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# What is the Test for Interlocutory Injunctions Affecting Homeless Encampments?

A critique of *Vancouver Fraser Port Authority v Brett* and associated case law

**Stepan Wood**

Peter A. Allard School of Law



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**PETER A. ALLARD  
SCHOOL OF LAW**

THE UNIVERSITY OF BRITISH COLUMBIA

# What is the Test for Interlocutory Injunctions Affecting Homeless Encampments?

A critique of *Vancouver Fraser Port Authority v Brett* and associated case law

Stepan Wood<sup>1</sup>

## Abstract

*Vancouver Fraser Port Authority v Brett* (*VFPA v Brett*), decided in 2020, marked a new low in judicial responses to the intersecting crises of housing, homelessness, poverty, toxic drugs, mental health, racism and colonialism. By dropping to the ground the already low bar for granting interlocutory injunctions to evict homeless encampments from publicly owned land in BC, this decision invites a critical assessment of BC courts' approach to homeless encampment injunctions. In this paper I present the first comprehensive survey of 21<sup>st</sup> century BC homeless encampment interlocutory injunction applications, which shows that they have an extremely high success rate. I then argue that such applications must satisfy all three prongs of the usual *RJR-MacDonald* test rather than a more relaxed test based on trespass or statutory violation; that the standard for the first prong should be a strong *prima facie* case due to the mandatory and effectively final character of most homeless encampment injunctions; and that courts should not decide complex, contested constitutional and evidential issues at the interlocutory stage on the basis of affidavits

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<sup>1</sup> Canada Research Chair in Law, Society and Sustainability, and Director, Centre for Law and the Environment, Allard School of Law, University of British Columbia. I was involved on a pro bono basis with the *Vancouver Fraser Port Authority* case. I submitted an affidavit for the defence that documented public health advice for homeless encampments during the COVID-19 pandemic. I also oversaw a team of Allard JD students and alumni (Jade Dumoulin, JD 2022, Robert Munro, JD 2020 and Sebastian Ennis, JD 2017) who conducted pro bono legal research into homeless encampments for Pivot Legal Society in the summer of 2020. Neither I nor the research team played any role in the preparation of other affidavits or of the pleadings in the case. I am grateful to the members of the research team for their assistance and to Alexandra Flynn, Douglas Harris, Robert Munro and Amandeep Singh for comments on an earlier draft. I also acknowledge the scores of lawyers in BC who volunteer their time and expertise to represent defendants in homeless encampment litigation. Without their contributions, these defendants would be unrepresented, important evidence would not be presented to the court and important legal issues would remain unexplored. These lawyers do a great service not just for their clients but for society and the justice system, but this paper is dedicated to the people they represent: the residents of homeless encampments.

alone. They should instead reassert the extraordinary character of interlocutory injunctions and repudiate the tendency to treat them as the norm in homeless encampment cases. In short, *VFPA v Brett* highlighted the urgency of raising the bar for such injunctions to a height that can do justice to the fundamental rights and interests at stake in homeless encampment cases.

## Keywords

Homelessness; encampments; injunctions; British Columbia

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## 1. Introduction

In June, 2020, in the early stages of the COVID-19 pandemic, Chief Justice Christopher Hinkson of the British Columbia Supreme Court granted an interlocutory injunction to clear a homeless encampment from an unused, unfenced parking lot owned by the federal government in downtown Vancouver.<sup>2</sup> Although *Vancouver Fraser Port Authority v Brett* (*VFPA v Brett*) was just one in a long line of traumatic encounters between people experiencing homelessness and the Canadian justice system, it represented a new low in the courts' response to the intersecting crises of housing, homelessness, poverty, toxic drugs, mental health, racism and colonialism. It dropped to the ground the already inappropriately low bar for granting interlocutory injunctions to evict homeless encampments from publicly owned land, setting a precedent that should not be followed.

The encampment began on May 8, 2020, just as an operation to clear an older, much larger encampment in Vancouver's Oppenheimer Park in the name of the COVID-19 public health emergency was coming to a close. The new encampment was established on an empty parking lot beside CRAB Park, a small waterfront park serving Vancouver's Downtown East Side (DTES). The Port Authority did not take a wait-and-see approach to the encampment. It did not try to connect the campers with outreach or support services. It made no effort to work with the campers, emergency services, government officials or community agencies to manage health and safety at the encampment. Instead it rushed to court as if it were an irate private landowner and the campers were pesky trespassers to be evicted without delay.

The court obliged. Chief Justice Hinkson did not require the Port Authority to satisfy the usual three-pronged test for an interlocutory injunction laid down in *RJR-MacDonald v Canada (Attorney General)*<sup>3</sup>—namely, there is a serious question to be tried, the applicant will suffer irreparable harm without the injunction, and the balance of convenience favours the applicant. Instead, he held that, as a landowner whose title was not in issue, it was entitled to an injunction simply by showing a *prima facie* case of trespass; and as a public authority responsible for enforcing legislation, it was entitled to an injunction simply by showing a breach of the legislation—both without any inquiry into irreparable harm or balance of convenience.

There were at least four problems with the decision's treatment of the test for an interlocutory injunction. First, in allowing the trespass and statutory injunction tests to displace the three-pronged *RJR-MacDonald* test, it went against the weight of BC authority, which insists—rightly, I argue—that the full *RJR-MacDonald* test applies whenever defendants' *Charter* rights are at issue, which is almost always the case in homeless encampment litigation. Trespass or statutory breach are not irrelevant, but they are not trump cards. They are taken into account alongside other considerations in determining how the *RJR-MacDonald* test applies in particular cases. Second, in adopting the “serious question to be tried” standard for the first prong of the *RJR-MacDonald* inquiry, the decision ignored the Supreme Court of Canada's clear direction that the standard for the first prong is a strong *prima facie* case when the injunction sought is mandatory or will effectively bring the lawsuit to an end, both of which were true in this case and are true in most

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<sup>2</sup> *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (*VFPA v Brett*).

<sup>3</sup> [1994] 1 SCR 311.

homeless encampment cases. Third, the decision ignored the principle that courts should not prejudge complex, contested constitutional and evidentiary issues at the interlocutory stage, on the basis of affidavit evidence alone. Finally, the decision failed to honour the principle that an interlocutory injunction is a drastic and extraordinary remedy.

The first of these problems, short-circuiting the *RJR-MacDonald* test, was anomalous in the British Columbia homeless encampment caselaw, but the others were unfortunately typical. The BC courts have uniformly failed to apply the strong *prima facie* case standard in applications for injunctions to evict homeless encampments from publicly owned land, have routinely prejudged contested factual and legal issues at the interlocutory stage on the basis of affidavits alone, and have made interlocutory evictions the norm rather than the exception in such cases. The low bar applicants faced in such cases was more or less removed in *VFPA v Brett*. The decision highlighted the urgency of raising the bar closer to a height at which it can do justice to the fundamental rights and interests at stake in homeless encampment cases.

This issue is important because interlocutory injunction applications dominate homeless encampment litigation in BC. Only a few cases have been decided finally on the merits, including *Victoria v Adams*<sup>4</sup> and *Abbotsford v Shantz*,<sup>5</sup> which held that bans on temporary overnight shelter in public places violated homeless individuals' right to life, liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*<sup>6</sup> and could not be justified under section 1.<sup>7</sup> Most homeless encampment cases are decided at the interlocutory stage, and almost all interlocutory applications are for injunctions to evict encampments. Only a few have been aimed at regulating encampments rather than removing them.<sup>8</sup> The stakes are high for defendants: they face eviction from their homes to streets or parks where they are displaced every morning or more often, and where they often face elevated risks of isolation, sickness, violence, harassment and death.

Hinkson CJSC's articulation and application of the test for interlocutory injunctions was not the only problem with *VFPA v Brett*. The decision also pre-emptively neutralized

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<sup>4</sup> *Victoria (City) v Adams*, 2008 BCSC 1363, varied 2009 BCCA 563 (*Adams*);

<sup>5</sup> *Abbotsford (City) v Shantz*, 2015 BCSC 1909 (*Shantz #3*).

<sup>6</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24) (*Charter*).

<sup>7</sup> The other reported final decisions on the merits were *Johnston v Victoria (City)*, 2010 BCSC 1707, aff'd 2011 BCCA 400 (appeal of summary conviction for violating parks bylaw by maintaining round-the-clock encampment in public park); *Saanich (District) v Brett*, 2018 BCSC 2068 ("*Saanich v Brett #2*") (unopposed application for final order granting permanent injunction against encampment in municipal park and provincial highway verge); *Prince George (City) v Stewart*, 2021 BCSC 2089 (petition by city for permanent statutory injunction against violation of municipal zoning and safe streets bylaws by erecting encampments in public park and city-owned vacant lot); and *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 (petition by homeless encampment residents for judicial review of Park Board orders closing public park to overnight camping and later to all public use; and counter-petition by Park Board for injunction clearing encampment). Injunctions were not at issue in two of these decisions and they are therefore excluded from the analysis I undertake in Part 3: *Adams*, *supra* note 4 and *Johnston*, *ibid*.

<sup>8</sup> *Maple Ridge (City) v Scott*, 2019 BCSC 157, *leave denied* (*sub nom. Maple Ridge (City) v Copperthwaite*) 2019 BCCA 99 (*Scott*) (application for interlocutory injunction to enforce compliance with fire safety orders, vacate encampment temporarily for cleanup, and verify identities and intentions of returning residents); *Victoria (City) v Smith*, 2020 BCSC 1173 (*Smith*) (application for interlocutory injunction to remove tents from environmentally and culturally sensitive areas of a city park, so as to confine encampment to other portions of the park).

the defendants' constitutional defences by applying an inappropriate "public arena" test to section 7 of the *Charter*; collapsed a nuanced public-private spectrum of publicly owned property into a formalistic dichotomy in which homeless defendants have constitutional rights only on public land that is open to the public as of right; was insensitive to the intersecting crises of homelessness, housing, mental health, toxic drugs, colonialism and COVID-19; and treated the evidence in a selective and lopsided way in favour of the applicant.

I cannot address all those issues here.<sup>9</sup> In this article I restrict myself to the narrow but consequential issue of identifying the proper test for granting an interlocutory injunction to remove or regulate a homeless encampment on publicly owned land. I use the term "interlocutory injunction" to encompass both interlocutory injunctions proper, which remain in effect until trial, and interim injunctions, which remain in effect for a shorter specified period, often measured in days or weeks.

In Part 2 I describe the *VFPA v Brett* case. I begin Part 3 by presenting a comprehensive survey of reported homeless encampment injunction decisions in BC between 2000 and 2021 (Part 3.A). The rest of Part 3 is devoted to demonstrating that applicants for interlocutory injunctions against homeless encampments must satisfy all three prongs of the *RJR-MacDonald* test (Part 3.B), that in fact courts must go farther and apply a "strong *prima facie* case" standard to the first prong in such cases (Part 3.C), and that they must stop deciding complex, contested constitutional and evidential issues at the interlocutory stage, on the basis of affidavit evidence alone (Part 3.D). I conclude by arguing that courts must reassert the drastic and extraordinary character of interlocutory injunctions and repudiate the judicial tendency, demonstrated clearly by the case law to date, of treating the grant of interlocutory injunctions as the norm in homeless encampment litigation.

## 2. *VFPA v Brett*

The encampment in *VFPA v Brett* was established on an asphalt parking lot and grassy area bordering CRAB Park, in an industrial part of Vancouver's waterfront (Figure 1). Totalling around 0.9 hectares,<sup>10</sup> the encampment site was part of a larger parcel of land owned in fee simple by "The Crown in the Right of Canada c/o Vancouver Port Authority."<sup>11</sup> The Port Authority, a federal government agency created by letters patent issued under the *Canada Marine Act*,<sup>12</sup> managed the land as an agent of the federal Crown. The encampment site was

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<sup>9</sup> I address these other problems elsewhere. See Stepan Wood, "When Should Publicly Owned Land Be Considered Private in Homeless Encampment Cases? A Critique of Recent Developments in BC," *Journal of Law & Social Policy*, forthcoming; Stepan Wood, "A Tale of Two (Tent) Cities—And One Judge: How (Not) to Weigh Evidence in Homeless Encampment Injunction Cases," Paper presented at the 8th Annual International and Comparative Urban Law Conference, University of British Columbia (15 July 2022), copy on file with author.

<sup>10</sup> The parking lot was a rough parallelogram around 130 m long and 50 m wide, with an area of around 6,300 m<sup>2</sup>. The grassy area was a triangle of around 2500 m<sup>2</sup>, for a total of around 8,800 m<sup>2</sup> or 0.9 ha. Dimensions estimated by the author using the "measure distance" tool in Google Maps.

