Court of Queen's Bench of Alberta

Citation: Rebecca Marie Ingram et al v Her Majesty the Queen in Right of Alberta et al, 2020 ABQB 806

Date: 20201222
Docket: 2001 14300
Registry: Calgary

Between:

Rebecca Marie Ingram, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner

Applicants

- and -

Her Majesty the Queen in Right of the Province of Alberta and the Chief Medical Officer of Health

Respondents

Reasons for Decision (delivered orally)
of the
Honourable Madam Justice Anne L. Kirker

This is a written version of the oral decision I delivered on December 21, 2020. It is provided in the interests of accessibility. I have edited this written version as I said I would; adding citations and headings, and ensuring proper punctuation, spelling and use of language. I have not supplemented my oral reasons. This written decision is near verbatim, but not word for word, the oral decision I delivered. My oral reasons remain the official ruling of the Court.

[1] This is my decision in relation to the application brought by Heights Baptist Church, Northside Baptist Church, Erin Blacklaws, Torry Tanner and Rebecca Ingram, for an

interlocutory, or interim, injunction staying the current Chief Medical Officer of Health Order that restricts indoor and outdoor gatherings, as well as those in private residences, and that mandates the wearing of masks. Ms. Ingram also seeks an order enjoining the Alberta Government and the Chief Medical Officer of Health from restricting the conduct of any business in Alberta in the absence of evidence that the specific business is implicated in the spread of COVID-19 to any resident of Alberta over the age of 60, or with a health condition.

[2] Although the Applicants additionally sought an interim declaration that the current CMOH Order is of no force and effect for offending specified sections of the *Alberta Bill of Rights*, RSA 2000, c A-14, as well as a direction that the Government report the "cycle threshold" and reference ranges for every PCR test it runs, counsel accepted my direction that those issues were not appropriately dealt with at this stage, in the context of an expedited injunction application.

Introduction

[3] Briefly and by way of introduction, the Order in issue on this interim application is Chief Medical Officer of Health Order 42-2020. It is the Order currently in place. I will refer to it as Order 42. It was issued on December 11, 2020, to come into effect on December 13, 2020. Paragraph 48 of Order 42 states that the Order remains in effect until rescinded by the Chief Medical Officer of Health.

[4] Order 42 includes the following restrictions that the Applicants seek to have stayed – in effect, temporarily suspended - until the issues raised in the action they have commenced are determined or, in the alternative, until a fixed date: January 4, 2021. They seek injunctive relief to stay:

(a) Order 42, Part 2, section 3 which, subject to specified exceptions, provides that "a person who resides in a private residence must not permit a person who does not normally reside in that residence to enter or remain in the residence." I will refer to this as the "Private Residence Restriction."

(b) Order 42, Part 3, sections 11 and 12, which provide that "[a]ll persons are prohibited from attending a private social gathering at an indoor public place..." and from attending a private social gathering at an outdoor private place or public place ...", subject again to specified exceptions for persons of the same household, persons who reside on their own, and to limits for funeral services and wedding ceremonies. I will refer to these as the "Indoor and Outdoor Gathering Restrictions."

(c) Order 42, Part 5, section 23, which provides that "a person must wear a face mask at all times while attending an indoor public place." This includes any indoor location where a business or entity is operating. This "Mandatory Mask Requirement" is subject to the exceptions set out in section 24.

(d) Finally, Ms. Ingram seeks an order enjoining the operation of Order 42, Part 6, sections 25 and 27, which require "an operator of a business or entity listed or described in sections 1, 2, 3, 4 and 5 of Appendix A" of the Order to "ensure that the place of business or entity is closed to the public".

[5] It is important to emphasize that this application for an interlocutory or an interim injunction is a request for *temporary* relief decided on short notice *before* the Court has the opportunity to assess all of the evidence and argument necessary to adjudicate the complex and difficult issues raised in the main action.

