

Court File Nos.: AJ16458508-1, AJ16958269-1, AJ19780619-1

Abbotsford Registry

Court File Nos.: AJ06525804-1, AJ065289991, AJ06525789-1, AJ06529004-1, AJ06525797-1, AJ13323233-1, AJ06525804-1, AJ06525812-1, AJ06520408-1, AJ06521076-1, AJ06520755-1, AJ06521975-1, AJ06521133-1, AJ06521802-1, AJ06521141-1, AJ06521810-1, AJ06521159-1, AJ06521828-1, AJ06521167-1, AJ06524898-1, AJ06521175-1, AJ06527909-1, AJ06521836-1, AJ06525763-1, AJ06521886-1, AJ13323225-1, AJ06527884-1, AJ06520416-1, AJ06527892-1, AJ06520458-1, AJ06528733-1, AJ06521844-1, AJ06521878-1, AJ06522751-1

Chilliwack Registry

THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

JAMES BUTLER, TIMOTHY CHAMP, JOHN KOOPMAN,
RIVERSIDE CALVARY CHAPEL, BRENT SMITH,
IMMANUEL COVENANT REFORMED CHURCH

NOTICE OF APPLICATION

To: AGBC % Micah B. Rankin, Crown Counsel
Prosecution Support Unit
Criminal Appeals and Special Prosecutions
[REDACTED]
Victoria, B.C. V8W 3E6

And to: Dr. Bonny Henry and Dr. Brian Emerson,
% Emily Lapper, Legal Counsel, Litigation Group
Legal Services Branch, Ministry of the Attorney General
[REDACTED],
Vancouver, BC V6Z 2G3

TAKE NOTICE that the defendant John Koopman shall apply on a date and at a place to be determined by this Court for an order pursuant to common law and section 24(1) of the *Canadian Charter of Rights and Freedoms* that the violation ticket AJ06525763-1 herein be quashed and/or charge dismissed as an abuse of process;

AND FURTHER TAKE NOTICE that the defendant alleges that the prosecution herein constitutes an abuse of process in the context of both the main and the residual categories of such doctrine as described in *R. v. Babos*, 2014 SCC 16;

AND FURTHER TAKE NOTICE that in support of this application will be the evidence and submissions at trial held on August 11, 12, 15 and 16, 2022 and the exhibits and positions advanced on the Crown's Vukelich application heard on March 6-9, 2023 and supplemented with the following:

Affidavit of John Koopman, sworn April 4, 2023;

Affidavit of Camila Canon, sworn April 12, 2023; and

The anticipated evidence of Dr. Bonny Henry and/or Dr. Brian Emerson.

AND FURTHER TAKE NOTICE that the defendant applies to have this court call Dr. Bonny Henry and Dr. Brian Emerson as witnesses on this application on May 15, 2023 or such other time as may be determined, pursuant to the principles as confirmed in *R. v. Finta*, [1994] 1 S.C.R. 7

AND FURTHER TAKE NOTICE that, in the alternative, the defendant applies for an order under section 44 of the *Offence Act* RSBC 1996, Chap. 338 that subpoenas in the form as submitted herewith be issued to Dr. Brian Emerson and to Dr. Bonny Henry as requiring their attendance on May 15, 2023 or at such other time as may be ordered by this Court;

AND FURTHER TAKE NOTICE that the defendant relies on the following facts as particularized by the chronology set out below:

a) On March 28 2020, the Crown (BC Center for Disease Control) assured the public that the exercise of its powers in relation to the declared state of emergency related to COVID-19 would be governed by certain fundamental principles, including:

“Respect: To whatever extent possible, individual autonomy, individual liberties, and cultural safety must be respected”;

“Least Coercive and Restrictive Means: Any infringements on personal rights and freedoms must be carefully considered, and the least restrictive or coercive means must be sought”;

“Proportionality: Measures implemented, especially restrictive ones, should be proportionate to and commensurate with the level of threat and risk”; “Decision makers should take into account all relevant views expressed”; “Take into account any disproportionate impact of the decision on particular groups of people”; and

“Practical - have a reasonable chance of being feasible to implement and to achieve their stated goals”.

