



No. S-210209  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

ALAIN BEAUDOIN, BRENT SMITH, JOHN KOOPMAN, JOHN VAN MUYEN,  
RIVERSIDE CALVARY CHAPEL, IMMANUEL COVENANT  
REFORMED CHURCH  
and FREE REFORMED CHURCH OF CHILLIWACK, B.C.

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

**NOTICE OF APPLICATION**

**Names of applicants:** Attorney General of British Columbia and Dr. Bonnie Henry, in her capacity as Provincial Health Officer for the Province of British Columbia

To: The Petitioners Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C.

TAKE NOTICE that an application will be made by the applicants to Chief Justice Hinkson at the courthouse at 800 Smithe Street on 12/FEB/2021 at 10 a.m. for the orders set out in Part 1 below.

**Part 1: ORDERS SOUGHT**

1. 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. 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the January 8, 2021 Order of the Provincial Health Officer, Gatherings and Events (the “PHO Order”), as amended or as repealed and replaced, except: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 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 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 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 police 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. This 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.

## **Part 2: FACTUAL BASIS**

7. The Provincial Health Officer, Dr. Bonnie Henry, issued the PHO Order on January 8, 2021.<sup>1</sup> Its recitals state the following:

- a. On March 17, 2020, the Provincial Health Officer provided notice under s. 52(2) of the *Public Health Act* that the transmission of the infectious agent SARS-CoV-2 (the "Virus"), which has caused cases and outbreaks of a serious communicable disease known as COVID-19 among the population of British Columbia, constitutes a "regional event" as defined in section 51 of the *Public Health Act*.
- b. The Virus can cause outbreaks of COVID-19.
- c. A person infected with the Virus can infect other people with whom the infected person is in direct contact through droplets in the air.
- d. Social interaction and close contact resulting from the gathering of people and events promotes the transmission of the Virus and increases the number of people who develop COVID-19 and become seriously ill.
- e. With schools and post-secondary institutions operating and the change of seasons bringing cooler weather, people are interacting more and spending more time indoors which increases the risk of the transmission of SARS-CoV-2 in the

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<sup>1</sup> Affidavit #2 of Vanessa Lever made February 2, 2021 ("Lever #2"), Ex. A.



population and the number of people who develop COVID-19 and become seriously ill.

- f. Seasonal and other celebrations and social gatherings in private residences and other places have resulted in the transmission of SARS-CoV-2 and increases in the number of people who develop COVID-19 and become seriously ill.
- g. There had been a rapid increase in COVID-19 cases throughout the province which has resulted in increasing and accelerating numbers of people being hospitalized and admitted to critical care, outbreaks in health-care facilities and deaths.

8. The PHO therefore ordered that, subject to certain exceptions not material to this proceeding:

- a. no person may permit a place to be used for an “event”, except as provided for in the PHO Order. An event was defined to mean an “in-person gathering of people in any place, whether private or public and specifically included “a worship or other religious service, ceremony or celebration”;
- b. no person may organize or host an event; and
- c. no person may be present at an event.<sup>2</sup>

9. Provincial-wide limitations on in-person gatherings were first implemented by the PHO on November 19, 2020.<sup>3</sup> The Religious Petitioners had knowledge of the PHO Order and its predecessor orders, yet they continue to conduct in-person religious services.<sup>4</sup>

10. Notwithstanding having been issued violation tickets by the police,<sup>5</sup> the Religious Petitioners have expressed their intention to continue to conduct in-person religious services.

11. The underlying petition was filed on January 7, 2021. The petitioners claim that the PHO Order, and related enactments, are contrary to rights and freedoms guaranteed by the

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<sup>2</sup> Lever #2, Ex. A.

<sup>3</sup> Affidavit #1 of Dr. Brian Emerson made February 2, 2021, para. 79.

<sup>4</sup> Affidavit #1 of Vanessa Lever made February 2, 2021, Exs. A and B; Affidavit #1 of Brent Smith made January 5, 2021 (“Smith #1”), paras. 23-30; Affidavit #1 of Cameron Pollard made December 21, 2020 (“Pollard #1”), paras. 2-31; Affidavit #1 of John Koopman made December 23, 2020 (“Koopman #1”), paras. 34-43; Affidavit #1 of John Van Muyen made December 20, 2020 (“Van Muyen #1”), paras. 25-51; Affidavit #1 of Timothy Champ made December 21, 2020 (“Champ #1”), paras. 18-32.