[6] There, the Applicants challenge:

(a) The validity of the CMOH Orders on grounds that the Orders offend certain sections of the *Alberta Bill of Rights*, and unjustifiably infringe rights protected by ss. 2, 6(1), 7, 8 and 15 of the *Canadian Charter of Rights and Freedoms*;
(b) The validity of s. 29(2.1)(b) of the *Public Health Act*, RSA 2000, c P-37 on grounds that it offends enumerated sections of the *Alberta Bill of Rights*, contravenes s. 92 of the *Constitution Act*, and violates unwritten constitutional principles;
(c) The validity of ss. 38(1)(c) and 52.6(1)(d) of the *Public Health Act* on grounds that these sections unjustifiably infringe rights protected by ss. 2, 7, 8 and 9 of the *Charter*; and,
(d) The validity of s. 66.1 of the *Public Health Act* on grounds that it prohibits citizens from seeking damages arising from the Crown affecting property rights protected under s. 1(a) of the *Alberta Bill of Rights*.

[7] The issues related to validity of the CMOH Orders and enumerated sections of the *Public Health Act* will be decided on another day. They require more time to allow for a more complete evidentiary foundation and more specifically focused and thorough preparation by counsel. This is necessary for the careful analysis a complete constitutional review demands.

[8] I turn now to the test for the issuance of an interlocutory or interim injunction. Because the same principles apply to both interlocutory and interim injunctions, I will use the broader term “interlocutory” to refer to both.

The Test for an Interlocutory Injunction

[9] The test the Applicants must meet was affirmed by the Supreme Court of Canada in *RJR MacDonald Inc. v Canada*, [1994] 1 SCR 311. There are three parts to the test. First, I must be satisfied that there is a serious issue to be tried, in the sense that the Applicants’ claims are not frivolous or vexatious. Second, the Applicants must establish a likelihood of irreparable harm if the injunctive relief they seek is refused; and third, I must be satisfied that the balance of convenience or inconvenience favours granting the injunction the Applicants seek.

Is There a Serious Issue to be Tried?

[10] Although the Respondents argue that there are no serious issues to be tried, I respectfully disagree.

[11] This first stage of the *RJR* test requires that I undertake only a preliminary and limited assessment of the strength of the Applicants' case.

[12] As stated by the Supreme Court of Canada at paragraph 54 of *RJR* [cited to WL Can], “...[t]here are no specific requirements which must be met in order to satisfy the [serious issue to

be tried standard]. The threshold is a low one. ...". It requires only that the claim not be one that would be liable to being struck out as vexatious or frivolous.

[13] The Court explained the reason for this in *Charter* cases at paragraph 53, stating:

> The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, [and as I mentioned at the outset] the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. ..."

[14] The Applicants allege that one or more of the Private Residence, Indoor and Outdoor Gathering Restrictions, and the Mandatory Mask Requirements contained in Order 42 unjustifiably limit the following *Charter* protected rights and freedoms:

(a) Freedom of religion protected by section 2(a).

The interpretation of this freedom must be broad and purposive. As stated by the Supreme Court of Canada in *Ktunaxa Nation v BC*, 2017 SCC 54 at para 122:

> The claimant [need only] show: (1) that he or she sincerely believes in a belief or practice that has a nexus with religion; and (2) that the impugned [restriction] interferes with the claimant's ability to act in accordance with that belief or practice "in a manner that is more than trivial or insubstantial" [citations omitted]

(b) Freedom of expression protected by section 2(b).

The Respondents accept that:

> ...the reach of s. 2(b) is potentially very wide, expression being deserving of constitutional protection if "it serves individual and societal values in a free and democratic society".

This was the observation of Chief Justice Dickson in *R v Keegstra*, [1990] 3 SCR 697 at 727-728, cited with approval by Chief Justice Lamer in *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 176. The referenced quote went on to say that:

> ... the Court has attempted to articulate more precisely some of the convictions fueling the freedom of expression, ... as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom the meaning is conveyed.

(c) The Applicants allege that one or more of the Private Residence, Indoor and Outdoor Gathering Restrictions unjustifiably limit freedom of peaceful assembly protected by s. 2(c) and freedom of association protected by s. 2(d).