<sup>11</sup> *VFPA v Brett*, *supra* note 2 at para 4.

<sup>12</sup> SC 1998, c 10 (*CMA*).

unfenced. The only structure on it was a kiosk used by dispatchers during the cruise season. Most of the site was taken up by a paved parking lot. Beside the parking lot was a triangular grassy area. The parking lot was used as a staging area for cruise ship buses, limousines and supplies during the cruise season and was licensed to a private company for occasional special event parking in the off season. At the time the encampment was established, however, it was not in use at all and there was no definite prospect of its being used any time soon, due to the indefinite suspension of the cruise season and large public events during the COVID-19 pandemic. Moreover, there was uncontradicted evidence of long-term public access to the site and no evidence of any efforts by the Port Authority to restrict public entry aside from an ineffectual chain across the street frontage and some No Unauthorized Parking signs.



**Figure 1.** Satellite image showing the area at issue in *VFPA v Brett*. The VFPA parcel is outlined in blue, the encampment site (labelled “Occupied Area”) in red. CRAB Park is visible to the east, CPR rail yard and Gastown to the south, SeaBus terminal (shaped like a capital “E”) to the west. A cruise ship is visible in the upper left corner. The Centerm container terminal is just out of frame to the right. Source: *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (Notice of Application, Schedule A).

CRAB Park, the green space-deficient DTES’s only waterfront park, bordered the encampment site to the east. With the exception of this park, the entire surrounding area was industrial. Immediately to the south, the Canadian Pacific Railway (CPR)—ten tracks wide at the point where it passed the parking lot—cut the entire waterfront off from the



residential and commercial areas of the DTES and Gastown.<sup>13</sup> The closest residential buildings were almost 100 metres from the edge of the site, past the securely fenced rail yard. The closest railway crossing was more than 300 metres away. Immediately to the west was a large, empty gravel-surfaced lot. Just beyond it, one hundred metres from the parking lot, was a heliport. Beyond that were a SeaBus passenger ferry terminal and Vancouver's cruise ship docks. The Centerm container terminal loomed over the whole area, 200 metres to the northeast.

In short, the site was empty, unenclosed, undeveloped except for asphalt paving and a dispatcher's shack, and isolated from the nearby community. Not only that, it was lightly used at the best of times, and the COVID-19 pandemic had rendered it more or less useless to the Port Authority.

On May 15, 2020, the Port Authority commenced a civil action and applied for an interlocutory injunction against one of the encampment's informal leaders, housing activist Chrissy Brett, along with unnamed defendants. The lawsuit demanded damages along with a permanent injunction to remove the encampment and restrain the defendants from entering or occupying the site, on the basis of common law trespass and violation of federal port regulations.<sup>14</sup> The Port Authority served the defendants with notice of the action and interlocutory application on May 20.<sup>15</sup> After some extensions, the parties ultimately filed more than 900 pages of documents and 82 minutes of video evidence.<sup>16</sup>

The Port Authority's application requested an interlocutory injunction requiring the occupants to vacate and cease occupying the site, remove all tents, shelters, personal belongings and waste, and not to re-enter the site except with permission from the Port Authority. It would also authorize the Port Authority to dispose of anything left behind and authorize the police to enforce the order.<sup>17</sup>

Chief Justice Hinkson heard the application on June 4 and 9, 2020 and gave judgment on June 10. He granted the injunction as requested except for shortening its duration to 15 days and omitting the police enforcement clause.<sup>18</sup> He held that the Port Authority was entitled to an injunction under either or both of two exceptions to *RJR-MacDonald*: one for trespass, the other for statutory injunctions.

The trespass exception holds that "*prima facie* a landowner, whose title is not in issue, is entitled to an injunction to restrain trespass on his land whether or not the trespass harms him," although "the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass."<sup>19</sup> In BC, it is often cited to one of

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<sup>13</sup> The Gastown neighbourhood is a small sliver of Vancouver lying between the DTES to the east, Hastings Street to the south, the rail yard to the north and the Waterfront public transit station to the west. The parking lot lies directly north of Gastown, across the rail yard. Neighbourhood boundaries are informal, and the location of the boundary between Gastown and the DTES is a matter of opinion.

<sup>14</sup> *VFPA v Brett*, *supra* note 2 (Notice of Civil Claim (15 May 2020), citing *Port Authorities Operations Regulations*, SOR/2000-55).

<sup>15</sup> *Ibid* (Notice of Application (20 May 2020)).

<sup>16</sup> *Ibid* (Application Record (updated 4 June 2020) (824 pages), Written Argument of the Applicant (45 pages), Written Argument of the Respondents (32 pages), plus several affidavits filed at the last minute).

<sup>17</sup> *Ibid* at para 116.

<sup>18</sup> *Ibid* at paras 117-18, 131. The issue of police enforcement clauses is beyond the scope of this article. See, eg, Kate Mitchell, "Challenging the Use of Police Enforcement Clauses in Ontario" (2018) 38 CFLQ 85.

<sup>19</sup> *VFPA v Brett*, *ibid* at paras 38-39, quoting *Patel v WH Smith (Eziot) Ltd*, [1987] 1 WLR 853 (CA) at 858-59 (*per* Balcombe LJ) (*Patel*).

the leading BC cases, *Van Osch*.<sup>20</sup> Hinkson CJSC noted that the land was owned by the federal crown and occupied and managed by the Port Authority on behalf of the federal government. Although it was “an unfenced paved area adjacent to a small undeveloped green space,”<sup>21</sup> he found that the land was not available for general public use but was licensed for use by a company that offered public parking between mid-October and mid-April and for use by the cruise ship industry between mid-April and mid-October, and that the defendants’ use of the land was contrary to the *Regulations* and the Port Authority’s letters patent. He found, further, that Port Authority personnel had informed the occupants that they were on private property and asked them to leave and had posted notices to vacate and signs prohibiting unauthorized use of the area, but that the occupants had refused to leave and had obstructed the Port Authority’s efforts to post signs and concrete barriers to restrict entry. He found that some residents of the encampment had responded to requests to vacate “with verbal aggression, physical obstruction, and an assertion that the plaintiff has no authority over the area.”<sup>22</sup> He concluded that the encampment occupants were trespassers on the Port Authority’s land and that the Port Authority was entitled to an injunction on this basis.<sup>23</sup>

The statutory injunction test, known in BC as the *Maple Ridge v Thornhill Aggregates* rule after the leading case,<sup>24</sup> holds that “where a public authority ... turns to the courts to enforce an enactment, it seeks a statutory rather than an equitable remedy, and once a clear breach of an enactment is shown, the courts will refuse an injunction to restrain the continued breach only in exceptional circumstances.”<sup>25</sup> Chief Justice Hinkson found that in addition to refusing to comply with instructions to vacate and obstructing the Port Authority’s efforts to restrict entry, the defendants had erected tents and other structures, installed two fire pits one of which was lit, and deposited piles of scraps and garbage on the site. He found that a person claiming to represent the occupants had told the Port Authority’s head of security that she intended to expand the camp, would not allow anyone to control access to the site, would not take direction from Port Authority security guards, and did not accept that the Port Authority had any right to control the site. He noted that the Port Authority had received complaints about fire, smoke, garbage, needles, loud music and noise, vehicles coming and going at all hours, urination and defecation in the bushes and ocean, a lack of social distancing in the camp, and feelings of impaired safety on the part of users of the adjacent CRAB Park.

Chief Justice Hinkson concluded that the defendants had caused a fire, placed structures and released waste on Port Authority land without authorization, all of which were prohibited by the *Regulations*.<sup>26</sup> He also noted that the *Regulations* prohibit any person from engaging in any unauthorized activity that jeopardizes human safety or health, obstructs or threatens any part of the port, causes a nuisance, damages property, or

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<sup>20</sup> *Board of School Trustees of School District No. 27 (Cariboo-Chilcotin) v Van Osch*, 2004 BCSC 1827 (*Van Osch*).

<sup>21</sup> *VFP v Brett*, *supra* note 2 at para 76.

<sup>22</sup> *Ibid* at para 35.

<sup>23</sup> *Ibid* at para 50, 57.

<sup>24</sup> *Maple Ridge (District) v Thornhill Aggregates Ltd* (1998), 47 MPLR (2d) 249 (BCCA) (*Thornhill*).

<sup>25</sup> *VFP v Brett*, *supra* note 2 at para 47, quoting *Vancouver (City) v Maurice*, 2005 BCCA 37 at para 34, *aff’d* 2002 BCSC 1421 (*Maurice*).

<sup>26</sup> *VFP v Brett*, *ibid* at para 56.

adversely affects soil, air or water quality. The *Regulations* also prohibit anyone from accessing any port area unless they are there to conduct legitimate port business, they are authorized to be there, or there are no signs, devices or fences restricting access. Finally, they require everyone to obey any signs posted in the port by the port authority. He concluded that the defendants' breach of the *Regulations* entitled the Port Authority to an injunction, without any discussion of whether there were exceptional circumstances that might justify refusing it.<sup>27</sup>

Chief Justice Hinkson also held that, in any event, the Port Authority had satisfied the *RJR-MacDonald* test. While acknowledging that the site adjoined a public park, was unfenced and presently unused, he held that it had the same legal status as public land that is leased to a third party for private purposes. He rejected the argument that the site was quasi-public, holding that "The VFPA lands are private property and not intended for public use, other than by licence, and the use being made of them by the residents is not permitted under the *Regulations*."<sup>28</sup> Since the site was private property, the first prong of the *RJR-MacDonald* test was satisfied easily. The serious question to be tried was simply whether the defendants were trespassing, not—as the defendants asserted—how to reconcile the tension between the Port Authority's property rights and the defendants' right to engage in essential life-sustaining activities.<sup>29</sup>

The other two prongs received more attention but did not detain the court for long. Although Chief Justice Hinkson noted the defendants' argument that the potential benefits of the encampment were "especially critical in light of the current public health crisis" and that an injunction "would mean the displacement of the residents who would then fan out throughout the community as there are no alternative housing places for them at this time,"<sup>30</sup> he immediately concluded that the Port Authority would be irreparably harmed if the injunction were not issued because it was entitled to the use of its land and the defendants were evidently unable to indemnify it for restoration, maintenance or supervisory costs associated with the encampment.<sup>31</sup> He also found that the health and safety concerns that prompted the clearance of Oppenheimer Park had "simply been transplanted ... to the VFPA lands by the migration of individuals from the Park to the VFPA lands" and that the encampment would "result in inconvenience to others lawfully resident in the neighbourhood and in cleanup expenses to the plaintiff."<sup>32</sup> In a minor concession to the defendants, he found that the indefinite suspension of the cruise season and the speculative character of the Port Authority's alternative uses for the land—namely for shipping container storage during the expansion of the adjacent Centerm container terminal—did not support a finding of irreparable harm.<sup>33</sup>

Moving to the third prong, the court concluded that the balance of convenience favoured the Port Authority because the site was not and had not been available for unlicensed public use, and the case law did not give the homeless "a licence to choose

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<sup>27</sup> *Ibid* at para 57.

<sup>28</sup> *Ibid* at para 98.

<sup>29</sup> *Ibid* at para 101.

<sup>30</sup> *Ibid* at para 102.

<sup>31</sup> *Ibid* at para 107.

<sup>32</sup> *Ibid* at para 105.

<sup>33</sup> *Ibid* at para 103.

wherever they wish to set up an encampment” or permit unsafe encampments.<sup>34</sup> Hinkson CJSC repeated his assertion that the movement of some individuals from Oppenheimer Park to this encampment defeated the intention of the Ministerial Order clearing the Park and raised the same public health and safety concerns that motivated the Order. He accepted the Port Authority’s claim that the Province had taken steps to ensure that accommodation and support were made available to everyone evicted from the Park, concluding that “alternate housing can and is being made available to those at the VFPA lands who have migrated there from the Park” and that “the need for them to be at the VFPA lands has not been established.”<sup>35</sup> He rejected the defendants’ evidence of the benefits of encampments in general and of this one in particular. He also dismissed their evidence of the harms of continual displacement of unsheltered residents, including in the context of the COVID-19 pandemic. By contrast, he accepted the Port Authority’s claims about the risks and harms of the encampment. He found that intravenous drug use was widespread at the encampment and that “the residents of the encampment have littered the encampment area with garbage and hypodermic needles, urinated and defecated in the bushes on and near the VFPA lands, and into the ocean near the encampment.”<sup>36</sup> He found that the fire at the camp had caused smoke to enter adjacent residences, but he did not mention the defendants’ evidence that it was a sacred fire that fulfilled ceremonial, cultural and healing purposes that were central to the residents’ well-being. Finally, on the subject of COVID-19, Chief Justice Hinkson found—explicitly rejecting the contrary evidence of camp residents and visitors—that the defendants were not adhering to social distancing prescribed by the Provincial Health Officer.