Aff. of M. Patterson #1 (MP#1), “Covid-19 Ethical Decision Making”,
p. 112 (Aff of R. O’Neil, Ex A)

b) A prosecution arising from conduct which violated the Crown’s promise to uphold the above principles, as particularized herein, is offensive to societal notions of fair play and decency and brings the administration of justice into disrepute.

c) A prosecution arising from the use of public health powers for political, ideological or other reasons unrelated to public health is contrary to the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121) and offends societal notions of fair play and decency which brings the administration of justice into disrepute.

d) To conduct a trial in the criminal courts which precludes an accused’s right to advance a defence by reason of what the Crown contends are legal consequences arising from civil proceedings is to compromise the fairness of trial and a violation of the accused’s rights under sections 7 and 11(d) of the *Charter*.

e) At all material times, the PHO knew that COVID-19 transmission risk could not be affected by the subject of discussion at any particular gatherings;

f) At all material times, the PHO knew the impugned distinction (ie. differential treatment in the G&E Orders as between gatherings for worship and gatherings for secular purposes) caused injustice or health inequity but she refused to address it. As she confirmed in her book published after the events herein:

I was fully aware, however, that if I were wildly offside with what the provincial health minister and government believed, it could make my position challenging, and that if I was too far off the mark too often, the government could render me ineffective or fire me altogether.

...

What this meant in practice was that, as much as we may wish to, we didn't have to immediately take on the cause of every injustice or health inequity...at least, not right away.

For many issues in public health, knowing when to push - and when to keep the solution in your back pocket until the right political and societal moment arises - is a skill.

...we want to make change for the sake of health but must also be sensitive to the many fiscal and political realities that exist in a democracy...

ASF (Ex. 1 at trial), exhibit 59

g) At all material times, the PHO knew the data regarding case numbers in the community which she presented to the public and to the courts (including in *Beaudoin*) was unreliable as she conceded through the media on December 29 2021:

"All along, we know that the daily numbers are not reflecting everybody who has COVID in our province," Henry said during a news conference Wednesday. "That has been the case from the very beginning, and at different periods of time the actual true number can be varied by four or five times what we're seeing in terms of PCR testing."

ASF, exhibit 60

h) The PHO repeatedly represented that the reconsideration process under PHA section 43 was a viable option for persons seeking variance of the G&E Orders when, in

fact, from no later than early December 2020, she knew that process unavailable to the defendant and others.

i) From late November 2020 until late February, 2021, the PHO impermissibly discriminated between different faiths by, *inter alia*, prohibiting all Christian in-person worship gatherings of every kind while permitting Jewish in-person worship gatherings on certain conditions.

j) The PHO was dishonest in her letters of December 18, 2020 sent to, *inter alia*, the defendants John Koopman and Brent Smith by stating that it was necessary to prohibit all in-person worship gatherings despite, as revealed subsequently, she had already granted permission for Jewish synagogues to hold such gatherings subject to certain conditions;

k) Following PHA section 43 requests in the *Beaudoin* proceedings, the PHO responded by, *inter alia*, seeking an order that police be empowered to apprehend the defendant and others if suspected of gathering to worship. (See 2021 BCSC 248.) Such conduct appeared to be retaliatory to punish the defendant and others for asserting their constitutional rights.

l) After losing the above injunction application and only 2 business days before the hearing of the petition in *Beaudoin*, the PHO granted a s. 43 variance directed only to the religious petitioners in the *Beaudoin* proceedings despite numerous requests on behalf of many other churches dating back to November, 2020 and despite knowing that in-person worship gatherings could be conducted safely throughout that period.

m) The PHO was untruthful in her February 25, 2021 variance correspondence in the *Beaudoin* proceedings when stating, *inter alia*, that worship gathering indoors “*would pose an unacceptable risk to public health*”. As revealed subsequently, the PHO had already granted all orthodox synagogues across BC permission for ongoing weekly indoor worship gatherings on the basis that such activities would be “low risk”.

