apparent from Mr. Pollard's affidavit of December 21, 2020, sworn in support of the petition, that his church has held in-person services since the November 7, 2020 order.

Background

[17] The respondents produced evidence that religious settings can lead to elevated risk of COVID-19 transmission because they:

(a) Generally occur in indoor settings;

(b) Often involve the assembly of a large number of people from different households;

(c) Usually last for an extended duration (defined as longer than 15 minutes) which results in greater duration of exposure and therefore a higher risk of infection and chance of viral spread;

(d) Often include individuals within high risk groups, including older adults and those with comorbidities; and

(e) Often involve loud talking and singing, which may represent greater risk for viral transmission.

[18] The petitioners contend that they have not ignored the risks of the transmission of COVID-19. Their responses are varied, but for the most part appear to be consistent with the practice followed at the Valley Heights Community Church in Chilliwack. Timothy Champ is the pastor of that church. In his affidavit sworn December 21, 2021 Pastor Champ stated:

> We were eager to meet in-person, but also eager to make sure those who attended would be kept as safe as possible. In light of this, we established and communicated the following protocols:
>
> - We encourage our members to give non-family members adequate space when arriving, during their time at the service and after the service.
> - Upon entry, hand sanitizer and masks are provided to members.
> - Every pew in the facility is separated at least 6 ft. from the next pew.
> - Physical distancing is required between each person or family group.
> - Members are asked to limit the use of the washroom, and parents were urged to accompany their children. Sanitation wipes were provided in the bathroom for cleaning after each use.
> - Families are asked to enter, stay together, and exit the building together.
> - No childcare or Sunday school for children is provided.
> - Those with any symptoms associated with Covid-19, are asked to remain home and join the service online.

[19] The petitioner, Robert Smith described the precautions instituted at the Riverside Calvary Chapel in his affidavit sworn December 5, 2020 as:

- Holding three services on Sunday mornings capped at 50 people;
- Maintaining a reservation link on our website in order for people to reserve a seat and provide contact information;
- Having hand sanitizer stations were [sic] set up throughout the Church buildings;
- Cleaning and wiping down the sanctuary between each service;
- Ensuring that attendees were provided with clean masks;
- Having elders direct orderly and socially distanced entry of persons to the sanctuary and also constantly sanitizing the entry door;

- Keeping our services to an hour so as to maintain a timely flow of people in and out of the building.

[20] Notwithstanding similar precautions instituted by the respondent Chilliwack Free Reformed Church, Dr. Henry wrote to the Church on December 18, 2020, advising in part:

> I recognize the importance of religious freedom, and in particular the need for individuals to access the support within faith-based communities during this difficult time. I have had many discussions with religious leaders across the province about the current situation we face in BC and I am appreciative of the support I have received from most religious leaders for helping to achieve compliance with public health measures to reduce the spread of COVID-19 in our communities.
>
> In making the most recent orders, I have weighed the needs of persons to attend in-person religious services with the need to protect the health of the public. The limitations on in-person attendance at worship services in the Orders is precautionary and is based on current and projected epidemiological evidence. It is my opinion that prohibiting in-person gatherings and worship services is necessary to protect people from transmission of the virus in these settings.
>
> …
>
> I am aware that some people do not agree with my decision to prohibit in-person religious services, since other types of activities such as people visiting restaurants or other commercial establishments are permitted with restrictions. In my view, unlike attending a restaurant or other commercial or retail operation (all of which are subject to Worksafe COVID-19 Safety Plans) experience has shown it is particularly difficult to achieve compliance with infection-control measures when members of a close community come together indoors at places of worship.
>
> Unlike dining with one's household members in a restaurant, or visiting an establishment for short-term commercial purposes, it is extremely difficult to ensure that attendees keep appropriate distance from each other in the intimate setting of gatherings for religious purposes attended by persons outside of each attendee's own household. Additionally, singing, chanting, and speaking loudly are proven to increase the risk of infection when indoors.

[21] The Ministerial Order that is impugned by the petitioners in this case was granted on November 13, 2020, and an attempt to enforce it was apparently first made on November 29, 2020, now almost seven weeks ago.