The injunction gave the defendants three days to vacate the site and remove everything they had placed there. When they did not comply, the police moved in on June 16, 2020, arresting 46 people.<sup>37</sup> Soon afterward, the Port Authority enclosed the entire site with a chain link fence topped with barbed wire and secured with padlocked gates.<sup>38</sup> Many of the people displaced from the site relocated to Strathcona Park, a highly developed and heavily used public park located in a densely populated neighbourhood 2 kilometres away on the other side of the DTES.<sup>39</sup> The new encampment immediately whipped up a storm of controversy far surpassing that surrounding the Portlands encampment. Yet unlike the Port Authority, the Vancouver Park Board did not move immediately to evict the campers, nor even to enforce its policy of overnight-only camping. It took a wait-and-see approach while working with government authorities, community agencies and emergency services to manage health and safety, connect camp residents with supports and housing options, and provide facilities such as hygiene stations and a warming tent. After several months

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<sup>34</sup> *Ibid* at paras 108-09.

<sup>35</sup> *Ibid* at para 114.

<sup>36</sup> *Ibid* at para 80. The only evidence for some of these findings of fact was inadmissible hearsay, an issue I address elsewhere. Stepan Wood, “A Tale of Two (Tent) Cities,” *supra* note 9.

<sup>37</sup> “Dozens of arrests made as Vancouver police enforce injunction against homeless camp,” *The Globe and Mail* (17 June 2020), online: <https://www.theglobeandmail.com/canada/british-columbia/article-dozens-of-arrests-made-as-vancouver-police-enforce-injunction-against/>.

<sup>38</sup> Personal observation, confirmed by post-eviction Google Street View imagery.

<sup>39</sup> Jon Woodward, “Plan to disperse homeless camp backfires as campers move to park,” *CTV News* (16 June 2020), online: <https://bc.ctvnews.ca/plan-to-disperse-homeless-camp-backfires-as-campers-move-to-park-1.4986305>.

and amidst growing concerns about fire safety, crime and toxic drug overdose,<sup>40</sup> the Park Board, city and province reached an agreement on March 31, 2021 to work together to end the encampment by April 30 and prevent future encampments in the city.<sup>41</sup> Pursuant to this agreement, the Park Board ordered all tents and unauthorized structures to be removed from the park by April 30, 2021.<sup>42</sup> When that deadline arrived, the city and province had moved 184 campers into indoor accommodation. The Park Board did not obtain an injunction. Instead it erected fences around the encampment to control entry and asked the remaining campers to leave on their own.<sup>43</sup> Housing rights advocates complained that the deadline was arbitrary, the housing options inadequate and the decampment process traumatic.<sup>44</sup> One of the campers who accepted housing predicted: “This won’t end. It’ll move from this spot, to the next spot, to the next spot.”<sup>45</sup>

He was right. A new encampment soon popped up in CRAB Park itself, right next to the now securely fenced Port Authority parking lot that had been cleared almost a year earlier. Twenty-five to thirty of this new camp’s residents had been living in Strathcona Park until it was cleared. The Park rangers visited the new camp daily to remind campers that only temporary overnight camping was allowed and all tents had to be removed by 8 am.<sup>46</sup> After several weeks, in July 2021, the Park Board issued an order banning all temporary overnight shelters and structures in CRAB Park.<sup>47</sup> In September, 2021 it issued a further order closing the portion of the park that contained the new encampment to all public use, to permit remediation,<sup>48</sup> “leaving many tent city residents once again with nowhere to go.”<sup>49</sup> Some residents stayed in defiance of the orders, while others moved out. And so the cycle of displacement continued.

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<sup>40</sup> Sheila Scott, “Province, city, park board announce roles in moving residents from Strathcona tent encampment,” *CTV News* (7 April 2021), online: <https://bc.ctvnews.ca/province-city-park-board-announce-roles-in-moving-residents-from-strathcona-tent-encampment-1.5377760>.

<sup>41</sup> Province of British Columbia, City of Vancouver and Vancouver Board of Parks and Recreation, Memorandum of Understanding on Support for Unsheltered Vancouver Residents (31 March 2021), online: <https://parkboardmeetings.vancouver.ca/files/MOU-SupportingUnshelteredVancouverResidents-BC-COV-PB-20210331.pdf>.

<sup>42</sup> Travis Prasad, “Some campers remain in Vancouver’s Strathcona Park after moving deadline,” *CTV News* (30 April 2021), online: <https://bc.ctvnews.ca/some-campers-remain-in-vancouver-s-strathcona-park-after-moving-deadline-1.5408923>.

<sup>43</sup> *Ibid.*

<sup>44</sup> Bethlehem Mariam and Lisa Steacy, “Strathcona Park decampment ‘stressful, tense’ for residents,” *News 1130* (1 May 2021), online: <https://www.citynews1130.com/2021/05/01/strathcona-park-decampment/>.

<sup>45</sup> Brent Corkum, quoted in Prasad, *supra* note 42.

<sup>46</sup> Cheryl Chan, “Homeless campers at Vancouver’s CRAB Park being evicted,” *Vancouver Sun* (9 July 2021), online: <https://vancouversun.com/news/homeless-campers-at-vancouvers-crab-park-face-eviction>.

<sup>47</sup> *Bamberger*, *supra* note 7 at para 3. In *Bamberger*, the court set aside the Park Board’s orders, granting a petition by encampment residents for judicial review on the grounds that the Park Board’s decisions lacked procedural fairness and could not be reasonably justified in light of the available evidence. The court also adjourned the Park Board’s petition for an injunction evicting the encampment pending the Park Board’s reconsideration of its orders.

<sup>48</sup> *Ibid.*

<sup>49</sup> Renee Bernard, “CRAB Park tent city cleared again,” *News 1130* (10 September 2021), online: <https://www.citynews1130.com/2021/09/10/crab-park-homeless-cleared-again/>.

### 3. Clarifying the Test for Interlocutory Injunctions in Homeless Encampment Cases

*VFPA v Brett* was not unique in relaxing the *RJR-MacDonald* test for interlocutory injunctions in homeless encampment cases, but it highlighted the pressing need to clarify the test in a manner that does justice to the rights and interests at stake. I begin that task by presenting a comprehensive survey of all reported BC homeless encampment injunction decisions between 2000 and 2021 (Part 3.A). The survey shows that the weight of BC authority favours the full *RJR-MacDonald* inquiry in such cases. In Part 3.B I delve into the case law in more detail, arguing that the majority position is correct and that *VFPA v Brett* was wrong to short-circuit the *RJR-MacDonald* test. I then go farther, arguing that the courts should actually apply a more demanding “strong *prima facie* case” standard to the first prong of the inquiry (Part 3.C) and should not prejudge complex, contested constitutional and evidentiary issues at an interlocutory stage (Part 3.D).

#### A. A survey of BC homeless encampment injunction decisions, 2000-2021

In 2011, Madam Justice Mackenzie ACJSC noted that “[t]here is an issue about which test applies” on an application for an interlocutory injunction evicting a homeless encampment from publicly-owned land.<sup>50</sup> Eleven years later, BC courts are still making inconsistent pronouncements on this point. To get a clear picture of the jurisprudence, I surveyed 21<sup>st</sup> century BC homeless encampment injunction decisions, which to my knowledge has not been done before in the legal literature. The main goal of this survey is to determine what test(s) the courts have applied on applications for interlocutory injunctions affecting homeless encampments. Secondary goals of the survey are to determine the total number of homeless encampment injunction decisions in this period including both interlocutory and final decisions, and how these decisions break down in terms of result (injunctions granted or denied) and type of proceeding (interlocutory, final in chambers or final after trial).

I searched CanLII and Westlaw case law databases for every reported BC decision, interlocutory or final, granting or denying an injunction affecting a homeless encampment between the years 2000 and 2021. I included cases involving encampments established primarily as a protest, such as those associated with the Occupy movement, so long as there was evidence that some unhoused individuals were resident in the encampment. It is difficult to disentangle encampments established for shelter from those established for expression because homeless encampments typically combine both. As Mark Zion observes, “tent cities ... have always contained a political critique of the broader inequalitarian order.”<sup>51</sup> I included both interlocutory and final decisions when determining decision type and outcome, but for obvious reasons I excluded final decisions when determining the test applied for interlocutory injunctions. I excluded unreported decisions because it was impossible to verify the test applied or other aspects of the court’s

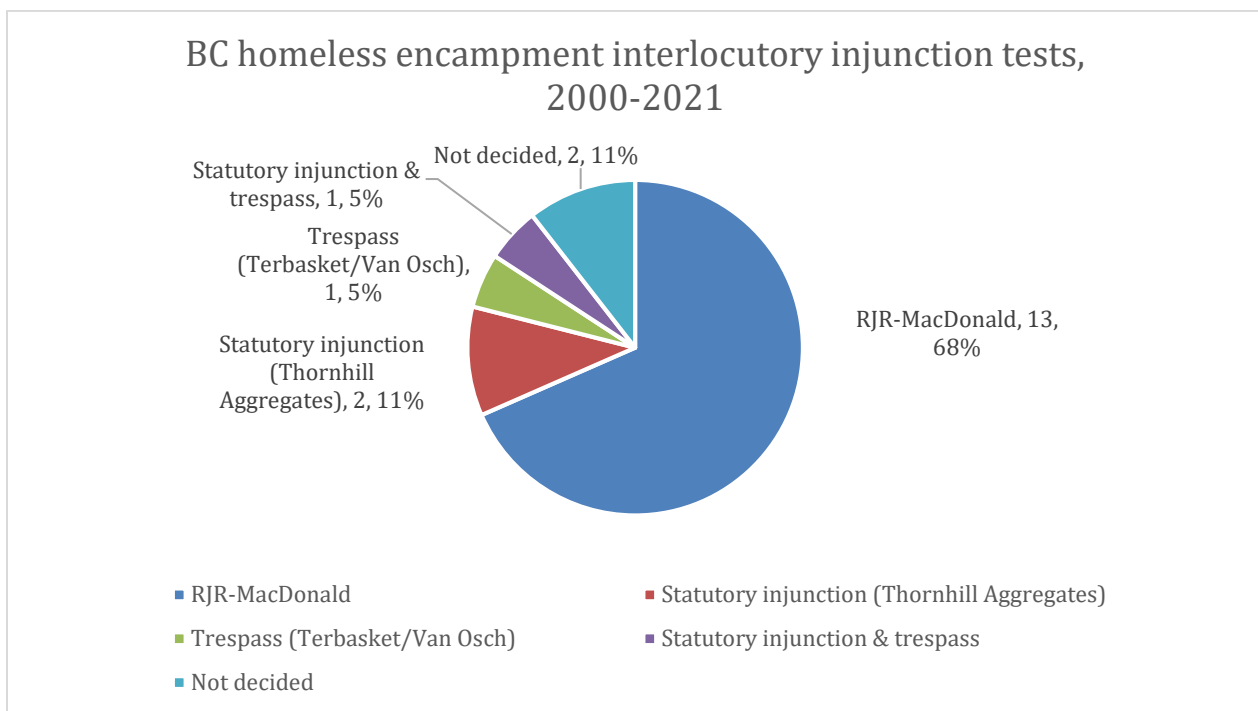
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<sup>50</sup> *Vancouver (City) v O’Flynn-Magee*, 2011 BCSC 1647 at para 21 (*O’Flynn-Magee*).

<sup>51</sup> Mark Zion, “Making Time for Critique: Canadian ‘Right to Shelter’ Debates in a Chrono-Political Frame” (2020) 37 Windsor YB Access to Justice 88 at 114.

reasoning in those cases.<sup>52</sup> For decisions that were appealed, I counted the decisions at first instance and on appeal as a single decision and classified the test applied and the result based on the appeal decision.

My research identified a total of 22 homeless encampment injunction decisions in BC dating from 2002 to 2021 (see the Appendix). Of these, 19 (86%) were interlocutory and three were final. Two (both of them interlocutory) were appealed, one (*PRHC v Doe*) being reversed, the other (*Maurice*) affirmed.<sup>53</sup> Of the 19 interlocutory decisions, 13 (68%) applied the *RJR-MacDonald* test,<sup>54</sup> two (11%) did not decide which test applied,<sup>55</sup> two (11%) applied the *Thornhill* statutory injunction test,<sup>56</sup> one (6%) applied the *Van Osch* trespass exception<sup>57</sup> and one (6%) applied both the *Thornhill* test and trespass exception independently.<sup>58</sup> Figure 2 summarizes these results.



