

The Courts' Role in Ensuring COVID-19 Lockdown Restrictions Minimally Impair Constitutionally Protected Rights

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In December of 2020, Brauti Thorning's Michael Lacy, Lawrence Gridin and Alex Alton brought an application for interlocutory injunction on behalf of the Toronto International Celebration Church seeking an exemption from the government restriction on religious worship during the grey-lockdown, which prohibited church gatherings of more than 10 people regardless of the size of the place of worship.

The regulation (O. Reg. 82/20) permitted many other types of secular activities to continue with capacity limitations based on the square footage of the indoor location where the activity was being conducted. The Toronto International Celebration Church wanted to similarly offer church services at 30% capacity. Their view was that the government of Ontario prioritized secular activities such as going to the hardware store or filming television or movie productions over religious activities.

Background

The Toronto International Celebration Church is an evangelical Christian church in Toronto which serves a congregation of more than 1500 people from over 50 different nationalities. Prior to COVID-19, the Church would host regular Sunday services in their 31,000 square foot facility. The Church would also host a number of smaller services and community gatherings throughout the week. Like many other businesses and services, however, the Church was subject to various restrictions in an effort to reduce the spread of COVID-19.

On November 23, 2020, the City of Toronto entered the grey-zone state of lockdown which came with a number of restrictions on businesses and institutions. One of these restrictions, namely section 1(1)(d) of Schedule 4 to Ontario Regulation 82/20, was specifically aimed at limiting religious worship prohibiting more than 10 people from gathering for in-person religious services.

Religious institutions were effectively forced to shut their doors to worshippers. In-person worship is of significant importance to many worshippers particularly to those who live alone, do not have access to internet or technology, or are new to the community. For many, in-person service fosters a sense of community and is essential to their mental health. Despite places of religious worship being subject to this blanket restriction, many businesses were allowed to remain open with less restrictive measures, such as the TV & film industry, hardware stores and big box retailers.

As a result, the Church brought an application to strike down this portion of the regulation arguing that it is an unjustified infringement of s. 2(a) of the *Charter*, which guarantees everyone freedom of conscience and religion. In the interim, the Church sought an interlocutory injunction to exempt them from the restriction and allowing them to operate at 30% capacity pending the outcome of the ultimate application.

Michael Lacy assembled a team of experienced lawyers and all three of the firm's articling students to bring the injunction motion on short notice. This included preparing to cross-examine three medical professionals and an expert within 18 hours of receiving their affidavits, and preparing a detailed factum reviewing the evidence and relevant legal framework within 24 hours

of the cross-examinations. A link to the transcripts of the cross-examinations and our written argument can be found [here](#).

The Test for Interlocutory Injunctions

In applications for interlocutory injunctions, the burden rests on the party bringing the application. This means that the Church bore the onus of establishing that granting an injunction was in the interests of justice.

A court must consider three questions in determining whether to grant an interlocutory injunction:

1. Does the ultimate application have merit?
2. Will the applicant suffer irreparable harm if the injunction is refused?
3. Does the balance of convenience favour granting the injunction?

The Motions Judge Findings

(1) Does the Church's *Charter* application have merit?

The parties disagreed on the threshold to be met at this stage. The Church argued that it only had to establish a serious issue to be tried. The Ontario Government, on the other hand, argued that the Church had to show it was likely to win the Charter application before an injunction could be granted as the injunction essentially amounted to a final determination of the case.

The motion judge, Justice Breese Davies, found that the proper test was whether there was a serious issue to be decided. Given that the Ontario Government conceded that the regulation restricts the Church's religious freedom, the main application will ultimately turn on whether the government can justify the restriction under section 1 of the *Charter*.

During the oral argument, lead counsel and partner with the firm, Michael Lacy, noted that the government was likely going to have difficulty justifying the minimal impairment issue which is part of the section 1 analysis noting the irony that a television production company could film a fictitious religious service in the Church's auditorium with up to 300 paid actors for entertainment purposes under the regulation but that the Church was prohibited from conducting a real religious service with the same number of attendees.