Although freedom of assembly is also an expressive activity, this freedom is geared toward protecting the physical gathering together of people: *Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 1994 CarswellNat 1463 at para 50.

With respect to freedom of association, the purpose of the right, broadly speaking, is "... to allow the achievement of individual potential through interpersonal relationships and collective action": *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 17. Although usually arising in the context of labour and collective bargaining, in *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 54, the Supreme Court of Canada said:

> The purposive approach, adopted by Dickson C.J. in the *Alberta Reference*, defines the content of s. 2(d) by reference to the purpose of the guarantee of freedom of association: "... to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends." ... Elaborating on this interpretive approach, Dickson C.J. states that the purpose of the freedom of association encompasses the protection of (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict."

(d) Finally, the Applicants allege that their section 7 right to liberty, to be free from state restrictions upon their freedom or movement (*R v Heywood*, [1994] 3 SCR 761) and to have personal autonomy to live their lives and to make decisions that are of fundamental personal importance (*B(R) v Children's Aid Society of Metropolitan Toronto*, 1995 SCC 115), are unjustifiably infringed by the restrictions contained in Order 42.

[15] While the Respondents accept that these are broadly defined rights and freedoms protected under the *Charter*, they ask me to find there is no serious issue to be tried, first because the Applicants have failed to provide admissible evidence to establish anything beyond complaints of inconvenience and unhappiness, and second, because on "an extensive review of the merits" the alleged infringements are not made out.

[16] Let me pause to address the evidence.

[17] The Applicants provide two broad categories of evidence: the first is evidence provided by individuals attesting to the personal harm they have experienced, or observed in others,

because of the restrictions, including harm arising from the inability to practice their religious beliefs; separation from loved ones; loss of employment; concern about psychological harm to children unable to attend school; and, the fear, frustration and anxiety born of the evolving events of the pandemic over the past nine months. These affidavits include the affidavits of Ms. Ingram, Ms. Tanner, Patrick Schoenberger, the lead pastor of the Heights Baptist Church, Maria Keibel, Diane Hachey, and Dr. Stephen Tilley.

[18] Some of these affidavits contain argument and conclusions that are not helpful to me. Legal argument must be made by counsel and conclusions to be drawn from the facts is the purview of the Court. I have disregarded these parts of the affidavits.

[19] The Respondents argue that I should exclude the affidavits of Pastor Schoenberger and Dr. Tilley because they contain hearsay evidence. I have not ignored these affidavits because they contain evidence based on the personal knowledge of or observations made by these witnesses themselves. To the extent the affidavits contain hearsay evidence in relation to difficulties reported by members of the Pastor's congregation or the Doctor's patients, I have considered that evidence because the source of information is evident, each witness swears he believes it to be true, and hearsay evidence is admissible on an interlocutory application such as this: Rule 13.18(3).

[20] The Respondents alternatively ask that I exclude the affidavit of Pastor Schoenberger on the basis that he is not a named applicant, but rather swears his affidavit on behalf of the Church which the Respondents say has no standing. I reject this argument for two reasons.

[21] First, questions of standing cannot be determinative at this interlocutory stage because they are more appropriately considered at the time the merits of the action are decided: *Manitoba (AG) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110 at paragraph 49.

[22] Secondly, and in any event, the Supreme Court of Canada in *RJR* made clear that parties on both sides of an interlocutory injunction application involving *Charter* issues are entitled to demonstrate how the public interest may be affected by the granting or refusal of the relief sought. "'Public interest" includes both the concerns of society generally and the particular interests of identifiable groups": *RJR* at para 71. On this basis, and even if Heights Baptist Church had no standing, the individual applicants would be entitled to provide the evidence of Pastor Schoenberger for the Court. This is the basis upon which I have also considered the affidavits of Ms. Keibel and Ms. Hachey.