**Figure 2.** BC homeless encampment interlocutory injunction tests, 2000-2021. Values correspond to the number of decisions applying a given test as the controlling test. Total number of decisions = 19.

<sup>52</sup> For example, in *Adams*, *supra* note 4 at paras 11 and 17 (BCSC), Madam Justice Ross noted that Stewart J had earlier granted an interim injunction evicting the homeless encampment in that case, while Johnston J had later denied a permanent injunction in the same case; and in *Saanich (District) v Brett*, 2018 BCSC 1648 at para 79 (*Saanich v Brett #1*), Branch J referred to a decision in which MacKenzie J had granted the city of Duncan, BC an injunction prohibiting an encampment there; but both of the referenced decisions are unreported.

<sup>53</sup> *Provincial Rental Housing Corp v Doe*, 2002 CarswellBC 3738 (SC), *rev'd sub nom Provincial Rental Housing Corp v Hall*, 2005 BCCA 36 (“*PRHC*”); *Maurice*, *supra* note 25.

<sup>54</sup> See the Appendix for the list of decisions.

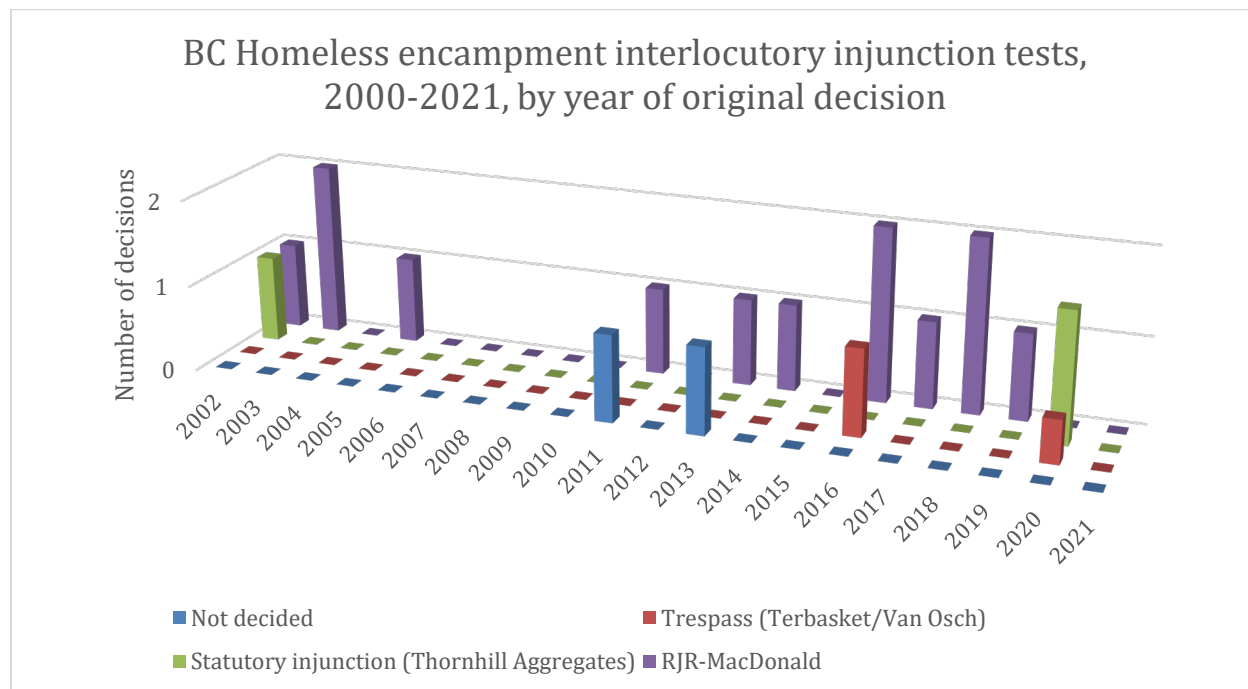
<sup>55</sup> *O'Flynn-Magee*, *supra* note 50; *Abbotsford (City) v Shantz*, 2013 BCSC 2426 (“*Shantz #1*”).

<sup>56</sup> *Maurice*, *supra* note 25; *Smith*, *supra* note 8.

<sup>57</sup> *Fraser Health Authority v Evans*, 2016 BCSC 1708 (“*Evans*”).

<sup>58</sup> *VFP v Brett*, *supra* note 2.

The earliest interlocutory decisions date from 2002, the latest 2020 (Figure 3). Decisions employing the *RJR-MacDonald* test appear steadily throughout the study period. Those applying the *Thornhill* statutory injunction test bookend the period, with one in 2002 (*Maurice*) and two in 2020 (*VFPA v Brett and Smith*), but none in between.<sup>59</sup> The *Van Osch* trespass exception is a latecomer, being applied once in 2016 (*Evans*)<sup>60</sup> and again in 2020 (*VFPA v Brett*),<sup>61</sup> both times by Hinkson CJSC. Finally, two decisions in the middle of the study period either declined to decide the test (*O'Flynn-Magee*)<sup>62</sup> or did not articulate it (*Shantz #1*).<sup>63</sup>



**Figure 3.** BC homeless encampment interlocutory injunction tests, 2000-2021, ordered chronologically by year of original decision. Values correspond to the number of decisions applying a given test as the controlling test. Total number of decisions = 19. One decision, *VFPA v Brett* (2020), applied trespass and statutory injunction tests independently and is counted as 0.5 decisions for each test, to avoid double counting.

In terms of outcomes, 16 of the 19 applications for interlocutory injunctions (84%) were granted while only three (16%) were denied (Figure 4a). If anything, these figures overstate the effective denial rate, insofar as one of the injunctions that was denied was granted upon reapplication a few months later (*Adamson #1 and #2*),<sup>64</sup> and another was denied only on appeal, three years after the initial injunction had been granted and the

<sup>59</sup> *Maurice*, *supra* note 25; *VFPA v Brett*, *ibid*; *Smith*, *supra* note 8. The latter two are counted as 1.5 decisions in Figure 3 to avoid double counting *VFPA v Brett*, which applied two tests independently.

<sup>60</sup> *Supra* note 57.

<sup>61</sup> *Supra* note 2, counted as 0.5 decision in Figure 3 to avoid double counting since it applied two tests independently.

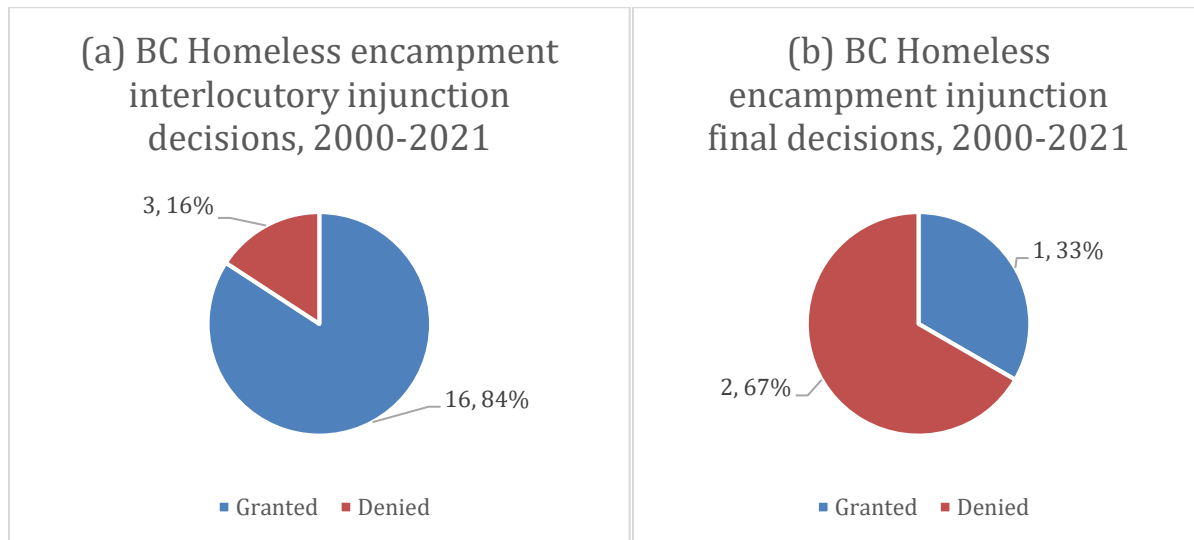
<sup>62</sup> *Supra* note 50.

<sup>63</sup> *Supra* note 55

<sup>64</sup> *British Columbia v Adamson*, 2016 BCSC 584 (“*Adamson #1*”); *British Columbia v Adamson*, 2016 BCSC 1245 (“*Adamson #2*”).



encampment cleared—cold comfort indeed for the defendants (*PRHC*).<sup>65</sup> Only one interlocutory injunction was denied outright (*Wallstam*).<sup>66</sup>



**Figure 4.** BC homeless encampment injunction decisions, (a) interlocutory and (b) final, 2000-2021.

The outcomes were almost the reverse for final decisions (Figure 4b). Injunctions were denied in two of the three final decisions (*Shantz #3* and *Stewart*), both decided by Hinkson CJSC.<sup>67</sup> The sole final decision to grant an injunction against a homeless encampment, *Saanich v Brett #2*, was unopposed and the legal basis for the injunction therefore untested.<sup>68</sup> In terms of type of proceeding, only one of the final decisions, *Shantz #3*,<sup>69</sup> was made after a trial. The other two (*Saanich v Brett #2* and *Stewart*)<sup>70</sup> were heard in chambers, without oral testimony or cross-examination, as were all the interlocutory injunction proceedings as far as I could tell (Figure 5). This is no surprise: summary proceedings in chambers, with affidavit evidence only and no cross-examination, are the

<sup>65</sup> *Supra* note 53.

<sup>66</sup> *Vancouver (City) v Wallstam*, 2017 BCSC 937 (“*Wallstam*”).

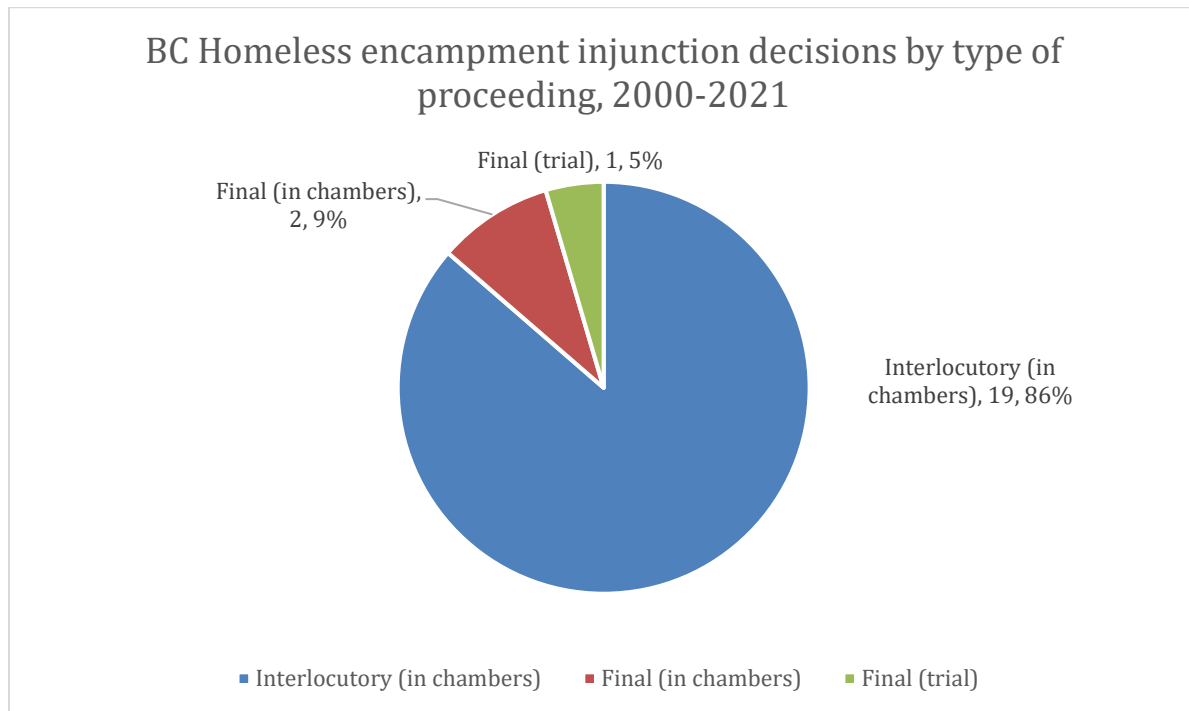
<sup>67</sup> *Shantz #3*, *supra* note 5; *Stewart*, *supra* note 7. I classified the result in *Stewart* as “injunction denied” even though Hinkson CJSC granted an injunction in part. He granted an injunction only in respect of one of the two encampment sites at issue in the case, on the basis that most of its occupants had already moved to the other encampment and the remaining occupants could also do so, consolidating the encampment in one place. Since he denied the injunction to clear the other encampment, and that other encampment was the main or only active encampment at the time of the hearing, the substantial effect of the decision was to deny the injunction sought by the petitioner.