Justice Davies concluded, that at a minimum, there was a serious issue to be decided with regards to whether the government appropriately tailored the restriction to ensure it impaired religious freedom no more than reasonably necessary:

[18] Nonetheless, based on the evidentiary record before me, I am satisfied that there is a serious issue to be determined, particularly in relation to the minimal impairment requirement under the s. 1 analysis. Ontario has made policy choices about which activities are permitted and which activities are restricted in regions that are in Stage 1. Some businesses and services are permitted to stay open with a 50 percent capacity limit during Stage 1. Some businesses and services are even permitted to operate without enforcing the indoor mask requirement during Stage 1. The evidence presented on the injunction motion is not conclusive that

restricting religious services to 10 people is the least restrictive way to achieve the government's objective of reducing the spread of COVID-19 in high-risk regions of the province.

(2) Will the Church and its members suffer irreparable harm if an interim injunction is not granted?

In the context of an injunction motion, irreparable refers to harm that cannot be quantified in monetary terms or that cannot be cured. This stage of the test solely focuses on the harm the Church and its members will suffer if not granted the injunction.

Justice Davies concluded that the Church and its member would suffer irreparable harm if the restriction on in-person religious worship continued. In arriving at this conclusion, Justice Davies relied on the evidence of the Church's founding Pastor, Peter Youngren, which attested to the religious significance of in-person worship and fellowship.

(3) Which party will suffer the greater harm from the granting or refusal of the injunction pending a decision on the merits?

Given that the application involved the *Charter*, Justice Davies considered the public interest and whether it was equitable to deprive the public from the protection and advantages of the impugned restriction before its validity has been determined. Justice Davies noted that it was difficult to determine where the balance of convenience lied given the strong public interest in both protecting the health of Ontarians amidst a pandemic, and the importance of protecting religious freedoms.

Ultimately, Justice Davies concluded that the harms to public health caused by granting the injunction outweighed the harms to the Church's freedom of religion. Although the Church only applied for an exemption for their church, there was a strong likelihood, that if successful, other religious institutions would seek a similar exemption leading to a cascade of stays and exemptions.

On that basis, the injunction application was denied.

Future Implications

Since the hearing of this motion, the province of Ontario has entered a province-wide grey-zone lockdown. It is notable, however, that Regulation 82/20 was significantly amended. Many permitted secular activities under the former regulation challenged by the Church are now prohibited or limited in the same manner as Church services are limited. The hearing of the ultimate application, which will determine the constitutionality of the 10-person limit on religious worship, has been adjourned until February 2021 at which point dates may be set for the ultimate hearing. Much will depend, however, on whether the grey-lockdown rules currently in place are amended or lifted.

Although the injunction was denied, this application raises several important considerations:

1. While there is no doubt a pressing and important objective in curbing the spread of COVID-19, we must ensure that the government does not unjustifiably erode constitutionally protected rights and freedoms. As Michael Lacy put it in his oral submissions on the

motion, “the measure of a constitutional democracy is not how we tolerate or facilitate fundamental rights when it is easy to do so but how we do so in times of crisis.”

2. In the face of a pandemic, the government is forced to make a number of choices as to which institutions remain open, which are closed and to what extent. This is the role of the legislature. It is the role of the courts, however, to determine whether those choices, where they infringe *Charter*-protected rights, are minimally impairing and proportional to the stated objectives. The fact that the Ontario government revisited some of the choices they made regarding grey-lockdown rules in the newly amended Regulation 82/20 was no doubt influenced by the injunction brought by the Church and the pending *Charter* litigation.
3. The issues raised in both the injunction motion and the pending *Charter* application transcend the interests of the Church. The Canadian Constitutional Foundation intervened on the injunction motion and has sought to intervene on the application if it goes ahead. The Canadian Civil Liberties Association has also given notice of its intention to seek to intervene on the pending application. Similar challenges are also pending in other jurisdictions in Canada and have been successful in the United States of America and in Switzerland.
4. The Church made a deliberate and conscious decision to seek the aid of the Courts rather than to engage in civil disobedience and challenge the legislation later. During the litigation they did not challenge the existence of the pandemic or the crisis that it created. Instead, they asked the Court to examine whether the choices made by the government are constitutionally sound. By engaging the team of lawyers and students at Brauti Thorning LLP, they were able to bring an important and serious constitutional issue to the attention of the courts in a professional and respectful way on very short notice.