[23] The second broad category of evidence provided by the Applicants is aimed at challenging the necessity or effectiveness of the particular restrictions in issue to contain the spread of COVID-19. This evidence is contained in the Affidavits of Denise Buchner, Kirsten Aikens, Dr. Dennis Modry and David Redman, and to a lesser extent, Dr. Bao Dang and Dr. Tilley. I agree with the Respondents that these witnesses all appear to proffer expert evidence although their qualifications for doing so has not been established. More fundamentally, however, this evidence has limited relevance at this interlocutory stage. I will discuss this further in the balance of convenience analysis.

[24] This brings me back to the Respondents' more central argument that I should undertake an extensive review of the merits of the Applicants' *Charter* claims at this stage on the basis of the limited evidence I can consider.

[25] It is only in “exceedingly rare” cases that a motions court should go beyond a preliminary investigation into the merits. This is not one of those cases. The constitutionality of the impugned Order and sections of the *Public Health Act* cannot be determined as a pure question of law. Further, the result of this injunction application will not amount to a final determination of the action in the sense contemplated at paragraphs 56-58 of *RJR*. This is not a case in which the right the applicants seek to protect can only be exercised immediately or not at all or where the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial: *RJR* at para 56.

[26] It is inappropriate to undertake an extensive review of the merits at this stage due to the inherent complexity of the *Charter* analysis. As aptly put by Justice D. M. Brown at paragraph 2 of *Batty v Toronto (City)*, 2011 ONSC 6862, the *Charter*:

> ... places great emphasis on the liberty of the individual -- as can be seen from the various rights and freedoms set out in ss. 2 through 15 of the Charter – [but], at the same time [it] reiterate[s] that those rights and freedoms are not absolute. Indeed, the first section of our Charter reminds us that individual action must always be alive to its effect on other members of the community: it states that limits can be placed on individual action as long as they are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[27] What section 1 of the *Charter* demands of Government when the merits of the action are decided is evidence demonstrating that the law under review has a goal that is “pressing and substantial”, and that the restrictions imposed are rationally connected to the law’s purpose and that they impair *Charter* rights as little as possible or “within a range of reasonably supportable alternatives”: *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 37; *Whatcott v Saskatchewan Human Rights Tribunal*, 2013 SCC 11 at para 101. The section 1 *Charter* analysis also requires the Court to consider whether the impact of the impugned law on *Charter* rights is too high a price to pay for the advantage it provides in advancing the law's purpose: *R v Oakes*, [1986] 1 SCR 103.

[28] These section 1 considerations will form part of the analysis on the merits of the Applicants’ claims in the main action. For the purposes of finding no serious issue to be tried, the Respondents urge me to undertake the analysis now. For the reasons I have just explained, I cannot.

[29] It is sufficient for the Applicants to meet the low threshold that I conclude the issues are neither frivolous nor vexatious.

[30] I am satisfied they are not.

[31] The action commenced by the Applicants raises serious issues to be tried not only because the validity and constitutionality of the CMOH Orders and legislative provisions are challenged, but because the eventual determination of the constitutionality will turn largely on the application of s. 1 of the *Charter*, which requires a complex factual and legal analysis.

[32] It was on this basis that the Supreme Court of Canada found there was a serious issue to be tried in *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 4.

[33] I have reached the same conclusion here.

[34] Given my conclusion about the serious issues to be tried in relation to the constitutionality of the CMOH Orders and impugned legislation in so far as they relate to the Private Residence, Indoor and Outdoor Gathering Restrictions, and the Mandatory Mask Requirements, I do not find it necessary to separately address the issues raised by Ms. Ingram in relation to the Business Closure Requirement. I say only this: it is not readily apparent to me how Ms. Ingram's section 6 mobility rights have been impaired by the Business Closure Requirement, or how this requirement infringes her right to the equal protection and benefit of the law without discrimination based on sex or the other enumerated grounds set out in section 15 of the *Charter*. The *Charter* does not protect pure economic interests (*Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 45) and consequently, to the extent Ms. Ingram seeks relief for an alleged deprivation of her right to enjoy property, she relies upon s. 2 of the *Alberta Bill of Rights*. The *Alberta Bill of Rights* provides different protection than the *Charter*, and that protection is, once again, not absolute. A person may be deprived of rights under the *Alberta Bill of Rights* by due process of law. Whether that is the case here will be decided at the same time as the Court's decision on the merits of the other constitutional questions.