n) On March 1 2021, upon becoming aware of an imminent court order for production of PHO communications with the synagogues, the PHO immediately rescinded the variance which had recently been granted to the synagogues, such conduct being an attempt to mitigate the consequences arising from exposure of her differential treatment between churches and synagogues.

o) The PHO refused to concede the constitutional invalidity of her prohibition of outdoor protests until the hearing of the petition in *Beaudoin*, despite knowing from November 2020 that such prohibition was solely for political purposes and was constitutionally impermissible.

p) To prevent the defendant and others from asserting their constitutional rights, the Crown has presented inconsistent positions, asserting at the Supreme Court of BC and Court of Appeal in the *Beaudoin* proceedings that challenging the constitutional validity of the impugned distinction must take place in the prosecution of violation tickets, whereas here in the Provincial Court, asserting that the outcome of the judicial review proceedings precludes any such challenge, all of which offends societal notions of fair play and decency and brings the administration of justice into disrepute.

Chronology

1. On October 26, 2020, the PHO publicly confirmed: “*And we know that when these COVID safety plans are followed in settings like restaurants, event spaces, churches, temples, hotels, that we don’t see transmission.*” (MP#1, p.1121, Aff.#2 of J. Koopman, para. 5)

2. On November 25, 2020 Rabbi Meir Kaplan emailed PHO (Dr. Emerson) (MP#1, p. 834) and requested an exemption for two gatherings, (no reference to PHA s. 43) being held in a tent, no more than 25 people, face masks, 6 foot distancing, 1 hour duration.

3. On November 27, 2020 the PHO (Dr. Emerson) responded to Rabbi Meir Kaplan, (MP#1, p. 833) and after referring to it being "low risk", the PHO granted the variance.
4. On November 28, 2020, the Council of the Immanuel Covenant Reformed Church submitted a letter to Premier Horgan, Minister Dix and Dr. Henry, explaining religious beliefs and importance of in-person worship gatherings and setting out safety measures to be taken. (MP#1, p. 850)
5. On November 30, 2020, Rev. Brent Smith (Riverside Calvary Chapel) sent a similar letter to Premier Horgan, Minister Dix and Dr. Henry, undertaking to adhere to safety guidelines, including "specific protocols around the maximum number of worshippers at a service, the use of masks, the use of hand sanitizer, social distancing, contact tracing, the distribution of food and drink, and the use of shared items." (MP#1, p. 217)
6. On December 3, 2020, Immanuel Covenant Reformed Church wrote to Dr. Henry (MP #1, p. 849) and attached a letter from ICRC dated Nov, 28/20. There was no response from the PHO. (Aff #1, B. Emerson, para. 121)
7. On December 7, 2020, Rev. Garry Vanderveen submitted a letter (MP#1, p. 1167) on behalf of Christ Covenant Church to Dr. Henry and other political, public health and law enforcement officials, seeking permission to gather in-person for worship subject to safety conditions.
8. On December 15, 2020, Rabbi Meir Kaplan emails Dr. Emerson seeking exemptions for "about 10 synagogues", no reference to PHA, s. 43. (MP #1, p. 838)
9. On December 17, 2020, the BC Civil Liberties Association wrote an open letter to the PHO and the BC Health Minister about the inappropriateness of the "punitive approach" taken against churches. (MP #1, p. 192)
10. On December 17, 2020, Dr. Emerson responds to Rabbi Kaplan and others (MP#1, p. 839-40) and after referring to such services being "low risk", permission is

given to all synagogues via section 43 (7) (a) of the Act for a class variance, noting “This variance remains in place for the duration of the Provincial Health Officer prohibition on events.”

11. Also on December 17, 2020, Dr. Emerson notified all “Chief CMO’s and Regional Health Directors” (MP #1, p. 839) advising of the class variance, stating “I am not sure where all these places are so sending to all regions in case this comes up in your area”.