<sup>68</sup> *Supra* note 7. In this case Mr. Justice Branch, who had earlier granted an interim injunction against a homeless encampment (*Saanich v Brett #1*, *supra* note 52), granted a permanent injunction against the same encampment, but the defendants—having long since been evicted—did not oppose the later order.

<sup>69</sup> *Supra* note 5.

<sup>70</sup> *Supra* note 7.

norm for interlocutory applications and for final hearings for statutorily authorized injunctions in BC.<sup>71</sup>



**Figure 5.** BC homeless encampment injunction decisions by type of proceeding, 2000-2021.

Four notable decisions are not included in the survey. *Victoria (City) v Adams*<sup>72</sup> and *Johnston v Victoria (City)*<sup>73</sup> were excluded because injunctions were not at issue in those decisions. There may be some confusion on this point in the case of *Adams*, as at least one BC judge has said that the trial judge in that case “declined to grant a permanent injunction.”<sup>74</sup> But the trial and appeal decisions in *Adams* were concerned only with the defendants’ counterclaim that the city’s parks bylaw was unconstitutional.<sup>75</sup> The city’s request for an injunction was not at issue.

Two decisions rendered in 2022 were excluded because they fell outside my study period. *Bamberger v Vancouver Board of Parks and Recreation (2022)*<sup>76</sup> set aside Park Board orders banning an encampment in CRAB park and also addressed the Park Board’s petition for a statutory injunction, but I did not include it because I did not wish to include a partial calendar year in my study period. In any event *Bamberger* did not decide the injunction application but adjourned it pending reconsideration of the Park Board’s orders

<sup>71</sup> See BC Supreme Court Civil Rules, B.C. Reg. 168/2009, Rules 1-2(4) (petitions and applications), 8-1 (applications), 10-4 (pretrial injunctions), 22-1 (chambers proceedings). The previous Rules, in effect before 2010, had broadly similar effect.

<sup>72</sup> *Supra* note 4.

<sup>73</sup> *Supra* note 7.

<sup>74</sup> *Saanich v Brett #1*, *supra* note 52 at para 52.

<sup>75</sup> See *Adams*, *supra* note 4 at paras 28 (BCSC) and 19 (BCCA).

<sup>76</sup> *Supra* note 7.

banning camping in CRAB Park. My decision to cut off the study period at the end of 2021 also required the exclusion of *Prince George (City) v Johnny*,<sup>77</sup> one of the rare cases in which a court denied an interlocutory injunction to clear a homeless encampment from publicly-owned land. This is a constantly evolving area of law, and no survey of it can be final.

Although *Bamberger* and *Johnny* are thus excluded from my quantitative survey of BC homeless encampment injunction decisions, they are nevertheless highly germane to my qualitative evaluation of the injunction case law and I include them in that analysis where relevant.

## B. *RJR-MacDonald* is the test

As my survey shows, a substantial majority of BC decisions have insisted on applying the *RJR-MacDonald* test to applications for interlocutory injunctions against homeless encampments. Application of the *Thornhill Aggregates* statutory injunction test or the *Van Osch* trespass test as independent bases for granting injunctions in such cases is an anomaly. It is important to understand the reasoning that informs the case law. To that end I focus first on trial-level decisions (Part 3.B(i)), before considering what the BC Court of Appeal has said on the subject (Part 3.B(ii)). I argue that *RJR-MacDonald* is, indeed, the proper test to be applied in such cases and proceed in Part 3.B(iii) to discuss how claims of trespass or statutory violation ought to be incorporated into it.

### (i) The weight of BC authority supports *RJR-MacDonald*

In decisions spanning from 2003<sup>78</sup> to 2019<sup>79</sup> in my sample, BC courts ruled repeatedly and explicitly that *RJR-MacDonald* is the appropriate test “where *Charter* arguments are meaningfully raised in the application.”<sup>80</sup> They have noted that although the *Thornhill* line of cases “respected the presumption of legislative or constitutional validity and held that a law should be enforced, and respect for it compelled, until the law was proved to be invalid,” those cases did not involve any challenge to the constitutional validity of the legislation in question.<sup>81</sup> Different considerations apply when *Charter* issues are raised. The Supreme Court of Canada has noted that the presumption of legislative validity, upon which the statutory injunction rule is based, is incompatible with “the innovative and evolutive character” of the *Charter*.<sup>82</sup> As Duncan J wrote in relation to an application for an injunction to clear a homeless encampment from Vancouver’s Oppenheimer Park in 2014:

I am inclined to the view that the *RJR-MacDonald* test is the appropriate one to be applied in the circumstances before me. The evolution of the type of litigation in

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<sup>77</sup> 2022 BCSC 282 (*Johnny*).

<sup>78</sup> *Vancouver Board of Parks and Recreation v Mickelson*, 2003 BCSC 1271 (*Mickelson*).

<sup>79</sup> *Scott*, *supra* note 8.

<sup>80</sup> *Abbotsford (City) v Shantz*, 2013 BCSC 2612 (*Shantz #2*) at para 20.

<sup>81</sup> *Mickelson*, *supra* note 78 at para 18.

<sup>82</sup> *Ibid* at para 19, quoting *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 at 124 (*Metropolitan Stores*).

question here favours an approach which takes into account *Charter* issues rather than the consideration of a pure statutory breach approach to injunctive relief.<sup>83</sup>

Hinkson CJSC adopted Duncan J's analysis in the 2016 *Adamson* case involving a homeless encampment on the grounds of a courthouse, noting that "This court has repeatedly opined that the *Thornhill* analysis is not appropriate in cases where *Charter* issues are raised" and confirming that "*RJR-MacDonald* is the proper test to follow in applications such as this one."<sup>84</sup> In the *Courtoreille* case involving an encampment in downtown Nanaimo in 2018, Skolrood J surveyed the case law and concluded:

The cases reviewed above establish that the *Thornhill* test is limited to situations where there is no underlying constitutional challenge to the statute, bylaw or regulation on which the government authority relies as the basis for its injunctive relief. Where the underlying constitutional validity is challenged, the appropriate test to be applied is the *RJR-MacDonald* test.<sup>85</sup>

These courts have insisted that *RJR-MacDonald* is the proper test even where the constitutional issues are not clearly framed, as is often the case in such applications due to their tight timelines and preliminary character. As Skolrood J opined in *Courtoreille*, even though *Charter* arguments were not articulated clearly, "I am nonetheless satisfied that [the] application raises *Charter* issues concerning the rights of homeless people and that the *RJR-MacDonald* test therefore applies."<sup>86</sup> And in the 2022 *Bamberger* decision, which falls outside my study period but is on point, Kirchner J stated: "the constitutional issues relating to daytime sheltering are clearly framed, though in a summary fashion. On the basis of *Courtoreille*, this is more than sufficient to ... address the injunction application under *RJR-MacDonald*."<sup>87</sup>

On the other side of the ledger are three decisions holding *Thornhill* to be the applicable test.<sup>88</sup> In the first and most influential of these, *Maurice*, Lowry J granted the City of Vancouver an injunction to clear an encampment from the public sidewalk outside the Woodward's building. The City sought the injunction pursuant to a section of the *Vancouver Charter* that authorized it to apply for an injunction to restrain violation of municipal bylaws.<sup>89</sup> Lowry J held that *Thornhill* was the proper test for the injunction even if the

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<sup>83</sup> *Vancouver Board of Parks and Recreation v Williams*, 2014 BCSC 1926 (*Williams*) at para 60.

<sup>84</sup> *Adamson #1*, *supra* note 64 at para 35.

<sup>85</sup> *Nanaimo (City) v Courtoreille*, 2018 BCSC 1629 at para 110 (*Courtoreille*). See also *Saanich v Brett #1*, *supra* note 52 at para 40, and *Scott*, *supra* note 8 at para 30, to the same effect.

<sup>86</sup> *Courtoreille*, *supra* note 85 at para 111; see also *Wallstam*, *supra* note 66 at para 36.

<sup>87</sup> *Bamberger*, *supra* note 7 at para 174. The court declined to decide this point, however, opting instead to adjourn the injunction application.

<sup>88</sup> In a fourth case, the court granted an injunction to remove a makeshift wooden pavilion erected to shelter homeless campers on a public parking lot on the basis that "the City has established a breach of its bylaws and its statutory right to enforce them." *Shantz #1*, *supra* note 55 at para 21. This decision appears to be based on the *Thornhill* rule but is of little precedential value because the court did not expressly articulate or discuss the test it applied. For purposes of my survey I classified it as "not decided."

<sup>89</sup> *Vancouver Charter*, SBC 1953, c 55, s 571(1) (now s 334(1)).

respondents' *Charter* rights were engaged (although he held they were not),<sup>90</sup> opining that "[a]ny discretion the court may have to permit unlawful conduct involving large numbers of people must be very narrow indeed and arise only in circumstances that are truly exceptional."<sup>91</sup> Lowry J went on to hold that even if some defendants had nowhere else to shelter, there were no exceptional circumstances to justify refusing the injunction:

Poverty and the consequences of poverty are serious social and political issues with which this, and other large cities in particular, must struggle. They are not, however, legal issues in the sense that they could constitute justification for the unlawful conduct of large numbers of people. The laws of this province and this city are to be obeyed by all. The personal hardship that may be suffered by those affected by the injunction being sought is, on the authorities that govern the exercise of this court's narrow discretion, outweighed by the public's interest in having the law enforced. There are no circumstances here that are sufficiently exceptional to justify the court's refusal to grant an injunction in favour of permitting the unlawful conduct of as many as 200 people, and perhaps more to come, to continue unabated.<sup>92</sup>

*Thornhill* was later treated as the authoritative test in two 2020 decisions, *VFPA v Brett and Smith*. In the first of these, Hinkson CJSC applied *Thornhill* to hold that the defendants' breach of federal regulations entitled the Port Authority to an injunction clearing the encampment from its vacant, unused parking lot.<sup>93</sup> He also held that the defendants' *Charter* rights were not meaningfully engaged because the publicly-owned parking lot was private property.<sup>94</sup> In *Smith*, Mayer J granted the City of Victoria an injunction to remove tents from environmentally and culturally sensitive areas of a city park, so as to confine an encampment to other portions of the park. The City sought the injunction pursuant to legislation analogous to that at issue in *Maurice*.<sup>95</sup> The court stated that *RJR-MacDonald* would have applied if a meaningful *Charter* issue had been raised, but no meaningful *Charter* issue was raised since the City was just seeking to keep the encampment out of sensitive areas, not shut it down altogether.<sup>96</sup>

In two other decisions, the court did not hold that *Thornhill* was the controlling test but nonetheless endorsed it to a significant extent. In *Sterritt*, Meiklem J acknowledged that *RJR-MacDonald* was the governing test but effectively modified it in line with *Thornhill*, holding that "[v]ery exceptional circumstances are required to deny an application for a

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<sup>90</sup> In *O'Flynn-Magee*, *supra* note 50 at para 23, Mackenzie ACJSC wrote that Lowry J "said that *Charter* rights were 'engaged' by the defendants in that case," but this is clearly mistaken. What he actually said was "I do not consider that s. 2(b) of the *Charter* is engaged because ... [o]bstructing the city's sidewalks in breach of its by-law is clearly not a form of expression that is compatible with the use of the sidewalks. ... I also do not consider that any of the other sections of the *Charter* that are raised are engaged." *Maurice*, *supra* note 25 at paras 30-31 (BCSC).

<sup>91</sup> *Maurice*, *ibid* at para 16 (BCSC).

<sup>92</sup> *Ibid* at para 22.

<sup>93</sup> *VFPA v Brett*, *supra* note 2 at para 57.

<sup>94</sup> *Ibid* at para 98. I criticize this conclusion elsewhere. Wood, "When Should Publicly Owned Land Be Considered Private," *supra* note 9.

<sup>95</sup> *Community Charter*, SBC 2003, c 26, s 274(1).