Injunctive Relief

[22] Jurisdiction to grant relief by way of injunction is conferred on this Court by s. 39 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253. Various other statutes, including s. 48 the *Public Health Act* provide for injunctions in particular cases.

[23] In *British Columbia Practice*, 3rd ed. (Markham, Ont.: LexisNexis Canada Inc., 2006), the authors state that “injunctions may be granted in a variety of different situations, the basic principle being that an injunction will be granted to enforce or maintain a legal right: *Birmingham (Corp.) v. Allen* (1877), 6 Ch. D. 284 (Ch.); *Ballard v. Tomlinson* (1884), 26 Ch. D. 194 (Ch.); *Sports and General Press Agency Ltd. v. Our Dogs Publishing Co. Ltd.*, [1917] 2 K.B. 125 (C.A.); *Duplain v. Cameron (No. 2)*, [1960] S.J. No. 62, 33 W.W.R. 38 (Q.B.); and *Fluorescent Sales and Service Ltd. v. Bastien*, [1959] A.J. No. 32, 39 W.W.R. 659 (C.A.).”

[24] In *JTT Electronics Ltd. v. Farmer*, 2014 BCSC 2413 at para. 63, Mr. Justice Voith referred to the description by Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, (Toronto: Canada Law Book, 2013) at para. 2.10, of an interlocutory injunction as a "drastic" remedy.

The Test for Injunctive Relief

[25] The test to be applied when an injunction is sought is set out in the well-known case of *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*]. It requires the court to consider three factors:

1. Has the applicant demonstrated there is a fair question to be tried?
2. Will the applicant suffer irreparable harm if an injunction is not granted?
3. Does the balance of convenience favour the granting of an injunction?

[26] These factors were the subject of discussion by Mr. Justice Beetz, writing for the Court, in the earlier decision of the Supreme Court of Canada in *Manitoba (A.G.) v. Metropolitan Stores Ltd*., [1987] 1 S.C.R. 110 [*Metropolitan Stores*]. There the Court established the three-part test that was referred to in determining whether to grant an interlocutory injunction in *RJR-MacDonald*.

(a) Fair Question to be Tried

[27] Section 2(a) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the “*Charter*”) protects freedom of conscience and religion. Section 2(b) protects freedom of thought, belief, opinion and expression. Section 2(c) protects freedom of peaceful assembly, and section 2(d) protects freedom of association.

[28] Section 7 of the *Charter* protects the life, liberty and security of person.

[29] Section 15(1) of the *Charter* protects individuals from discrimination based on religion, among other grounds.

[30] The petitioners assert that each of these *Charter* rights are breached by the impugned orders.

[31] The respondents concede that at least the s. 2(a) rights of the individual petitioners, and those attending the petitioner churches are breached by the impugned orders, but maintain that the impugned legislation is saved by s. 1 of the *Charter.*

[32] The ability of members or delegates of the Legislative Branch of Government to make the orders that affect the *Charter* rights of the individual petitioners and those who wish to attend the petitioner churches is a fair question to be tried.

(b) Irreparable Harm

[33] At this stage the only issue to be decided is whether refusal to grant the injunction could so adversely affect the respondents' own interests that the harm could not be remedied even if the eventual decision on the merits does not accord with the result of the interlocutory application: *RJR-MacDonald* at 341.

[34] The definition of irreparable harm was set out by the Supreme Court of Canada in *RJR-MacDonald* at 341:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other…

[35] If an injunction is not granted, the public, as represented by their elected officials and informed by the advice of Dr. Henry, will likely face what may be greater exposure to the virus.

[36] I am satisfied that members of the public could well suffer from the transmission of the virus by persons unsafely attending gatherings, and suffer from the effects of COVID-19, including death.

[37] I find that the enforcement of a validly enacted, but challenged law is an obligation of the Executive Branch of the provincial government. Failure to enforce the law could have the effect of depriving the public of the benefit of orders which have been duly enacted and which may in the end be held valid. That deprivation is, in my view, irreparable harm.