*Canadian Charter of Rights and Freedoms* and cannot be justified as reasonable limits under section 1 of the *Charter*. In the affidavits filed in support of the petition, the Petitioners make clear that they are aware of the PHO Order and that they do not intend to comply with it.<sup>6</sup>

12. Dr. Brian Emerson, the Acting Deputy Provincial Health Officer has filed an affidavit stating the current knowledge of the risk of transmission of SARS-CoV-2 at indoor in-person events and, in particular, religious events.<sup>7</sup> In particular, Dr. Emerson deposes that based on the latest scientific and epidemiological evidence available to the PHO, religious settings can lead to elevated risk of COVID-19 transmission risk 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 a 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.<sup>8</sup>

13. Dr. Emerson also deposes that clusters of COVID cases stemming from religious gatherings and religious activities have been noted since the onset of the pandemic globally, nationally and in British Columbia.<sup>9</sup>

14. While the moving seven-day average of new cases has begun to decline in British Columbia in recent weeks, the volume of cases is still significantly higher than in the summer and early fall 2020, prior to the dramatic rise in cases in late October and November 2020.<sup>10</sup>

15. Maintaining adherence to the PHO's orders is also critical right now as variants of

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<sup>5</sup> Smith #1, Exs. C and E; Koopman #1, Ex. G; Van Muyen #1, Exs. B and C; Champ #1, Ex. B.

<sup>6</sup> Smith #1, paras. 23-30; Pollard #1, paras. 2-31; Koopman #1, paras. 34-43; Van Muyen #1, paras. 25-51; Champ #1, paras. 18-32.

<sup>7</sup> Affidavit #2 of Dr. Brian Emerson made February 2, 2021 ("Emerson #2"), paras. 4-6.

<sup>8</sup> Emerson #2, para. 6.

<sup>9</sup> Emerson #2, paras. 7-9.

COVID-19 that have been reported globally have begun to emerge here in BC. BC has reported 14 confirmed COVID-19 cases of the B.1.117 (U.K.) and four of the B.1.351 (South African) variants, for a total of 18 cases with these variants of concern in BC. These variants have been associated with increased transmission in a number of countries around the world. Recent modeling suggests that if these variants were to become established or predominant in our province, case counts will rise quickly and significantly.<sup>11</sup>

16. A significant increase in case volumes would pose a real risk of overwhelming BC's contact tracing capacity and healthcare system, which in turn puts at risk not only those requiring COVID-19-related care, but all users of the healthcare system. Further if BC's hospitals were to become overwhelmed with COVID-19 patients, cancellations of non-COVID-19 procedures may be required.<sup>12</sup>

17. Increased rates of community transmission also pose a risk that older people, especially those over age 65, who are at much higher risk, face a much higher likelihood of becoming infected and will suffer higher rates of hospitalizations, intensive care unit admissions, and deaths.<sup>13</sup>

18. The PHO and her team of advisors continually analyze the data and changing epidemiologic circumstances of BC's COVID-19 pandemic and experiences from other jurisdictions with a view to reducing the nature and scope of restrictions on gatherings and events, including religious activities at the earliest safe opportunity.<sup>14</sup>

19. The respondents concede that the PHO Order engages freedoms guaranteed by section 2 of the *Charter*, including freedom of religion, but take the position that it represents a reasonable and proportionate balance between fundamental freedoms and the objective of containing the spread of the Virus, and is therefore a reasonable limit under section 1 of the *Charter*.

### **Part 3: LEGAL BASIS**

20. A party may obtain an interlocutory injunction if they can demonstrate:

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<sup>10</sup> Emerson #2, para. 10.

<sup>11</sup> Emerson #2, para. 11.

<sup>12</sup> Emerson #2, para. 13.

<sup>13</sup> Emerson #2, para. 13.

<sup>14</sup> Emerson #2, paras. 14-15.