<sup>96</sup> *Smith*, *supra* note 8 at para 34.

statutorily-enabled injunction” even where *Charter* defences are raised, because “the public interest in enforcement of laws existing and enacted for the public good generally outweighs the interest of individuals who challenge the law on the basis of the constitution or other bases.”<sup>97</sup>

In *O’Flynn-Magee*, Madam Justice Mackenzie ACJSC declined to decide between *Thornhill* and *RJR-MacDonald*, noting that “[t]he case law is somewhat confusing” and holding that an injunction was warranted under either test.<sup>98</sup> Although she declined to decide the test, she endorsed the reasoning behind *Thornhill*, writing:

There is a difference in principle and rationale between an equitable interlocutory injunction and one that is based upon statutory authority. The rationale for not requiring the equitable injunction test [*RJR-MacDonald*] where the party seeking the injunction is a municipality, or other elected body, is that when elected officials enact by-laws or other legislation, they are deemed to do so in the public interest at large ....

Therefore, the irreparable harm and balance of convenience factors are pre-emptively satisfied in ensuring complying with law that is in the public interest .... To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed ....<sup>99</sup>

This brings me to the *Van Osch* trespass exception. In two cases, Chief Justice Hinkson applied this exception to grant interlocutory injunctions against homeless encampments on publicly-owned land: *Evans*<sup>100</sup> and *VFPA v Brett*.<sup>101</sup> No other BC judge has taken this approach. In both cases Hinkson CJSC held that publicly-owned land on which homeless encampments were located was actually private property and the landowner was entitled to an injunction upon showing a *prima facie* case of trespass, subject only to the defendants showing an arguable case that their possession was as of right. In both cases, he found that the defendants were clearly trespassing and had no arguable case that their possession was as of right. He concluded that the applicants were entitled to an injunction without any consideration of irreparable harm or balance of convenience.

These two decisions can be contrasted with Chief Justice Hinkson’s own earlier decision in *Adamson #1*, in which he rejected the trespass exception and applied *RJR-MacDonald* because “it cannot be said that the defendants have no right to the use of the Courthouse Green Space” and “the plaintiffs concede that following a brief period of some 10 – 12 weeks to permit remediation of the site, they will not seek to enjoin overnight sheltering on the Courthouse Green Space by homeless individuals.”<sup>102</sup> He went on to hold that even if the trespass exception applied, the question of whether the defendants had

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<sup>97</sup> *Vancouver Board of Parks and Recreation v. Sterritt*, 2003 BCSC 1421 at para 5 (*Sterritt*).

<sup>98</sup> *O’Flynn-Magee*, *supra* note 50 at paras 21 and 24. The quotation is from para 21.

<sup>99</sup> *Ibid* at paras 27-28.

<sup>100</sup> *Supra* note 57.

<sup>101</sup> *Supra* note 2.

<sup>102</sup> *Adamson #1*, *supra* note 64 at para 26.

some colour of right to be there “is not an issue to be resolved on this application for interim relief.”<sup>103</sup>

The trespass exception also arose obliquely in two other BC cases. In *O’Flynn-Magee*, Mackenzie ACJSC referred to it briefly but expressed no position on it except to say that a claim that a bylaw is constitutionally suspect cannot amount to a “colour of right” to excuse what would otherwise be trespass.<sup>104</sup> In addition, as we shall now see, the BC Court of Appeal in 2005 repudiated Loo J’s evident application of the trespass exception in *PRHC*, though it did not rule explicitly what the proper test was and actually left the waters muddier than they were before.<sup>105</sup>

## (ii) The BC Court of Appeal has muddied the waters

The BC Court of Appeal has not been much help on the issue of the test for granting an interlocutory injunction against a homeless encampment on publicly-owned land. In two appeals arising out of the so-called “Woodsquat,” a protest encampment in and around the partially demolished Woodward’s building in Vancouver in 2002, it sent inconsistent signals despite hearing the appeals together and releasing the decisions on the same day. In *Maurice*, the Court upheld Lowry J’s decision granting the City of Vancouver an injunction to clear the encampment from the public sidewalk outside the Woodward’s building, and agreed that *Thornhill* was the correct test:

Contrary to the submissions made by the appellants, where a public authority, such as the City, turns to the courts to enforce an enactment, it seeks a statutory rather than an equitable remedy, and once a clear breach of an enactment is shown, the courts will refuse an injunction to restrain the continued breach only in exceptional circumstances.<sup>106</sup>

But the legal foundation for the injunction was not at issue on appeal—the grounds for appeal were purely procedural;<sup>107</sup> so this statement was *obiter dicta*.

In the companion case, *PRHC*, the Court reversed Madam Justice Loo’s decision granting a provincial crown corporation an *ex parte* interlocutory injunction to clear the encampment from the Woodward’s building itself. The PRHC brought a civil action in trespass and applied *ex parte* for an interim injunction restraining the occupants from trespassing on its property. Counsel for the PRHC emphasized “that the building is private property owned by the plaintiff” and that the plaintiff “has not permitted the parties to be on the property.”<sup>108</sup> Loo J accepted this characterization and implicitly applied the trespass exception, holding that “the protestors are trespassing on private property, taking the law into their own hands, and the plaintiff is not precluded from pursuing its civil remedy.”<sup>109</sup> The Court of Appeal reversed Loo J’s decision on due process grounds, holding that she

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<sup>103</sup> *Ibid* at para 29.

<sup>104</sup> *Supra* note 50 at para 71.

<sup>105</sup> *Supra* note 53.

<sup>106</sup> *Ibid* at para 34 (BCCA).

<sup>107</sup> *Ibid* at para 2 (BCCA).

<sup>108</sup> *PRHC*, *supra* note 53 at para 1 (BCSC).

<sup>109</sup> *Ibid* at para 10 (BCSC).

violated the respondents' right to be heard, first by refusing defence counsel's request for an adjournment and then refusing his request to make oral submissions.<sup>110</sup> The Court held that an *ex parte* injunction should be granted only for a brief period, leaving the burden on the applicant to justify extension and giving the respondents an opportunity to mount a defence.<sup>111</sup>

In the process, the Court implied strongly that *RJR-MacDonald* is the appropriate test where *Charter* rights are at issue, even where defendants are occupying a site that everyone agrees is private property. This is evident in Madam Justice Rowles' statements that the injunction application should consider "how the lawful exercise of the right of freedom of expression, which includes protest, is to be taken into account in *weighing the balance of convenience*"; "Whether the material could support the conclusion that *irreparable harm would have ensued if injunctive relief was not obtained immediately* in this case seems to me to be open to serious question"; and "When injunctive relief is being sought in a case such as this, it seems to me to be essential that the potential for 'harm' to our constitutionally entrenched right to freedom of expression must be taken into account as part of *the familiar balance of convenience test* referred to in the case authorities."<sup>112</sup>

It is probably a reflection of the BC courts' general hostility to homeless encampments that whereas the Court of Appeal's decision in *Maurice*, which went against encampment occupants, has been cited in at least seven BC homeless encampment decisions,<sup>113</sup> its decision in *PRHC*, which favoured the occupants, has not been cited in a single such case. The decisions are from the same court on the same day and should be on an equal footing.

If we take both decisions seriously, the paradoxical upshot would seem to be that the usual three-pronged *RJR-MacDonald* test applies where *Charter* issues are implicated, even if the encampment is on private property (*PRHC*); but that the *RJR-MacDonald* test is short-circuited by the *Thornhill* statutory injunction test when a public authority seeks to restrain violation of an enactment by an encampment in an indisputably public space, even when *Charter* issues are raised (*Maurice*). This cannot be right. There is no reason why the *Charter*, irreparable harm and the balance of convenience should matter in the former situation yet not the latter. This unsatisfactory state of affairs probably helps explain why the BC courts continue to struggle with the test for homeless encampment interlocutory injunctions more than fifteen years since these decisions were issued in 2005.

It is also significant that these BC Court of Appeal decisions predated the landmark *Adams* decision holding that a municipal ban on erecting temporary overnight shelter on public land violated the *Charter*.<sup>114</sup> *Adams* changed the constitutional landscape of homeless encampment litigation, casting doubt on the precedential value of earlier

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<sup>110</sup> Although the application was *ex parte*, a lawyer acting for some occupants heard about it and appeared at the hearing.

<sup>111</sup> *PRHC*, *supra* note 53 at paras 20, 60-62 (BCCA).

<sup>112</sup> *Ibid* at paras 20, 56 & 58, respectively (BCCA) (emphasis added).

<sup>113</sup> *Victoria (City) v Thompson*, 2011 BCSC 1810 (*Thompson*) (granting interlocutory injunction to clear Occupy Victoria encampment from public park); *O'Flynn-Magee*, *supra* note 50; *BC/Yukon Association of Drug War Survivors v Abbotsford (City)*, 2014 BCSC 1817 (granting homeless advocacy organization public interest standing to sue city over its treatment of homeless residents); *Courtoreille*, *supra* note 83; *VFPA v Brett*, *supra* note 2; *Smith*, *supra* note 8; and *Bamberger*, *supra* note 7.

<sup>114</sup> *Adams*, *supra* note 4.



decisions and in particular on *Maurice's* suggestion that engagement of the *Charter* is irrelevant to an application for a statutory injunction evicting a homeless encampment from publicly-owned land.

The more defensible position, and the one that is consistent with *Adams* and its progeny, is that *RJR-MacDonald* is the appropriate test when *Charter* issues are raised and that the courts will take a liberal approach to determining whether *Charter* issues are raised. This position is also consistent with recent statements from the Supreme Court of Canada that there is just one test for an interlocutory injunction. In 2017, the Court reaffirmed that injunctions “are equitable remedies” and that *RJR-MacDonald* set out the “three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction.”<sup>115</sup> It said again in 2018:

In *Manitoba (Attorney General) v Metropolitan Stores Ltd* and then again in *RJR-MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd*.<sup>116</sup>

We have already seen that most BC courts have followed this path in homeless encampment litigation, casting doubt on the applicability of the trespass and statutory injunction tests in such cases. The trespass and statutory injunction tests were already somewhat unsettled in Canadian law.<sup>117</sup> These recent pronouncements by the Supreme Court of Canada reinforce the conclusion that *RJR-MacDonald* is the only test for interlocutory injunctions.

*VFPA v Brett*, by applying both the *Thornhill* statutory injunction test and the *Van Osch* trespass exception as independent grounds for an interlocutory injunction, departed farther from the *RJR-MacDonald* framework than any BC homeless encampment decision before or since. Although Hinkson CJSC has in this respect gone where no BC judge has gone before, he is not alone in departing from *RJR-MacDonald*. As we have seen, although he is alone—so far—in allowing the trespass exception to trump the *RJR-MacDonald* analysis, other BC judges have done the same with the *Thornhill* statutory injunction test. This departure must be corrected.

### (iii) *RJR-Macdonald* accommodates claims of trespass or statutory violation

Saying that *RJR-MacDonald* is the test does not settle what role claims of trespass and statutory violations should play in its application. My argument in this connection has two parts. First, trespass and statutory violations should be addressed via contextual application of the *RJR-MacDonald* test rather than via separate tests that ignore irreparable harm and balance of convenience. Second, trespass and statutory violations should be given a considerably narrower interpretation and less weight in favour of an injunction

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<sup>115</sup> *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paras 23, 25.

<sup>116</sup> *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12 (citations omitted) (*CBC*).

<sup>117</sup> See, eg, Jeffrey Berryman, *The Law of Equitable Remedies*, 2<sup>nd</sup> ed (Toronto: Irwin Law, 2013) at 95-98 (statutory injunctions), 203-10 (injunctions to enjoin trespass).

than the existing BC decisions that invoke them have done. The first point is supported by the weight of existing authority; the second challenges prevailing judicial opinion.

*Taking a contextual, holistic approach, including to trespass claims*

First, the claim that homeless encampment occupants are trespassing on publicly-owned property or violating enactments that the applicant has authority to enforce does not operate in isolation to short-circuit the inquiry, but is considered alongside everything else when deciding “whether the granting of an injunction is just and equitable in all of the circumstances of the case,” which is the fundamental question.<sup>118</sup> Considerations such as the defendants’ violation of applicable legislation or their commission of trespass are factors that inform and inflect, but do not displace, the three-pronged *RJR-MacDonald* inquiry.

