

\$ 21187.7
No. _____
Vancouver Registry

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT, R.S.B.C. 1996, c.241

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Roman Catholic Archbishop of Vancouver

PETITIONER

AND:

Attorney General of British Columbia and
Dr. Bonnie Henry in her Capacity as Provincial Health Officer for
the Province of British Columbia

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO: Attorney General of British Columbia
c/o Deputy Attorney General
Ministry of Attorney General
PO Box 9290 Stn Prov Govt
Victoria BC V8W 9J7

This proceeding has been started by the Petitioner for the relief set out in Part 1 below.

If you intend to respond to this Petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this Court within the time for response to petition described below, and
- (b) serve on the Petitioner
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the Petitioner,

- (a) if you were served with the Petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the Petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the Court, within that time.

(1) The address of the registry is: 800 Smithe Street Vancouver, BC V6Z 2E1
(2) Hunter Litigation Chambers 2100 - 1040 West Georgia Street Vancouver, BC V6E 4H1 Fax number address for service (if any) of the Petitioner: (604) 647-4554 E-mail address for service (if any) of the Petitioner: rdalziel@litigationchambers.com , bduong@litigationchambers.com
(3) The name and office address of the Petitioner lawyers is: Ryan D. W. Dalziel, Q.C. and Brian T. Duong Hunter Litigation Chambers Law Corporation Barristers and Solicitors 2100 - 1040 West Georgia Street Vancouver, BC V6E 4H1 Telephone: 604 891 2400

CLAIM OF THE PETITIONER

Part 1: ORDER(S) SOUGHT

1. An order in the nature of *mandamus* granting an exemption to the Petitioner from the order made by the Provincial Health Officer regarding “Gatherings and Events”, dated February 10, 2021 (the “Provincial Health Order”) and such further orders as may be pronounced which

prohibit or unduly restrict gatherings for worship and other religious services, in the manner proposed by the Petitioner in its Reconsideration Request dated February 19, 2021 pursuant to section 43 of the *Public Health Act*, S.B.C. 2008, c. 28;

2. A declaration that the Provincial Health Order is unconstitutional in its application to the Petitioner's activities constituting religious gatherings or worship, including Mass, weddings, funerals, and baptisms;

3. An interim order pursuant to section 10 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("*JRPA*"), staying the Provincial Health Order in respect of the Petitioner's activities constituting religious gathering or worship until judgment is rendered in the Petition;

4. In the alternative, an interim order pursuant to section 10 of the *JRPA*, applying the order made by the Provincial Health Officer regarding "Gatherings and Events", dated November 10, 2020 to the Petitioner's activities constituting religious gathering or worship, until judgment is rendered in the Petition;

5. Special Costs; and

6. Such further and other relief which this Honourable Court deems just.

Part 2: FACTUAL BASIS

The Parties

7. The Roman Catholic Archbishop of Vancouver (the "Archbishop") is the Most Reverend J. Michael Miller, CSB, the chief pastor and leader of the Roman Catholic Archdiocese of Vancouver ("RCAV").

8. The Archbishop is also a corporation sole, incorporated under the *Roman Catholic Archbishop of Vancouver Incorporation Act*, S.B.C. 1909, c. 62 as amended S.B.C. 1938, c. 69.

9. The RCAV ministers to the spiritual needs of nearly a half million baptized Catholics, within approximately 120,000 km² of western British Columbia. It operates, among other things, 77 parishes, 51 schools, and oversees 4 Catholic institutes of higher education.

10. The Respondent Dr. Bonnie Henry is British Columbia's Provincial Health Officer (the "PHO"), appointed under Part 6 of the *Public Health Act*.