[38] But the harm that will arise from granting an injunction may deprive the petitioners of constitutional rights that may prove them to entitlement of the relief they seek in their petition, amounting to irreparable harm to them.

(c) The Balance of Convenience

[39] As the damages alleged by the respondents satisfy the criterion of irreparable harm, I must consider whether the balance of convenience favours granting the remedy that the respondents seek.

[40] In *Metropolitan Stores*, Mr. Justice Beetz discussed the balance of convenience at 129:

> The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

[41] In *Harper v. Canada (Attorney General)*, 2000 SCC 57, the majority of the Court commented that:

> 5 Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R. J. Sharpe, *Injunctions and Specific Performance* (loose-leaf ed.), at para. 3.1220.

[42] The majority added:

> 9 Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a

> public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR--MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 348-49:
>
> > When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

[43] However, the Supreme Court of Canada cautioned in *RJR-Macdonald* at 333-334:

> … the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

[44] If an injunction is granted, the petitioners' s. 2 *Charter* rights will be sacrificed, for a time, even if they are ultimately successful with their petition.

[45] The petitioners liken the risk of such exposure to the virus during their religious activities to other activities permitted by Dr. Henry. The petitioners assert that the risks created by their continued religious activities can be reasonably addressed with the safety measures imposed on other activities that create comparable risks without safety measures.

[46] The respondents correctly point out that this step in the *RJR-MacDonald* analysis presumes that duly enacted laws are operable. At 346, the majority wrote:

> In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

[47] Yet the respondents seek to invoke the authority of the Court to enforce the impugned orders.

[48] Both *Harper* and *RJR-Macdonald* are cases where applicants for a stay of the effect of legislation sought stays of the enforcement of that legislation pending the resolution of their claims that the legislation was *ultra vires* the enacting body. The applicants in those cases sought to delay the legal effect of regulations which had already been enacted and to prevent public authorities from enforcing them. Here, it is the enacting body that seeks injunctive relief to enforce its legislation. In the result, the lens through which the application before me is to be viewed commands the exercise of caution to the extent that the reasoning in those decisions are to be employed.

[49] The respondents also rely upon the decision of Madam Justice Kimmel in *Her Majesty the Queen in Right of Ontario v. Adamson Barbeque Limited*, 2020 ONSC 7679 [*Anderson Barbeque*] as support for their submission that injunctive relief should be granted in this case.

[50] In that case, the respondents were in breach of provincial legislation passed in response to the COVID-19 pandemic. That legislation specifically contemplated the granting of a restraining order by the Court for the breach of legislation, and Kimmel J. said that she had “no hesitation” in granting injunctive relief to the province.

[51] But in *Anderson Barbeque*, there was no *Charter* right engaged, nor was Kimmel J. apprised of the reasoning discussed in *British Columbia (Attorney General) v. Sager et al*, 2004 BCSC 720 [*Sager*], which I will address below.

[52] The respondents differ from many litigants who seek injunctive relief. In particular, they do not necessarily require the assistance of the Court to enforce their legislation. The alternate remedies available to the respondents are a factor

to be considered in the exercise of my discretion. The challenged orders remain extant unless and until set aside or overturned by this Court.

[53] When asked if the Attorney General is not more constrained than other litigants seeking injunctive relief, counsel for the respondents asserted that government actors are as entitled to such relief as non-government litigants.

[54] While a municipality was granted injunctive relief in *Vancouver (City) v. Zhang*, 2009 BCSC 84, that is not necessarily the case when such relief is sought by the Attorney General.