- a. a serious question as to the merits of the case,
- b. that irreparable harm will result if the relief is not granted, and
- c. that the balance of convenience favours granting the relief.<sup>15</sup>

21. A party seeking an injunction establishes that there is a serious question to be tried if a preliminary investigation shows that the action is not frivolous or vexatious.<sup>16</sup>

22. The underlying petition turns on whether the PHO Order is a reasonable balance of religious freedom and the protection of the vulnerable from a deadly disease. There can be no question that this raises a serious question.

23. Irreparable harm is harm that will occur if the order is not granted and that cannot be compensated by a damages award at the end of the action. "Irreparable" refers to the *nature* of the harm rather than its *magnitude*. Harm that cannot be quantified in money terms is irreparable.<sup>17</sup>

24. The interests at stake in this injunction application are the ability to engage in religious worship in-person and avoiding risk of transmission of a deadly virus. In neither case could the harm be quantified in money terms or redressed by damages.

25. The real issue, therefore, is the "balance of convenience." This involves weighing the irreparable harm identified by the applicant against the irreparable harm identified by the defendant if the stay or injunction is granted and the defendant is successful on the merits. A dominant consideration at the balance of convenience stage in a constitutional case is the public interest, which is defined as the "concerns of society generally and the particular interests of identifiable groups."<sup>18</sup>

26. In the case of a public authority, the balance of convenience test will nearly always be satisfied upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon "some indication" that the impugned enactment was undertaken pursuant to that responsibility. These are "minimal requirements." A court should not attempt to ascertain whether actual harm would result if the law were not enforced, since this would in

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<sup>15</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*], p. 334.

<sup>16</sup> *RJR-MacDonald*, pp. 314-15.

<sup>17</sup> *RJR-MacDonald*, pp. 342.

effect require judicial inquiry into whether the government is governing well.<sup>19</sup>

27. In *Harper*,<sup>20</sup> the Supreme Court of Canada stated this principle as a presumption that the operation of a constitutionally impugned law produces the public good it is intended to. This presumption “weighs heavily in the balance.” Courts will not lightly order that duly enacted laws for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. Only in “clear cases” will the balance of convenience be held to go against enforcement of an enactment on grounds of alleged unconstitutionality.<sup>21</sup>

28. In this application, there is far more than “some indication” that the PHO Order was undertaken pursuant to the Provincial Health Officer’s responsibility to take action to prevent the spread of the Virus. The step of preventing in-person religious gatherings was not taken for 8 months after COVID-19 became a regional health event and public emergency. It was taken in the face of an increased and “accelerating” growth in transmission. A number of clusters in Fall 2020 were as a result of religious gatherings. A reproduction rate greater than 1, if sustained, would have meant overwhelming our health system.

29. The presumption that the balance of convenience supports enforcement of the ordinary law applies to all enactments, but it has special force in the context of a public health emergency. Courts across Canada have consistently deferred to the view of public health authorities in relation to the balance of convenience between rights and freedoms and preventing the spread of the Virus.

30. In *Ontario v. Adamson Barbecue Limited*<sup>22</sup> the Province of Ontario successfully applied for an injunction restraining the respondent (a restaurant business) from contravening Ontario’s public health orders. The court had “no hesitation” in granting the injunction sought by the government, noting both the public interest in having the law obeyed and the fact that it is for public health officials, not courts, to weigh the benefits to the public good and determine how to balance individual rights in dealing with matters of public health and welfare.<sup>23</sup>

31. A number of religious groups have sought interim injunctive relief prohibiting the

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<sup>18</sup> *RJR-MacDonald*, p. 344.

<sup>19</sup> *RJR-MacDonald*, p. 344

<sup>20</sup> *Harper v. Canada (Attorney General)*, 2000 SCC 57

<sup>21</sup> *Harper* at para. 9.

<sup>22</sup> *Ontario v. Adamson Barbecue Limited* 2020 ONSC 7679 .

<sup>23</sup> *Adamson Barbecue Limited* at paras. 18-19.



enforcement of public health orders restricting worship services in Ontario, Manitoba and Alberta, pending the determination of a *Charter* challenge to those orders.<sup>24</sup> In all three decisions, injunctive relief was denied on the basis that the balance of convenience favoured enforcement of the public health and public health-related orders. In each case, the court found there to be a greater public interest in maintaining the integrity of the public health orders during a public health emergency than in staying portions of those orders that restrict gatherings to exercise protected rights.