[35] Again, my decision that there is a serious issue to be tried does not mean I am deciding the issues raised in the action. Rather, it means only that the claims asserted are not frivolous or vexatious. There will be additional evidence and argument available to the Court when the issues raised in the Originating Application are finally adjudicated that will inform the ultimate outcome.

[36] I turn now to the second part of the *RJR* test.

Will the Applicants Suffer Irreparable Harm if the Injunction is Not Granted?

[37] I am also satisfied that this part of the test has been met, although not for all of the reasons asserted by the Applicants.

[38] In *RJR*, the irreparable harm test was described at paragraphs 63 and 64 as follows:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "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. ... [emphasis added]

[39] At paragraph 65 of *RJR*, the Supreme Court of Canada went on to observe that:

> The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

[40] Damages for *Charter* breaches are not always quantifiable in monetary terms, functionally justifiable, or just and appropriate. I note that where harm is suffered as a result of the mere

enactment or application of a law that is subsequently declared to be unconstitutional, the Supreme Court of Canada has held that absent conduct that is clearly wrong, in bad faith or an abuse of power, damages will not be awarded: *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 at paras 78-79.

[41] Further, and without deciding the question of its validity, s. 66.1 of the *Public Health Act* provides that no action for damages may be commenced against the Respondents for anything done in good faith while carrying out duties or exercising powers under the *Act*.

[42] In analyzing whether the Applicants have established a likelihood of irreparable harm for the purposes of meeting the test for injunctive relief, I am not deciding whether or what damages they may be entitled to if the Court ultimately grants the declarations of invalidity they seek. Rather, I am assessing whether there is an adequate remedy for harm they can establish they will suffer if the interlocutory injunction they seek is refused, but they are ultimately successful on the merits.

[43] I highlight the difficulties in obtaining damages in *Charter* cases only to explain how this informs the assessment of irreparable harm in *Charter* cases.

[44] This said, it is not enough at this stage of the test, for the Applicants to simply say that *Charter* rights are being infringed and to ask the Court to presume that if the injunction they seek is not granted, they will suffer harm for which there is no just and reasonable remedy: *Springs of Living Water Centre Inc. v The Government of Manitoba*, 2020 MBQB 185 at paras 23-25.

[45] A finding of irreparable harm requires an evidentiary basis.

[46] In the recent decision of the Manitoba Court of Queen's Bench in *Springs of Living Water Centre*, the Applicant sought urgent relief to enable its congregants to worship at the church, in their vehicles, in a "drive-in" manner. The Applicant argued that the public health restrictions in that Province prohibiting congregants from doing so violated their rights to freedom of religion, peaceful assembly and association. Chief Justice Joyal was not satisfied irreparable harm was made out on the evidence.

[47] I have a similar problem with some, but not all, parts of the Applicants' argument.

[48] The harm the Applicants argue they will suffer if they are ultimately successful on the merits, but unsuccessful in this injunction application, is the infringement of various *Charter* rights for the period of time between this application and January 4, 2021, or, alternatively, the ultimate determination on the merits.

[49] I have evidence upon which I can find that if an injunction staying the Private Residence and Indoor and Outdoor Gathering Restrictions is not granted, the Applicants are likely to suffer harm to their rights to manifest, without constraint, their sincerely held religious beliefs and relationships through communal institutions and traditions, particularly over the Holiday period (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 64; *National Council of Canadian Muslims v Attorney General of Quebec*, 2017 QCCS 5459 at para 41, citing *R v Big M Drug Mart Ltd*., [1985] 1 SCR 295 at 336-37), and to do so in association

with others (Peter W. Hogg, *Constitutional Law of Canada*, 5th ed Supplemented (Toronto: Thomson Reuters, 2016) at 44-14).

[50] Ms. Tanner has provided evidence that "Christmas is the one time of year when [her] entire family gathers together to celebrate the birth of Jesus. This time of celebration has become a sacred tradition for [family] where they can lean on each other for love, prayer and support." Their family traditions include both indoor and outdoor activities. Being unable to gather to celebrate Christmas as a family is devastating and demoralizing for Ms. Tanner.