[55] In *Sager,* Madam Justice Quijano considered the extent of the Attorney General's entitlement to injunctive relief at common law where alternative statutory remedies were available. At paras. 21–23, Quijano J. summarized the Attorney General's ability to obtain injunctive relief:

> [21] … [I]n *British Columbia (Attorney General) v. Perry Ridge Waters Users Assn.*, [1997] B.C.J. No. 2348 (S.C.) … McEwan J. stated, in *obiter*, at paragraph 9:
>
> > I summarize a great deal of case law in saying that there appears to be considerable authority for the proposition that the Attorney General's resort to the courts for injunctive relief ought to be a final step and not merely a convenient alternative to the application of criminal or other available sanctions.
>
> [22] A number of cases follow in the footsteps of *Perry Ridge* and express concern regarding the use of an injunction as a first choice remedy. These cases are well summarized in *Alliford Bay Logging* by Williamson J. starting at paragraph 4:
>
> > [4] Mr. Ward, for one of the defendants, in a compelling submission argues that it is wrong to resort to court injunctions in these circumstances when the simple course is for the police to act to protect the plaintiff's legal rights by advising protesters that they will be charged pursuant to the *Criminal Code* if they do not cease to impede the way, and by arresting the protesters if they do not accede to that warning.
> >
> > [5] The police in this province, I understand with the knowledge of the Attorney General, do not adopt that course. This is evident from a review of three recent decisions of this court. I am going to refer to those decisions. The first is a decision of Mr. Justice Vickers in *International Forest Products Limited v. Kern*, 2000 BCSC 888, a decision handed down on June 6, 2000, [2000] B.C.J. No. 1129. That learned judge dealt with the issue of whether

the police should be enforcing the law. He said in paragraph 29:

> In the circumstances that were then ongoing the court concluded that a bubble zone of 500 metres was required in order to preserve peace and order. All three orders are also a result of a political decision by law enforcement officials that a criminal law will not be enforced in this type of dispute, rather it is considered to be a dispute that need only be responded to if the court grants an injunction. Thus it is the order of the court that becomes the subject of criticism and not the decision of law enforcement officials. In the discharge of its duty the court is drawn into a controversy that could have been resolved by more traditional and less costly law enforcement strategies.

[6] The second decision is that of Mr. Justice McEwan in *Slocan Forest Products Limited v. Doe*, a decision dated July 21, 2000, [2000] B.C.J. No. 1592 [which stated]:

> In sum, having had the benefit of explanations offered by the Attorney General and the police for the policies now in place, I am simply not convinced that the rule of law is enhanced by the present process which (a) forces innocent bystanders to seek their own protection by manufacturing ill-fitting civil suits; (b) places the court in a position where it must fashion some remedy at the expense of repeatedly putting its authority in issue; and (c) arguably deprives demonstrators of due process.

[7] The third decision handed down only about a week later which deals with this issue is *International Forest Products Limited v. Kern*, Mr. Justice Pitfield, 2000 BCSC 1141, [2000] B.C.J. No. 1533, so all of these decisions are just this past summer. Mr. Justice Pitfield, in a strongly worded judgment, was critical of the policies in place that the police do not enforce the law in these particular sorts of circumstances. Starting at paragraph 57 he said the following:

> Whatever decision has been made the result is regrettable. The court is placed in the unenviable position of being asked to respond in order to preserve the rule of law. It is the duty of the Attorney General to ensure respect for and the benefit of laws enacted by the legislature. In this case the law in question is the right to harvest timber from Crown land. There appear to be adequate provisions in the *Criminal Code* to permit the Attorney General to ensure the required

> protection. If the Attorney General doubts the adequacy of the criminal law then the legislature should search for other means to ensure that rights it has lawfully created are not abrogated by actions taken by members of the public. The responsibility to devise a means of ensuring that protection should not be delegated to the courts.

[23] Also of significance in the *Alliford Bay* decision is Williamson J.'s analysis of the obiter comments of Esson J.A. of the British Columbia Court of Appeal in *International Forest Products Ltd. v. Kern* (2000), 144 B.C.A.C. 141, 2000 BCCA 500, which provided some support for the government policy of seeking injunctions to restrain public protest where an alternate criminal law remedy was available. Williamson J. determined that the origin of the court's concern regarding this sort of injunctive relief was valid and based upon earlier case law including *Everywoman's Health Centre v. Bridges* (1990), 54 B.C.L.R. (2d) 273 (C.A.) in which Southin J.A. said at page 285:

> There is today the grave question of whether public order should be maintained by the granting of an injunction which often leads thereafter to an application to commit for contempt or should be maintained by the Attorney General insisting that the police who are under his control do their duty by enforcing the relevant provisions of the *Criminal Code*.