Overview of Facts

11. The Archbishop has set out the most salient facts in a letter sent February 19, 2021 and addressed to the PHO. The letter requests reconsideration of the Provincial Health Order pursuant to section 43 of the *Public Health Act*, and makes the following observations:

First, in the Catholic faith the Sunday Eucharist is the foundation and summit of all Christian practice. It is necessarily a gathering, through attendance and

participation in Holy Mass. The obligation to attend mass in person on Sundays is binding on all Catholics, unless reasons of health excuse them. The reason for in person worship is that Christ the Lord, through the ministry of the priest, offers himself, substantially present under the species of bread and wine, to God the Father and gives himself as spiritual food to the faithful united with his offering. And it most fittingly occurs in a sacred place - a church - absent true necessity. This foundational practice of the Catholic faith and life of divine worship has now been precluded for three months, with no clear end in sight.

Second, there are no known instances of COVID-19 transmission within any of the parishes of the RCAF. Catholics can maintain their practice of attending Mass with at least as great a degree of safety as many currently permitted practices, and I am committed to ensuring that the RCAF will continue to do so in order to protect the health of the community.

Third, the accommodation of Christian practice of worship that the RCAF seeks is modest. I propose below an attendance limit of just 10% of the capacity of our parishes. RCAF has developed, and will apply on a mandatory basis, robust measures to ensure the health and safety of the faithful (and by extension, of the wider community), including by way of hand sanitizing, masking and physical distancing.

Fourth, I submit that not all faiths are alike regarding the importance given to in person worship. A diversity of religious practices exists both within and without the Christian faith. Below I describe in detail the practices and beliefs that are specifically important to the faithful within the RCAF, and correspondingly to this reconsideration request. I additionally provide detailed proposed departures from our customary practices, in order to reduce any health risk to a minimum. I have confidence that you will consider with care the specific circumstances that the RCAF's reconsideration request presents.

Fifth, this request is now of the utmost urgency. February 17 was Ash Wednesday, and our community has now commenced the Lenten season of the liturgical calendar, a period of solemn religious observance in anticipation of Easter. Although this is the first request coming directly from the Archdiocese, I am mindful of efforts made by the St. Thomas More Catholic Lawyers Guild of British Columbia (the "Guild") in order to raise their concerns regarding the legality of the Orders in relation to the *Charter of Rights and Freedoms*. Specifically, the Guild sent a formal letter to the Provincial Health Officer and Minister Dix on December 23, 2020 (which I was copied on), and which is enclosed with this letter as **Schedule A**. Having received no response, I am advised that the Guild sent a follow-up e-mail on January 6, 2021. I am also advised that the original letter was then sent to the attention of Minister David Eby on January 25, 2021. The Guild has advised me that they have received no response to their correspondence to date.

**Affidavit #1 of Kristy Wong, affirmed
February 25, 2021 (“Wong Affidavit”), Exhibit D**

12. The Deputy Provincial Health Officer acknowledged receipt of the reconsideration request on February 24, 2021. No decision on the request has been made to date.

Wong Affidavit, Exhibit G

Province-Wide Restrictions

13. The Provincial Health Order currently prohibits any person from attending, organizing, hosting or permitting an “event” unless specifically provided for in the Provincial Health Order.

Wong Affidavit, Exhibit C (“Order”), Part B

14. “Event” is defined as an “in-person gathering of people”, and specifically includes “a worship or other religious service, ceremony or celebration”, as well as “a wedding; a baptism; a funeral”.

Order, Definitions

15. The Provincial Health Order does permit a “support group meeting” of up to 50 patrons. Weddings, Baptisms and Funerals, are also permitted, so long as no more than 10 patrons are present.

Order, Part C, Sections 1-2.

16. The Provincial Health Order further permits indoor group low intensity exercise (defined to include stretching, Tai-Chi, Pilates and, yoga) under conditions with a limit of 25 participants and staff members present in any exercise class or room.

Order, Part I, Section 3 and Definitions

17. The Provincial Health Order has no expiration date; in other words, it is indefinite.

Order, Part N

18. Gyms and recreation facilities that offer individual workouts and personal training sessions remain open subject to adherence to a COVID-19 Safety Plan.

Wong Affidavit, Exhibit D

19. Under an order made by the PHO, “Food and Liquor Serving Premises and Retail Establishments Which Sell Liquor December 30, 2020”, restaurants, coffee shops, cafes, cafeterias, pubs, bars, lounges and nightclubs may provide food and drink services, subject to conditions.