32. This Court has made similar findings in the context of an application for *more intrusive* measures in the education setting.<sup>25</sup> In *Trest*, this Court rejected the petitioners' application for injunctive relief, reasoning that, with respect to the balance of convenience, "the public interest is best served by continuing to rely on the PHO, her team of experts, and the Minister of Health to guide British Columbia's response to the ongoing COVID-19 pandemic."<sup>26</sup>

33. In the petition itself, the petitioners provided no evidence from anyone with scientific or medical background to support the contention that the PHO Order is not a reasonable balance between the risks of transmission and the fundamental freedoms engaged. By contrast, the Attorney General and Provincial Health Officer have provided evidence that transmission occurs in social situations, that when these measures were put in place, there was an exponential growth in incidence of COVID-19, that clusters were associated with gatherings, including religious gatherings, that there is evidence from British Columbia, Canada and around the world of transmission in gatherings and, in particular, religious gatherings.

34. In addition to prohibitory injunctions directed at the petitioners and associates of the petitioner churches, an order is sought to give the police a discretionary power to detain a person where they have reasonable and probable grounds to believe that person is attending a gathering prohibited by the injunction. This authority is not otherwise available and will make the order more enforceable.

35. There is no question that the petitioners are entitled to challenge whether, in light of what was known to the PHO, the PHO Order was a reasonable limit on freedoms guaranteed

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<sup>24</sup> *Toronto International Celebration Church v. Ontario (Attorney General)*, 2020 ONSC 8027; *Springs of Living Water Centre Inc. v. The Government of Manitoba*, 2020 MBQB 185; and *Ingram v. Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806.

<sup>25</sup> *Trest v. British Columbia (Minister of Health)*, 2020 BCSC 1524.

<sup>26</sup> *Trest* at para. 91.

under section 2 of the *Charter* and whether it infringes other rights, as they allege. But, in the meantime, they are under the same legal obligation as all other British Columbians to abide by its requirements.

**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Brian Emerson made February 2, 2021;
2. Affidavit #2 of Brian Emerson made February 2, 2021;
3. Affidavit #1 of Vanessa Lever made February 2, 2021;
4. Affidavit #2 of Vanessa Lever made February 2, 2021;
5. Affidavit #1 of Brent Smith made January 5, 2021;
6. Affidavit #1 of Brian Versteeg made December 21, 2020;
7. Affidavit #1 of Cameron Pollard made December 21, 2020;
8. Affidavit #1 of John Koopman made December 23, 2020;
9. Affidavit #1 of John Van Muyen made December 22, 2020;
10. Affidavit #1 of Randy Dyck made January 5, 2020; and
11. Affidavit #1 of Timothy Champ made December 21, 2020.

The applicant estimates that the application will take 2 hours.

☐ This matter is within the jurisdiction of a master.

☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on the person,

- (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: February 2, 2021

Emily Lapper  
Signature of  
☐ applicant ☒ lawyer for applicants  
Gareth Morley  
Jacqueline Hughes, Q.C.  
Emily Lapper

**To be completed by the court only:**

Order made

☐ in the terms requested in paragraphs ..... of Part 1 of  
this notice of application

☐ with the following variations and additional terms:

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.....  
.....

Date: .....[dd/mmm/yyyy].....

Signature of ☐ Judge ☐ Master



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**APPENDIX**

*[The following information is provided for data collection purposes only and is of no legal effect.]*

**THIS APPLICATION INVOLVES THE FOLLOWING:**

*[Check the box(es) below for the application type(s) included in this application.]*

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts

This **NOTICE OF APPLICATION** is prepared by Gareth Morley, Barrister & Solicitor, of the Ministry of Attorney General, whose place of business and address for service is P.O. Box 9280, Stn Prov Govt, 1001 Douglas Street, Victoria, British Columbia, V8W 9J7; Telephone: (250) 360-6735; Email Address: Gareth.Morley@gov.bc.ca.