[56] In *Sager*, the province sought an injunction to prevent protestors from blocking construction of a parking lot on Crown land. Madam Justice Quijano observed that there was a statutory remedy that the Attorney General had chosen not to invoke. The *Land Act,* R.S.B.C. 1996, c. 245 contained a statutory penalty for trespass where notice is given. Notice could be given by posting it on the Crown land if the identity of the trespasser was unknown. The maximum penalty for non-compliance with the no trespassing notice was $1,000 and could be imposed multiple times. In addition, a public officer could initiate legal action against a trespasser, and under the *Land Act* penalties included fines of up to $20,000 and jail terms of up to six months. Instead of proceeding in that manner, the provincial Crown had not provided notice in the form set out in the *Land Act* and had not utilized the enforcement provisions of the *Land Act*.

[57] Madam Justice Quijano held that while it was clear that the Attorney General, as the representative of the public, had the right to seek redress in the courts whenever a public right is infringed or threatened with infringement, the injunction application raised the issue of whether, in the circumstances of the case, the equitable jurisdiction of the court ought to be invoked to restrict the rights

of members of the public to enter on Crown land through the use of a Jane/John Doe injunction where the Attorney General had chosen not to utilize the offence provisions of the *Land Act*. She concluded, on a consideration of *Ontario (Attorney General) v. Ontario Teachers' Federation*, [1997] O.J. No. 4361, 36 O.R. (3d) 367 (Gen. Div.), that the injunction should be refused.

[58] As counsel for the petitioners pointed out, there are means to enforce the impugned orders other than by way of injunctive relief. Section 47 of the *Public Health Act* provides:

> **47**(1) Without notice to any person, a health officer may apply, in the manner set out in the regulations, to a justice of the peace for an order under this section.
>
> (2) A justice of the peace may issue a warrant in the prescribed form authorizing a health officer, or a person acting on behalf of a health officer, to enter and search a place, including a private dwelling, and take any necessary action if satisfied by evidence on oath or affirmation that it is necessary for the purposes of
>
> (a) taking an action authorized under this Act, or
>
> (b) determining whether an action authorized under this Act should be taken.

[59] Sections 99, 100 and 108 of the *Public Health Act* provide, in part:

> **99**(1) A person who contravenes any of the following provisions commits an offence:
>
> […]
>
> (e) section 14 (3) *[failure to provide information]*;
>
> (f) section 16 *[failure to take or provide preventive measures, or being in a place or doing a thing without having taken preventive measures]*;
>
> (g) section 17 (2) *[failure to take steps to avoid transmission, seek advice or comply with instructions]*;
>
> […]
>
> (i) section 40 (4) *[failure to comply with instructions]*;
>
> […]
>
> (k) section 42 *[failure to comply with an order of a health officer]*, except in respect of an order made under section 29 (2) (e) to (g) *[orders respecting examinations, diagnostic examinations or preventive measures]*;
>
> (l) section 56 (2) or (3) *[failure to take emergency preventive measures or comply with instructions]*, except in respect of an order to do a thing described in section 29 (2) (e) to (g);

(2) A person who contravenes any of the following commits an offence:

(a) section 18 *[failure to prevent or respond to health hazards, train or equip employees, or comply with a requirement or duty]*;

[…]

(3) A person who contravenes either of the following commits an offence:

(a) section 15 *[causes a health hazard]*;

[…]

(4) A person who does either of the following commits an offence:

[…]

(b) wilfully interferes with, or obstructs, a person who is exercising a power or performing a duty under this Act, or a person acting under the order or direction of that person.

(5) A person who commits an offence under this Act may be liable for the offence whether or not an order is made under this Act in respect of the matter.

[…]

100(1) If a corporation commits an offence under this Act, an employee, an officer, a director or an agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence whether or not the corporation is convicted.

(2) If an employee commits an offence under this Act, an employer who authorized, permitted or acquiesced in the offence commits the offence whether or not the employee is identified or convicted.