It is important to recall that the *RJR-MacDonald* test is not a rigid formula but a general framework to be applied in a context-sensitive way.<sup>119</sup> It is flexible enough to accommodate circumstances like those that faced Chief Justice Hinkson in *Evans* and *VFPA v Brett*. Hinkson CJSC’s rigid application of the *Thornhill* and trespass exceptions brings to mind the warning of McLachlin JA (as she then was), in the leading BC case on the test for interlocutory injunctions, against “slavish adherence to precise formulae.”<sup>120</sup> A recent BC decision reiterated what numerous courts have said:

While this three-part test is the appropriate analytical framework, it is important to remember that it is not a formula to be employed as a series of independent hurdles. Rather, it should be seen in the nature of evidence relative to the central issue of assessing the relative risks of harm to the parties from granting or withholding the interlocutory relief. In other words, the three considerations I have just articulated are to guide the court in arriving at the most just and equitable result in the circumstances.<sup>121</sup>

I will have more to say below about what this means in the case of statutory injunctions. Let me focus for now on what it means for injunctions grounded in allegations of trespass. Although the trespass exception has been applied in only two BC homeless encampment cases, and both were decided by the same judge, it deserves closer attention both because it represents a dangerous new development and because the judge in question is the chief justice of BC’s general trial court. These decisions departed from the established case law in two key ways: first, by characterizing the publicly-owned sites at stake as private property and second, by insisting that “in cases involving trespass to private land, the three part test from *RJR-MacDonald Inc.* does not apply.”<sup>122</sup>

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<sup>118</sup> *Google*, *supra* note 115 at para 25.

<sup>119</sup> *Ibid*; *CBC*, *supra* note 116 at para 13.

<sup>120</sup> *British Columbia (Attorney General) v Wale*, 120 NR 212, [1987] 2 WWR 331 (BCCA), *aff’d* [1991] 1 SCR 62, at para 52.

<sup>121</sup> *MacKay v Brookside Campsite Inc*, 2020 BCSC 375 at para 6 (citations omitted).

<sup>122</sup> *Evans*, *supra* note 57 at para 49.

Hinkson CJSC's characterization of the sites in *Evans* and *VFPA v Brett* as private property does not withstand scrutiny.<sup>123</sup> The site in *VFPA v Brett* was an empty, unenclosed and at the time unused parking lot owned by a federal port authority, right next to a public park, with an uncontradicted history of public access and little evidence of any efforts to exclude the public. The site in *Evans* had somewhat more indicia of non-publicness. It was a small, unfenced strip of land at the edge of the unused site of a boarded-up former public hospital owned by a regional health authority. The owner had taken substantial steps to exclude unauthorized access long before the encampment arose, including by fencing almost the entire property and expressly prohibiting public entry. It had intended to fence the entire property but had inadvertently failed to fence the narrow strip where the encampment was later established.

Hinkson CJSC went against prior BC case law by holding that these publicly-owned sites were private property and that this displaced the *RJR-MacDonald* test. Other BC judges have applied the *RJR-MacDonald* test to homeless encampments on publicly-owned land that is not intended for public use—precisely the kind of property that Hinkson CJSC believed he had before him in *Evans* and *VFPA v Brett*. Not only that, the private or public character of the properties hardly even factored into their analysis.

In *Wallstam*, Walsh J refused to apply the trespass exception or *Thornhill* rule to a homeless encampment on a City-owned vacant lot in Vancouver that was enclosed by a locked fence and slated for redevelopment as social housing run by a non-profit third party.<sup>124</sup> Unlike in *Evans* or *VFPA v Brett*, the defendants had to break through a locked enclosure to gain access to the site. The same was true in *Courtoreille*, where the land was owned by the city of Nanaimo, leased to a private charitable organization, sublet to a private railway company and—much like the Port Authority lands in *VFPA v Brett*—zoned for “transportation uses such as ferry and bus terminals, rail yards and transportation storage.”<sup>125</sup> As in *Wallstam*, the site was securely enclosed by a locked chain link fence, which the defendants breached deliberately to establish the camp.

By any reckoning, the sites in *Wallstam* and *Courtoreille* had more hallmarks of private property than the parking lot in *VFPA v Brett* and at least as many as the unfenced verge in *Evans*, yet in both cases the courts insisted on the *RJR-MacDonald* test. Moreover, as I discussed above, in *PRHC* the Court of Appeal clearly endorsed the application of the *RJR-MacDonald* test to an encampment inside a building that counsel and judges agreed was private property.

Even outside the homeless encampment context, the non-public character of the property does not displace the *RJR-MacDonald* framework. In numerous cases arising out of blockades and protest camps on publicly-owned property that is not intended for public use or is leased or licensed to a private party, and even on privately-owned property, courts have applied the *RJR-MacDonald* test to interlocutory injunction applications.<sup>126</sup>

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<sup>123</sup> I develop this argument in more detail elsewhere. Wood, “When Should Publicly Owned Land Be Considered Private,” *supra* note 9.

<sup>124</sup> *Wallstam*, *supra* note 54 at para 38.

<sup>125</sup> *Courtoreille*, *supra* note 54 at para 11.

<sup>126</sup> Eg *Canadian Forest Products Inc v Sam*, 2011 BCSC 676 at paras 71-2, *rev'd in part* (but not on this point) 2013 BCCA 58 (*Sam*); *British Columbia Hydro and Power Authority v Boon*, 2016 BCSC 355 at para 41; *AJB Investments Ltd v Elphinstone Logging Focus*, 2016 BCSC 734 at para 21; *Marine Harvest Canada Inc v Morton*,

They did so, for instance, with the Wet’suwet’en solidarity blockades of 2020, which arose just a few months before the *VFPA v Brett* encampment.<sup>127</sup> One of those cases concerned a blockade on land owned by the Vancouver Fraser Port Authority itself. The blockade was designed to halt the movement of goods and people into and out of the Port of Vancouver. The court applied *RJR-MacDonald* without hesitation.<sup>128</sup> In these cases the courts considered irreparable harm and the balance of convenience even though the defendants were “inarguably trespassing.”<sup>129</sup>

Just four months later, Hinkson CJSC held that the Port Authority was entitled to an injunction against homeless encampment occupants simply on the basis of trespass to land, with no consideration of irreparable harm or balance of convenience. Not only does this clearly contradict those earlier decisions, it is paradoxical in that the harm that the Port Authority and commercial third parties would have suffered had the earlier Wet’suwet’en solidarity blockade continued far outweighed the harm they would have suffered had the later homeless encampment remained, as there was no evidence that the encampment actually interfered with any port activities other than a potential arrangement for temporary container storage—a prospect that arose (conveniently for the Port Authority) only after the encampment was established and that Hinkson CJSC properly dismissed as speculative.<sup>130</sup>

The general jurisprudence on the trespass exception also supports application of all three prongs of the *RJR-MacDonald* framework. Much of this case law traces its roots to an English Court of Appeal decision, *Patel*, in which Balcombe LJ opined:

It seems to me that, first, *prima facie* a landowner, whose title is not in issue, is entitled to an injunction to restrain trespass on his land whether or not the trespass harms him. ... However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be trespass. Then the court must consider the application of the principles set out in *American Cyanamid* ... in relation to the grant or refusal of an interlocutory injunction.<sup>131</sup>

*Patel* confirms that trespass does not dispel the need to consider harm and inconvenience between the parties, so long as the respondent puts forward relevant evidence.

In one of the leading BC cases on the trespass exception, *Terbasket*, Madam Justice Quijano accepted the principle that where the applicant has established clear title to the land in question, an interlocutory injunction will normally issue without consideration of irreparable harm or balance of convenience unless the defendant shows an arguable case that its possession is as of right. She found that the defendants had not shown an arguable case that their possession was as of right. Nevertheless, she engaged in the full *RJR-MacDonald* analysis of irreparable harm and balance of convenience because the

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2017 BCSC 2383 at para 51; *Marine Harvest Canada Inc v Morton*, 2018 BCSC 1302 at para 136; *Alton Natural Gas Storage Inc v Poulette*, 2019 NSSC 94 at para 32.

<sup>127</sup> Eg *Canadian Pacific Railway Ltd v Doe*, 2020 BCSC 388 at para 43 (*CPR v Doe*); *Canadian National Railway Co v Doe*, 2020 CarswellOnt 2403, 316 ACWS (3d) 2 at para 6.

<sup>128</sup> *Vancouver Fraser Port Authority v Doe*, 2020 BCSC 244 at para 3.

<sup>129</sup> *CPR v Doe*, *supra* note 127 at para 47.

<sup>130</sup> *VFPA v Brett*, *supra* note 2 at para 103.

<sup>131</sup> *Patel*, *supra* note 19 at 858-59.

defendants stood to be harmed substantially by transferring possession of the disputed land to the plaintiffs before trial.<sup>132</sup>

The subsequent leading BC cases of *Van Osch* and *Sol Sante Club* overlooked this key point in *Terbasket* and took a somewhat schizophrenic approach to the trespass test. On one hand they cited *Terbasket*, incorrectly in my view, as supporting the propositions that “once an applicant establishes a *prima facie* case that his or her property rights are being wrongfully interfered with by another and the other party intends to continue the wrong, an injunction should issue without regard to the remaining parts of the general test”<sup>133</sup> and that where the defendants fail to advance an arguable case that their possession is as of right, “questions of balance of convenience or irreparable harm do not arise.”<sup>134</sup> On the other hand, despite so holding they both went on to apply the full *RJR-MacDonald* analysis.<sup>135</sup>

In 2020, a month after Hinkson CJSC decided *VFPA v Brett*, Madam Justice Baker summarized the correct approach to interlocutory injunctions in cases of alleged trespass:

I must first determine whether the allegation of the respondent’s conduct amounts to a trespass or a nuisance. If it amounts to a trespass, I must then consider whether the respondent has made out an arguable case to possession as of right and whether the questions of irreparable harm and the balance of convenience favour the granting of an injunction.<sup>136</sup>

If irreparable harm and balance of convenience must be considered when purely economic interests are at stake (as in *Terbasket*) and when Indigenous land rights, environmental protection or freedom of expression are at stake (as in the protest cases noted above), surely they must be considered when litigants’ health, safety and survival are at stake. To apply Quijano J’s reasoning in *Terbasket* by analogy, it is hard to imagine defendants who stand to be harmed more substantially by transferring possession of disputed land to a plaintiff before trial than residents of a homeless encampment. Applications for interlocutory injunctions to evict homeless encampments from publicly owned land put defendants’ lives and health on the line. Such defendants are amongst society’s most marginalized and vulnerable members. In these applications, government actors who are charged with upholding the public interest—which must include, above all, the well-being and survival of community members—are consciously putting at risk the well-being and survival of people who are experiencing homelessness. This context differentiates these cases from other situations in which interlocutory injunctions are sought to enjoin demonstrations, trespasses, nuisances or statutory breaches, and it demands a careful assessment and balancing of the relative harms and inconveniences to the parties and the public.

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<sup>132</sup> *Terbasket v Harmony Co-ordination Services Ltd*, 2003 BCSC 17 at paras 24-28.

<sup>133</sup> *Sol Sante Club v Biefeld*, 2005 BCSC 1908 at para 18.

<sup>134</sup> *Van Osch*, *supra* note 19 at para 14.

<sup>135</sup> *Ibid* at para 15 (“In spite of having reached the foregoing conclusion, I have also assessed the test of balance of convenience”); *Sol Sante Club*, *supra* note 133 at para 21 (“Nevertheless, I will go on to consider the issues of irreparable harm and balance of convenience”).

<sup>136</sup> *OSED Howe Street Vancouver Leaseholds Inc v FS Property Inc*, 2020 BCSC 1066 at para 18.

### *Giving due regard to statutory violations*

Up to this point my argument in this section is well supported by the existing jurisprudence. But in other respects the existing jurisprudence is deeply flawed and exhibits an inordinate concern with property rights and law enforcement at the expense of the dignity, well-being and survival of some of society's most vulnerable members.<sup>137</sup> The second part of my argument in this section is that BC courts should give claims of statutory violation and trespass substantially less weight in favour of interlocutory injunctions in homeless encampment cases. There is not the space to develop it fully here, but I will sketch its outlines.

I start with the *Thornhill* test for statutory injunctions. My argument here has three parts. First, courts should expand the range of circumstances that will justify denying an injunction once a statutory violation is demonstrated. Second, the less the applicant seeking a statutory injunction approximates a democratically elected and accountable government body, the less willing courts should be to grant it a statutory injunction. And third, courts should hesitate to grant such an injunction when the statute concerned provides its own clear enforcement methods.

The *Thornhill* line of cases has two roots. One is in statutes that authorize government actors to apply for injunctions enforcing legislation they have enacted. A common example is statutes authorizing local governments to sue for an order enforcing a local bylaw or restraining its contravention.<sup>138</sup> Another is federal or provincial statutes authorizing a government minister to apply for an injunction to restrain violations of the statute.<sup>139</sup> Courts have held that such proceedings and remedies are statutory, not equitable, and that the usual considerations for an equitable injunction have limited or no application.<sup>140</sup> The other root is in the Crown's *parens patriae* standing to sue to enforce public rights, which entitles the Attorney General to sue to restrain breach of a statute even in the absence of a statute authorizing such a proceeding.<sup>141</sup> In either case, once the

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<sup>137</sup> For a complementary argument see Sarah E Hamill, "Private Property Rights and Public Responsibility: Leaving Room for the Homeless" (2011) 30 Windsor Rev Leg & Soc Issues 91; Sarah E Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58 McGill LJ 365.