[51] Pastor Patrick Schoenberger of Heights Baptist Church has sworn an affidavit explaining how the Private Residence and Indoor Gathering Restrictions, as well as the Mandatory Mask Requirements interfere with or prohibit the members of the Church from manifesting their religious beliefs. He swears that Heights Baptist and its members hold religious beliefs and values that include regularly meeting together in a congregational setting to worship. This involves singing and making music to the Lord. Pastor Schoenberger has deposed that wearing face masks hinders Church members' ability to sing, and practically and symbolically covers up the image of God hindering the ability to reflect the glory of God through something as simple as a smile. Baptist Heights and its members also believe that they are called by Scripture to practice the Lord's Supper on a regular basis, which involves serving one another and sharing the communion elements of bread and wine or juice. They believe in laying hands on people during times of prayer and commissioning and in anointing the sick with oil. They believe in the blessing of physical touch and in using their homes to offer hospitability to one another.

[52] Ms. Ingram deposes that she regularly attends First Alliance Church, and that the attendance limits will prevent her and other congregants from attending Christmas services. She says this is extremely concerning for her. Ms. Ingram, Ms. Keibel and Ms. Hachey all describe distress in being unable to gather with family.

[53] If an interlocutory injunction staying the Private Residence and Indoor and Outdoor Gathering Restrictions is not granted and the Applicants are ultimately successful on the merits, the harm they will have suffered by the infringement of the freedom of religion and association I have described is, in my view and on the basis of this evidence, more than trivial or insubstantial. It is not harm that can be fairly and reasonably remedied. I am therefore satisfied it is irreparable harm for the purposes of this second part of the *RJR* test.

[54] Beyond this, however, I am not satisfied that the evidence establishes a likelihood of irreparable harm if the interlocutory injunction the Applicants seek is not granted.

[55] The evidence I have in relation to harm caused by the Mandatory Mask Requirement is the evidence of Pastor Schoenberger that masks interfere with congregants' ability to sing and hinder their ability to reflect the glory of God through facial expression. The Pastor also says masks make it difficult for people to hear and communicate with one another. I am not persuaded on the basis of this evidence that these impediments are substantial enough to rise to the level of irreparable harm.

[56] Ms. Ingram is exempt from wearing a mask pursuant to section 24(c) of Order 42 and consequently, her evidence in relation to the Mandatory Mask Requirement is not helpful.

[57] It is Ms. Ingram alone who asserts that without an interlocutory injunction staying the Business Closure Requirement, there will be no possibility for her to recover losses of revenue

from the closure of her Gym and in turn, the value of her shares in that business. Her evidence falls short of the clear evidence required to establish irreparable harm of this nature: *1003126 Ontario Ltd. v Caterina DiCarlo*, 2013 ONSC 278 at paras 26-27. Ms. Ingram asks me to presume that will be the case. But, it is speculation that an interlocutory injunction will necessarily ameliorate business losses, unemployment or financial stress.

[58] I turn now to the final part of the *RJR* test: the balance of convenience or inconvenience.

Balance of Inconvenience and Public Interest Considerations

[59] The balance of convenience analysis requires the Court to consider which of the parties would suffer greater harm if the injunction were, or were not, granted: *Laurent v Fort McKay First Nation*, 2008 ABQB 84 at para 10.

[60] It is important to note here that the three parts of the test are not considered "... as separate hurdles but as interrelated considerations": *Apotex Fermentation Inc. v Novopharm Ltd*., [1994] 7 WWR 420 (Man CA) at para 14, citing R.J. Sharpe, *Injunctions and Specific Performance* (2nd Ed. 1992) at pp. 2, 32-34. See also *Domo Gasoline Corporation Ltd. v St. Albert Trail Properties Inc.*, 2005 ABQB 69 at n 41.

[61] My findings in relation to the irreparable harm necessarily inform my assessment of the balance of (in)convenience.