Wong Affidavit, Exhibit B

COVID-19 Public Exposures

20. Each of British Columbia's Regional Health Authorities disclose both current and past COVID-19 public exposure information online.

21. Both Vancouver Coastal Health and Fraser Health Authority's websites disclose exposures occurring at restaurants, pubs, gyms, cafés, bars, lounges, nightclubs, and retail establishments. No RCAV parish, and indeed, no places of worship are listed.

Wong Affidavit, Exhibits I and J

Part 3: LEGAL BASIS

The Provincial Health Order Constitutes an Infringement on the Freedom of Religion

22. The Provincial Health Order infringes upon section 2(a) of the *Canadian Charter of Rights and Freedoms*:

2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion

23. Freedom of religion includes the right to manifest religious belief by worship and practice.

***R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 336 ["Big M"]**

24. Where it is the nature of the law that is in issue in a section 2(a) *Charter* challenge, it does not matter if the petitioner is an individual or a corporation.

***Big M, supra* at pp. 314-315**

25. The Archbishop, the chief pastor and leader of the RCAV, has stated that the Provincial Health Order has precluded for three months the attendance and participation in Holy Mass, the foundational practice of the Catholic faith and life. There can be no question then the requirements for a section 2(a) infringement are met as the interference (a) relates to a belief or practice that has a nexus with religion, and (b) interferes with the claimant's ability to act in accordance with their religious beliefs that is more than trivial or insubstantial.

***Syndicat Northcrest v. Amselem*, 2004 SCC 47, paras. 56-58;
Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, para. 34**

26. This infringement implicates both the individual aspect and collective aspects of religious freedom: it limits both the ability of the Catholic person to manifest their belief by attending and participating in Mass and other religious gatherings, and the ability of the RCAV to maintain a community of faith.

see eg, *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, at paras. 30, 130, 181;
Loyola High School v. Quebec (Attorney General), 2015 SCC 12, para 59

27. The Provincial Health Order goes much further than simply meeting the requirement that that the interference be more than trivial or insubstantial: it goes to the core of the rights of the Catholic faithful. Here, the infringement constitutes a wholesale extinguishment of a religious practice, and one that is facially discriminatory, targeting religious practice for disadvantageous treatment relative to a host of secular activities.

28. The Provincial Health Order's prohibition of religious gatherings also intersects with other *Charter* rights including the section 2(b) right to freedom of expression, the section 2(c) right to freedom of peaceful assembly and the section 15 right to equality, which prohibits discrimination on the basis of religion. However, the focal point of the prohibition on religious gatherings is the infringement on religious freedom.

The Provincial Health Order is not demonstrably justified in a free and democratic society

29. The Provincial Health Order as it applies to the Archbishop and the Catholic faithful is an unreasonable limit in light of both the *Charter* itself and *Charter* values, and cannot "be demonstrably justified in a free and democratic society".

30. The onus of proving the justification rests with the government. Overt religious discrimination cannot be viewed as a reasonable limit, absent true necessity for a genuinely pressing purpose. Necessity for health and safety cannot be established in light of the Provincial Health Order's obvious under-inclusiveness with respect to permitted activities.

R. v. Oakes, [1986] 1 S.C.R. 103 at pp 136-137

Mandamus and Declaration of Invalidity

31. The *JRPA* contemplates both relief in the nature of mandamus and a declaration in relation to the exercise or refusal to exercise statutory power:

2(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

(a) relief in the nature of mandamus, prohibition or certiorari;

(b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

32. In addition to the *JRPA*, the Archbishop asserts section 24(1) of the *Charter*: the "appropriate and just" response to a violation of section 2(a) of the *Charter* are the declaration and *mandamus* orders sought by the Archbishop.

33. The circumstances of this case warrant an order in the nature of *mandamus* requiring the Provincial Health Officer to grant an exemption under section 43 of the *Public Health Act*, given the modest accommodation sought, the severity of the infringement, the unresponsiveness of the decision-maker, and the narrow tailoring of the remedy to the infringed right.