[…]

108(1) In addition to a penalty imposed under section 107 *[alternative penalties]*, a person who commits an offence listed in

(a) section 99 (1) *[offences]* is liable on conviction to a fine not exceeding $25 000 or to imprisonment for a term not exceeding 6 months, or to both,

(b) section 99 (2) or (4) is liable on conviction to a fine not exceeding $200 000 or to imprisonment for a term not exceeding 6 months, or to both, or

(c) section 99 (3) is liable on conviction to a fine not exceeding $3 000 000 or to imprisonment for a term not exceeding 36 months, or to both.

[60] In his affidavit, Mr. Pollard described the attendance of two members of the RCMP to his church on November 29, 2020 and says that one of the officers, Officer Peters, threatened those in attendance that day “with up to 6 months in jail and massive fines, upwards of $50,000”.

[61] According to a statement attributed to the Chilliwack RCMP on December 12, 2020, a report of three churches holding in-person services “was actively investigated by the RCMP and the evidence gathered has resulted in the Chilliwack RCMP forwarding a report to the B.C. Prosecution Service for charge assessment of these violations”.

[62] In *Vancouver Fraser Port Authority v. John Doe, Jane Doe et al,* 2020 BCSC 244, Mr. Justice Tammen issued an injunction to enjoin an organized protest activity in the form of a blockade attempting to prevent access to the Port of Vancouver.

[63] In his reasons for judgment, Tammen J. found:

> 15 Moreover, the current blockade is designed to be a direct attack on the rule of law. It amounts to organized, unlawful activity as a means of voicing disapproval of a court order. Obviously such conduct cannot be countenanced by the court. A police enforcement clause is clearly appropriate.

[64] When six individuals were arrested for their alleged refusal to comply with Tammen J.’s injunction, the matter was referred to the B.C. Prosecution Service for the consideration of criminal charges for contempt of court. The B.C. Prosecution Service acknowledged that “there have been other incidents” at the location that was the subject of the injunction order of Tammen J., but observed that those had not led to arrests.

[65] The B.C. Prosecution Service considered Tammen J.’s referral and concluded that the evidentiary standard for such prosecutions had been met, and that there was a substantial likelihood of conviction if such charges were initiated. Notwithstanding these conclusions, the B.C. Prosecution Service declined to initiate criminal prosecutions on the basis that it was not required in the public interest “given the nature of the offences and the passage of time during the COVID pandemic”.

[66] Despite the finding of Tammen J. that the blockade he had dealt with constituted a direct attack on the rule of law by an organized group voicing disapproval of a court order, the reputation of administration of justice was brought into disrepute because no consequences were pursued.

[67] If the statement attributed to the Chilliwack RCMP that they forwarded a report to the B.C. Prosecution Service for charge assessment of the violations alleged against three churches is correct, the B.C. Prosecution Service has already been made aware of the conduct of, or similar to that of the petitioners.

[68] I am left to wonder what would be achieved by the issuance of an injunction in this case. If it were granted and not adhered to, would the administration of justice yet again be brought into disrepute because the B.C. Prosecution Service considers that it would not be in the public interest to prosecute those who refused to adhere to the orders sought from this Court?

[69] When asked, counsel for the respondents said that the respondents accept that the petitioners' beliefs are deeply held, but in response to my question as to why an injunction was sought, responded that while the petitioners and others like them are not dissuaded from their beliefs and practices by the impugned orders, an order from this Court is more likely to accomplish their compliance.

[70] Given the other remedies available to the respondents, I have reservations that an injunction alone, without enforcement by the B.C. Prosecution Service, would overcome the deeply held beliefs of the petitioners and their devotees. Taking into account the decision in *Sager*, and the other means of enforcement open to the respondents, I find that the balance of convenience does not favour the respondents in this case, and dismiss their application for an injunction.

Conclusion

[71] To be clear, I am not condoning the petitioners' conduct in contravention of the orders that they challenge, but find that the injunctive relief sought by the respondents should not be granted.

"The Honourable Chief Justice Hinkson"