[62] As I mentioned earlier, I am not limited at this third stage of the *RJR* test to considering only the harm directly suffered by the Applicants themselves. The Supreme Court of Canada explained at paragraph 71 of *RJR* that it is "… open to all parties in an interlocutory *Charter* proceeding [such as this] to rely upon considerations of public interest. Each party is entitled to make the court aware of the damage it might suffer [if an injunction is or is not granted] prior to a decision on the merits. In addition, either the applicant[s] or the respondent[s] may tip the scales of convenience in [their] favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups."

[63] The focus on the public interest raises some special considerations: *Harper* at para 5, citing R. J. Sharpe, *Injunctions and Specific Performance* (loose-leaf ed.), at para 3.1220.

[64] While it is "… open to all parties in an interlocutory *Charter* proceeding to rely upon considerations of public interest" and to "... tip the scales of convenience in [their] favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought", the Supreme Court of Canada in *RJR* also observed at paragraph 73 that:

> When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

[65] And at paragraphs 76-78 of *RJR* the Court stated that:

> ... 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. [emphasis added]

[66] In the *Harper* case, Chief Justice McLachlin, as she then was, explained this principle at paragraph 9. She referenced paragraph 85 of *RJR*, where the Court *summarized* the test, and then she went on to say:

> It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law – in [that] case the spending limits imposed by s. 350 of the [*Canada Elections*] *Act* -- is directed to the public good and serves a valid public purpose. ... The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

[67] In the *Springs of Living Water* case, Chief Justice Joyal noted at paragraph 28 that "there are but five examples from the Supreme Court of Canada in the post-*Charter* era where injunctions have been sought to stay legislation pending a constitutional determination. In all five cases, the Court denied the injunction on the basis of [this assumption of] public interest. The bar is very high."

[68] The Applicants argue that I cannot, in this case, assume that Order 42 is directed at the public good and serves a valid public purpose because the CMOH Orders are not "legislation" enacted by a democratically elected Legislative Assembly. They say that the Chief Medical Officer of Health is a "democratically unaccountable civil servant" who "... has no prior claim to the public interest over that of the Applicants or the rest of Albertans."

[69] I find that this argument unfairly diminishes the Chief Medical Officer of Health's duly appointed and important role and frames what the Supreme Court of Canada said about the assumption of public good and valid public purpose in *RJR* too narrowly. At paragraph 76, the

Court spoke of *public authorities* charged with the duty of promoting or protecting the public interest and about legislation, regulation, *or activity* undertaken pursuant to that responsibility.

[70] That is the situation here.

[71] Dr. Deena Hinshaw is appointed to her position as Chief Medical Officer of Health by the Minister of Health. In this role, she monitors the health of Albertans and makes recommendations to the Minister on measures to protect and promote the health of the public and to prevent disease and injury. Upon the declaration of a state of public health emergency by the Lieutenant Governor in Council, acting on or with the advice of the Executive Council or Cabinet, as was done on March 17, 2020 and again on November 24, 2020, section 29 of the *Public Health Act* gives the Chief Medical Officer of Health the authority to take whatever steps are necessary to lessen the impact of the public health emergency. While the powers are broad and are exercised by a government appointee rather than an elected representative, these powers are nonetheless clearly granted by the statutory scheme that was passed by the Legislative Assembly.

[72] This is not to say that the weight of the valid public purpose assumption on one side of the balance of convenience scale always carries the day. There are some examples in the case law relied upon by the Applicants where the assumption has not been determinative.

[73] It is to say that "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed": *Harper* at para 9.

[74] The Applicants urge me to find that this is a clear case and say that contrary to the general rule, I ought to evaluate the effectiveness of the Private Residence, Indoor and Outdoor Gathering Restrictions, and the Mandatory Mask and Business Closure Requirements in determining whether the public interest will suffer greater harm from the granting, or refusal, of an interlocutory injunction. They suggest the Respondents bear the evidentiary burden to show that the impugned parts of Order 42 have a "reasonable chance of success" and to "demonstrate that the harms of COVID-19 are worse than" the harms caused by the Restrictions. This is where they seek to rely upon their "expert" evidence. The information they provide questions the necessity of the Restrictions on the entirety of the population of Alberta.