See eg, Canada (Attorney General) v. PHS Community Services Society,
2011 SCC 44, para 150

34. The Archbishop is not required to wait for a decision on the reconsideration request from the Provincial Health Officer. The principle of exhaustion of administrative remedies does not apply to bar relief where the applicant would suffer substantial prejudice if required to await the outcome of the administrative process and the court is fully apprised of the facts upon which the jurisdictional error is founded. For the reasons set out above, the prejudice has been ongoing for the past three months, with no end in sight, and the PHO has to date refused to respond to the requests made by the Archbishop and the Catholic faithful to reconsider the Provincial Health Order.

D. Brown and J. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), BoA Tab 68, at topic 1:2100 *et seq.* *OK Industries Ltd v District of Highlands*, 2021 BCSC 81, para 115 *et seq.*

Interim Stay

35. Section 10 of the *JRPA* permits the Court to “make an interim order it considers appropriate until the final determination of” an application for judicial review.

36. The test for interlocutory injunctive relief is well established. It involves consideration of whether:

- (a) there is a fair question or serious issue to be tried;
- (b) the applicant has demonstrated that it will suffer irreparable harm if the injunction is not granted; and
- (c) the balance of convenience favours the grant of an injunction.

***British Columbia (Attorney General) v. Wale*, [1986] B.C.J. No. 1395 (CA), *aff'd* [1991] 1 S.C.R. 62; *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.**

37. For the reasons set out above regarding the application of the Provincial Health Order to the RCAV, the RCAV submits that there is a fair question or serious issue to be tried.

38. Depriving the Archbishop and the Catholic faithful of their constitutional rights constitutes irreparable harm to them.

***Beaudoin v. British Columbia*, 2021 BCSC 248, para 38**

39. The balancing exercise contemplated in the third branch of the test involves consideration of which party will suffer greater harm from the granting or refusal of the relief sought. The analysis is a multi-faceted and fact-specific inquiry that varies with the particular circumstances of each case. It often includes, without limitation, consideration of:

- (a) the relative harm to the parties of the granting or refusal of the injunction sought,
- (b) the adequacy of damages as a remedy for such harm,
- (c) the likelihood that awarded damages will be paid,
- (d) the status quo;
- (e) the strength of the applicant's case,
- (f) the public interest, and
- (g) any other factors affecting the balance of justice and convenience.

***Canadian Broadcasting Corp. v. CKPG Television Ltd.*, 1992 CanLII 560 (BC CA), p 10;
British Columbia Hydro and Power Authority v. Boon, 2016 BCSC 355, para 69**

40. Here, in the absence of evidence from the Respondents of any incidents of public exposure in RCAF churches, and the severe nature of the infringement, the balance weighs in favor of granting an interim stay. This can particularly be seen by considering: (i) the relative harm; (ii) in inadequacy of damages as a remedy of such harm; and (iii) the strength of the Archbishop's case.

Special Costs

41. Given the "significant and widespread societal impact" of this case, the severe nature of the *Charter* infringement, and failure of the PHO to respond in a timely manner, the Court should exercise its discretion to award special costs.

***See eg, Carter v. Canada*, 2015 SCC 5, paras 140-141**

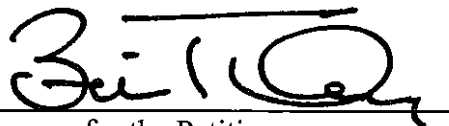
Part 4: MATERIAL TO BE RELIED ON

42. Affidavit #1 of Kristy Wong, made February 26, 2021

43. Such further and other material as counsel may advise and this Honourable Court may permit.

The Petitioner estimates that the hearing of the Petition will take **2 days**.

Dated: February 26, 2020



Lawyers for the Petitioner
Ryan D. W. Dalziel, Q.C. and Brian T. Duong
Hunter Litigation Chambers Law Corporation

To be completed by the Court only:

Order made

- in the terms requested in paragraphs _____ of Part 1 of this petition
- with the following variations and additional terms:

Date: _____

Signature of Judge Master