12. On December 18, 2020, The PHO sent identical letters to Pastors Brent Smith and John Koopman, referencing section 43 of the Public Health Act and encouraging them to “accept the importance of compliance with this Order and the need to respect the difficult decisions of public health officials.” (MP#1, pp. 856 and 882)

13. On December 22, 2020, Rev. Koopman responded to PHO regarding the unfairness of treating churches differently and lack of PHO response to numerous requests. (MP #1, p. 190)

14. On December 23, 2020, Rabbi Federgun emailed Dr. Emerson on behalf of two synagogues in addition to the group of synagogues mentioned in the Rabbi Kaplan communications, no mention of PHA s. 43. (MP#1, p. 843)

15. On December 26, 2020, Dr. Emerson emails Rabbi Federgun, stating: “*I can confirm that the variance of the Provincial Health Officer order does, with the conditions mentioned, apply to all the Orthodox Synagogues, so would include Congregations ScharaTzedek and BethHamidrash.*” (MP#1, p.843)

16. On January 7, 2021, Pastor Vanderveen again wrote to Dr. Henry, the Premier and the health minister and again set out the importance of worship gatherings and the safety steps his church would take. (Aff of J. Koopman, Ex. B)

17. On January 7, 2021, the *Beaudoin* judicial review proceedings commenced; the petition and all affidavits were delivered to the PHO and the AGBC. (MP #1, Exs. A, G-O, BB)

18. On January 8, 14 and 25, 2021, legal counsel (John Sikkema) on behalf of 11 different Reformed churches (the Acacia Group) wrote to the PHO formally requesting a s. 43 reconsideration pursuant to PHA section 38 and 43 and received no response from the PHO other than auto replies. (MP #1, pp 1103- 1119)
19. On January 8, 2021, Dr. Emerson emailed 13 different Rabbis (MP#1, p. 845) preemptively, (ie. with no recent requests), his comments including: *“I anticipate you would want an extension of the variance for in-person services provided on December 17, described below”*; and *“This is to confirm that to accommodate your religious beliefs the variance that was provided on December 17, 2020 described below, is now extended to February 5, 2021”*.
20. On January 21, 2021, the MLA for Abbotsford West (Michael DeJong) wrote to the AGBC on behalf of “a number of spiritual organizations” as to the unfairness of the ban on religious services and asking that it not be renewed or that it be amended in a manner that will permit certain in-person religious gatherings to occur. (MP #1, p. 1174-77)
21. On January 25, 2021 and in the course of exchanges between counsel in the Beaudoin proceedings, counsel for the defendant and other petitioners in that matter stated: *“....were you able to ascertain whether Dr. Henry needs any further information from my clients for section 43 exemptions? That would, of course, make the AG’s injunction application unnecessary.”* (Aff. of C. Camon, Ex. A)
22. On January 26, 2021, the AGBC was reminded by counsel for the defendant and other petitioners in Beaudoin that *“As to the section 43 exemption, Dr. Henry has my clients materials which we served her with sometime ago. I’m not sure what else she needs.”* (Aff. of C. Camon, Ex. A)
23. On January 29 and February 3, 2021, the petitioners’ counsel in *Beaudoin* confirmed that s. 43 reconsideration requests were formally made by the defendant and others. (MP #1, p. 968 and 1489- 1492)