[75] But, this part of the Applicants' argument goes too far and drifts away from the focus of the balance of convenience analysis. As stated by the Supreme Court of Canada at paragraph 73 of *RJR*, it is the Applicants who must convince the Court of the public interest benefits that will flow from the granting of an interlocutory injunction.

[76] The public interest benefit that the Applicants have established will flow from the granting of an interlocutory injunction is the benefit of allowing the citizens of this Province to gather and celebrate the holidays and to otherwise exercise, unconstrained, their religious freedoms.

[77] The ultimate question is whether I am satisfied that *these benefits* outweigh the harm of suspending the restrictions until January 4, 2021, or until the merits of the action are decided.

[78] I am not satisfied that they do.

[79] I hear and appreciate how difficult it is for the Applicants and other members of the public to forgo these rights, especially at this time of year. But, I do not find that the public

interest in granting the stay to allow Albertans to exercise these rights outweighs the public interest in denying the relief in advance of the full hearing on the merits.

[80] The Applicants themselves acknowledge that it is in the public interest to have measures in place to address the transmission of COVID-19 and to protect those vulnerable to the illness (paragraph 69 of the Memorandum of Argument of the Applicants Heights Baptist Church, Northside Baptist Church, Erin Blacklaws, and Torry Tanner). Their concern from a constitutional perspective is that the measures taken are not the right ones; that the Private Residence and Indoor and Outdoor Gathering Restrictions, and the Mandatory Mask and Business Closure Requirements, do not impair *Charter* rights as little as possible or "within a range of reasonably supportable alternatives." They are concerned that the impact of measures on *Charter* rights is too high a price to pay for the advantage it provides in advancing the purpose of the Restrictions. But, that is the section 1 analysis that is yet to be undertaken.

[81] I am bound by Supreme Court of Canada authority to assume that the Restrictions serve the public good; here, that they protect public health. I also have evidence from Dr. Hinshaw explaining how, left unchecked, the virus is anticipated to spread, threatening people's lives and the capacity of the health care system to provide patient care for Albertans who need it, whether as a result of COVID-19 or otherwise.

[82] The Applicants ask me to find that there will be no harm because the Respondents have not provided an adequate scientific basis to establish that the Restrictions work.

[83] Not only is this inconsistent with their acknowledgment that it is in the public interest to address the transmission of COVID-19, it is not the law that guides the Court on an interlocutory application for injunctive relief.

[84] Again, and precisely because these applications are brought on short notice and before the Court has a complete evidentiary record and can undertake the complex *Charter* analysis required, I must assume the Restrictions protect public health. Moreover, Dr. Hinshaw's affidavit sets out the data that leads to her concern for the health and safety of all Albertans if the Restrictions are stayed.

[85] Given the risks associated with the spread of the virus that the Respondents are seeking to manage, I am of the view that there is a greater public interest in maintaining the integrity of Order 42 than there is in staying the parts of it that the Applicants ask me to suspend so that they, and other citizens of this Province, are able to gather and celebrate the holidays and to otherwise exercise their religious freedoms.

Conclusion

[86] In conclusion, although I find that there is a serious issue to be tried, in the sense that the Applicants claims are not frivolous or vexatious, and that the Applicants have established a likelihood of irreparable harm sufficient to meet the second part of the *RJR* test in relation to some of the rights asserted, I am not satisfied that the balance of (in)convenience favours

granting an interlocutory injunction to stay the Private Residence, Indoor or Outdoor Gathering Restrictions, or the Mandatory Mask or Business Closure Requirements.

[87] The application for an injunction is therefore dismissed.

Heard on the 21th day of December, 2020.
Dated at the City of Calgary, Alberta December 22, 2020.

Anne L. Kirker
J.C.Q.B.A.

Appearances:

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for the Respondents, Her Majesty the Queen in Right of the Province of Alberta and the Chief Medical Officer of Health