24. On February 2, 2021, the Crown filed a Response to the Petition and applied for a Court order to, *inter alia*, detain people who the police believe intend to attend a worship or other religious service. (MP #1, pp. 19-34, 40-51)
25. On February 8, 2021, Rabbi Kaplan wrote to Dr. Emerson on behalf of all orthodox Jewish congregations for gatherings on Purim. (MP #1, p. 1499)
26. On February 12, 2021, the Crown's injunction application to, *inter alia*, empower police to detain the defendant and others was heard before Hinkson CJBC.
27. On February 17, 2021, the Crown's injunction application was dismissed. (2021 BCSC 248)
28. On February 17, 2021, Dr. Emerson wrote to Rabbi Kaplan, (MP #1, p. 1498) granting a variance to all synagogues, noting "*Based on our review of the safety plan and current spread of COVID-19 in BC it is our opinion that these events would be low risk if held outdoors.*"
29. On February 23, 2021, Dr. Emerson pre-emptively (ie. no apparent communications from the Rabbis) emailed Rabbi Kaplan and granted permission to all of the Orthodox synagogues to hold weekly services indoors on an ongoing basis. (MP#1, p 1496-1500)
30. On February 23, 2021, Dr. Emerson sent a second email to Rabbi Kaplan and asked that he inform the other Orthodox congregations of the decision. (MP #1, p. 1496)
31. On February 25, 2021, two days after granting synagogues permission for ongoing indoor worship gatherings and only two business days before the hearing of the petition in *Beaudoin*, Dr. Henry granted the defendant and other petitioners permission for only outdoor gatherings, stating, *inter alia*, that worshipping indoors "*would pose an unacceptable risk to public health*". (MP#1, p. 1430)
32. On February 26, 2021, the defendant found out through the media that the synagogues had been given permission for worship service indoors. (MP#1, p. 1527-41)

33. On February 28 and March 1, 2021, counsel exchanged emails in relation to disclosure of the PHO's dealings with the synagogues, the AGBC being advised (at 7:20 am on day of the hearing): "*If you fail to produce the requested documents to us in court today, we will seek an order that it be produced.*" (MP #1, p. 1542, also see Aff. of J. Koopman, Ex D, transcript pages 121-125 from *Beaudoin* at SCBC)

34. On March 1, 2021, (MP#1, p. 1502-1509) the PHO emailed Rabbi Kaplan (at 10:57 am) and rescinded the variance which had just been granted on February 23, 2020 for ongoing indoor worship gatherings.

35. On March 2, 2021, the AGBC argued at the SCBC in the *Beaudoin* hearing that the Provincial Court is the venue for the constitutional validity of the impugned distinction to be addressed, its submissions including (Transcript, March 2/21, p. 82):

There is no relief this court can give him in relation – he has – if he has tickets, they will proceed to judicial justice or Provincial Court judge or – and whether the constitutionality of the prohibition at the time, whether that is a defence for him on those violation tickets is properly before that judicial justice or Provincial Court judge.

36. On May 5, 2021, Dr. Emerson finally responded to Pastor Vanderveen's communications of December 7, 2020 and January 7, 2021, stating, *inter alia*, that, "*in the interests of public health*" and *aside from the Beaudoin proceedings, Dr. Henry was not accepting requests to reconsider Orders.*" (Aff. of J. Koopman, para. 4, Ex. B)

37. On March 30, 2022, the AGBC continued at the Court of Appeal with its argument in *Beaudoin* that the Provincial Court is the venue for contesting the constitutional issues herein, stating (BCCA, Transcript, March 30/22, p. 16 and p. 35):

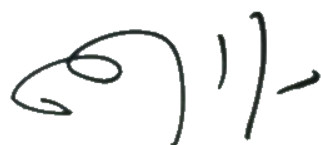
[T]here are violation tickets issued in respect to orders that are no longer in force, or that there were violation tickets inappropriately issued by the RCMP, that's a matter for the prosecution of those tickets in the examination of whether or not those violation tickets were rightfully issued. Those violation tickets are being attacked in Provincial Court.

These appellants do have a remedy, Justices. They are in Provincial Court now in the prosecutions of their tickets arguing that the very same orders are unconstitutional in that forum.

38. Had the defendant known that the PHO was permitting in-person worship gatherings in tents and/or outdoors in December, 2020, that option would have been considered as an alternative by the Free Reformed Church of Chilliwack at that time. (Aff of J. Koopman, para. 7)

39. Beginning in November 2020, hundreds of requests were sent on behalf of Christian churches to the PHO for reconsideration of her ban on in-person worship gatherings with no responses other than form letters, auto replies and the February 25, 2021 letter to the petitioners in *Beaudoin*. (Aff. of J. Koopman, paras. 2 and 3)

Dated: April 14, 2023

A handwritten signature in black ink, appearing to read 'PJ', is written above a horizontal dashed line.

Paul Jaffe
Counsel for the Defendants