<sup>138</sup> Eg *Vancouver Charter*, *supra* note 89, s 334(1); *Community Charter*, *supra* note 95, s 274(1).

<sup>139</sup> Eg *Saskatchewan (Minister of Environment) v Redberry Development Corp*, [1987] 4 WWR 654, 58 Sask R 134 (QB) (cited to WWR), *aff'd* [1992] 2 WWR 544, 100 Sask R 36 (CA) (provincial statute authorizing designated minister to apply to court for order enjoining contravention of statute or of ministerial approval issued under it); *British Columbia (Minister of Environment, Lands and Parks) v Alpha Mfg Inc* (1997), 150 DLR (4th) 193, 155 WAC 193, 96 BCAC 193, 25 CELR (NS) (2d) 217, 73 ACWS (3d) 618, 1997 CanLII 4598 (CA) (provincial statute authorizing designated minister to apply to court for order restraining contravention of statute); *British Columbia (Minister of Forests) v Okanagan Indian Band*, 1999 CarswellBC 2475, [1999] BCJ No 2545, [2000] BCWLD 34, 25 BCTC 161, 37 CPC (4th) 224, 92 ACWS (3d) 855, *aff'd* (*sub nom British Columbia (Minister of Forests) v Adams Lake Band*) 2000 BCCA 315, 187 DLR (4th) 664 (provincial statute authorizing designated minister to apply to court for order directing compliance with or restraining violation of stop order issued under statute) (*Okanagan Indian Band*).

<sup>140</sup> Eg *Nelson (City) v Kranz*, [1990] BCJ No 2695, [1991] BCWLD 193, 11 WCB (2d) 581, 24 ACWS (3d) 370, 3 MPLR (2d) 258; *Kamloops (City) v Baines*, [1996] BCJ No 835, [1996] BCWLD 1390, 32 MPLR (2d) 264, 62 ACWS (3d) 1017 (SC); *Thornhill*, *supra* note 24 at para 7.

<sup>141</sup> Eg *AG v Premier Line Ltd*, [1932] 1 Ch 303; *AG v Bastow*, [1957] 1 QB 514, [1957] 2 WLR 340, [1957] 1 All ER 497; *AG v Harris*, [1961] 1 QB 75.

government plaintiff has demonstrated that the defendants have breached a statute or bylaw, the courts will refuse an injunction only in exceptional circumstances.<sup>142</sup> The Supreme Court of Canada explained the rationale for this principle succinctly in *Toronto (City) v Polai*: the plaintiffs in such cases are “seeking to protect and enforce a public right.”<sup>143</sup> Schroeder JA of the Ontario Court of Appeal put it this way:

As members of the city corporation the inhabitants are entitled to look to the duly elected representatives who comprise the municipal council for enforcement of the provisions of by-laws passed for their protection, and in enforcing those by-laws the corporation, whether by means of a prosecution or in a suit for injunctive relief, acts on behalf of all the inhabitants. The municipality, acting through its council and duly appointed officials, occupies in a more restricted sense the same position as does the Attorney-General who represents the Crown in its capacity as *parens patriae* charged with the responsibility of enforcing the rights of the public when they are violated .... [T]he dispute is not one between individuals. Rather it is one between the public and a small section of the public refusing to comply with the by-law.<sup>144</sup>

MacKenzie ACJSC agreed in *O’Flynn-Magee*:

The rationale for not requiring the equitable injunction test where the party seeking the injunction is a municipality, or other elected body, is that when elected officials enact by-laws or other legislation, they are deemed to do so in the public interest at large.<sup>145</sup>

If the public interest provides the rationale for statutory injunctions, it should also define their limits. One implication of this has already been noted. Most BC courts agree that the statutory injunction test is inappropriate when *Charter* issues are raised.<sup>146</sup> The public interest in respecting constitutional rights demands that when defendants’ *Charter* rights are engaged, a government actor’s assertion that the public interest favours enforcement of the law on which its impugned action is based cannot be taken at face value but must be demonstrated.

This brings me to my first argument for limiting the availability of statutory injunctions. Even though most BC courts have insisted on the *RJR-MacDonald* test in such cases, they have taken an unduly cramped view of the circumstances that warrant refusal of an injunction to restrain contravention of legislation. *Maurice* set a tone from which few subsequent BC homeless encampment injunction decisions have departed. Despite acknowledging that the encampment offered its residents safety and that many of them had no alternative shelter, Lowry J held that there were no circumstances “to justify the court’s refusal to grant an injunction in favour of permitting the unlawful conduct of as many as

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<sup>142</sup> *Thornhill*, *supra* note 24 at para 9; *Burnaby (City) v Oh*, 2011 BCCA 222 at para 41, *leave denied*, 2011 CanLII 79128 (SCC).

<sup>143</sup> [1973] SCR 38 at 41, *aff’d* (1969), 8 DLR (3d) 689, [1970] 1 OR 483 (CA).

<sup>144</sup> *Ibid*, 8 DLR (3d) at 697 (ONCA).

<sup>145</sup> *O’Flynn-Magee*, *supra* note 50 at para 27.

<sup>146</sup> See *supra*, notes 82-83 and accompanying text.

200 people, and perhaps more to come, to continue unabated.”<sup>147</sup> Courts have repeatedly emphasized that hardship, poverty, lack of shelter and the need for housing are not circumstances justifying denial of an injunction to enforce legislation.<sup>148</sup> In 2020 the court in *Smith* said the same of city officials’ harassment of homeless people and the need for self-isolation during the COVID-19 pandemic.<sup>149</sup>

Circumstances that have been recognized as exceptional include “instances where there was a right that pre-existed the enactment contravened, where there is a clear and unequivocal expression that the unlawful conduct will not continue, where there is such uncertainty that it can be said that the breach is not being flouted, or where the events do not give rise to the mischief the enactment was intended to preclude.”<sup>150</sup> The first of these is unavailable to encampment residents since the right to camp day and night on public land has not (yet) been accepted and in any event is not the kind of right the courts have recognized as a pre-existing right within the meaning of this exception. The second is unavailable since the defendants’ continued presence on the sites in question typically negates any intention to refrain from the unlawful acts. The third is unavailable in most cases since, even in the face of evidence of efforts to comply with fire safety orders and the like, courts typically find that defendants continue to break laws after the alleged breach has been brought to their attention explicitly and repeatedly.<sup>151</sup> Finally, the fourth is unavailable in most cases since courts have ruled that encampments do in fact give rise to the mischiefs at which the relevant enactments were aimed—including disruption of traffic, interference with authorized uses and creation of unsanitary, unsafe, disorderly and aesthetically displeasing conditions in public places.

Some courts have reduced the inquiry to whether the defendants are flouting the law.<sup>152</sup> Going even farther, in *VFPA v Brett Hinkson* CJSC dispensed with the exceptional circumstances inquiry altogether, reciting numerous ways in which the defendants were violating port authority regulations and concluding that the Port Authority was entitled to an injunction on that basis without any discussion of circumstances that might justify refusing it—circumstances that included COVID-19 risks and precautions, an ongoing housing crisis and a lack of evidence that the encampment was interfering with other uses of the site.<sup>153</sup>

A central problem with the current case law is that it assumes an opposition between the public interest and private harm. This opposition is reflected in repeated assertions that “[t]he court will rarely conclude that the public interest in having the law

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<sup>147</sup> *Maurice*, *supra* note 25 at paras 17-18 and 22 (BCSC).

<sup>148</sup> Eg *Okanagan Indian Band*, *supra* note 139 at para 60 (BCSC); *Maurice*, *ibid* at para 21; *O’Flynn-Magee*, *supra* note 50 at para 48.

<sup>149</sup> *Smith*, *supra* note 8 at para 33.

<sup>150</sup> *Maurice*, *supra* note 25 at para 20; *Smith*, *ibid* at para 29; *O’Flynn-Magee*, *supra* note 50 at para 47. Outside the homeless encampment context, see *Alpha Mfg*, *supra* note 139 at para 32; *Okanagan Indian Band*, *supra* note 139 at para 55 (BCSC).

<sup>151</sup> Eg *VFPA v Brett*, *supra* note 2 at paras 28-30 (referring to defendants’ repeated refusals to leave after being notified of alleged violations repeatedly).

<sup>152</sup> Eg *Williams*, *supra* note 83 at para 50 (referring to defendants’ “expressions of intention to continue to flout the law”).

<sup>153</sup> *VFPA v Brett*, *supra* note 2 at para 57. Elsewhere the court explicitly rejected the defendants’ evidence about COVID-19 risks and precautions (paras 78, 111) and found that the defendants had responded to requests to leave with aggression and denied the plaintiff’s authority over the site (para 35).



obeyed is outweighed by the hardship an injunction would impose upon the defendant,”<sup>154</sup> and “[t]o the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed.”<sup>155</sup> This assumption of an opposition between public interest and private harm is false when applied to homeless encampment cases, because it reduces the public interest to an interest in law enforcement and excludes encampment occupants from the public whose interest is at stake.

Courts facing homeless encampment injunction applications should acknowledge that the public interest includes not just law enforcement but also shelter, safety, survival and respect for the constitutional rights of all members of the public. This does not necessarily imply that governments have no “monopoly on ‘the public interest’ in a case like this,” a proposition on which courts have expressed some doubt.<sup>156</sup> Rather, I am suggesting that the public interest for which governments are responsible in applications for injunctions to enforce legislation against residents of homeless encampments is broader and more nuanced than law enforcement. The hardship suffered by homeless encampment residents from enforcement of such an injunction is not merely private harm. It is also harm to the public interest and deserves to be weighed against the public interest in having the law obeyed.

To exclude these considerations from the scope of the public interest poses a real risk that granting an injunction will work a wrong and cause injustice, which is a recognized “exceptional circumstance” justifying denial of a statutory injunction. As Brooke JA, concurring, wrote in *Polai*:

On the other hand, and equally important, the Court must see to it that its processes are never used to accomplish a wrong against any person and, of course, this is so irrespective of who applies for the remedy. There may well be circumstances where it would be in the public interest to refuse relief by way of injunction to a plaintiff whether a municipal corporation or otherwise in this type of action, and some actions where wrongful discrimination could be shown would fall within the class of cases to which I refer.<sup>157</sup>

I would suggest that infringement of constitutional rights to life, liberty, security of the person, equality and free expression also fall within this class of cases. Moreover, the leading Canadian text on injunctions suggests that a court is justified in refusing a statutory injunction where it is “likely to prove ineffective or would cause injustice.”<sup>158</sup>

Further support for rethinking the narrow approach courts have taken to “exceptional circumstances” is found in McEachern CJBC’s dissent in *Thornhill*, which rejected the proposition that a judge has no alternative but to grant an injunction once a statutory violation is established and insisted that “a judge should always give great weight

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<sup>154</sup> Robert J Sharpe, *Injunctions and Specific Performance*, looseleaf ed (Toronto: Canada Law Book, 2019) (Release No. 29, November 2020) at para 3.150; *Redberry* (QB), *supra* note 139 at 660; *Alpha Mfg*, *supra* note 139 at para 30; *Thornhill*, *supra* note 24 at para 9.

<sup>155</sup> *Thornhill*, *ibid* at para 9. See also *Sterritt*, *supra* note 97 at para 5.

<sup>156</sup> *Okanagan Indian Band* (CA), *supra* note 139 at para 11.

<sup>157</sup> *Polai* (ONCA), *supra* note 143 at para 14.

<sup>158</sup> Sharpe, *supra* note 154 at para 3.150.

to the public interest when it can reliably be ascertained, but a judge always has a discretion to refuse to grant an injunction when there are circumstances where some other course may suffice.”<sup>159</sup>

The 2022 *Bamberger* case opened the door even farther. There Kirchner J relied on “exceptional circumstances” to refuse to grant an interlocutory injunction clearing a homeless encampment from CRAB Park (recall that this encampment was in some ways the progeny of the encampment in *VFPA v Brett*). Those circumstances were the futility of homeless encampment eviction injunctions, the relative merits of this encampment site compared to alternative sites, the need for daytime shelter, the lack of evidence of harm to the public, and the fact that the defendants were not flouting the law so much as unable to comply with it. Kirchner J elaborated carefully on each of these points in a way that provides a solid precedent for other courts to follow.

First, building on comments by Hinkson CJSC in *Adamson #1*, he found that the recent history of encampments demonstrates “a certain futility in making orders in these circumstances” because government orders and court injunctions may be effective at clearing camps from specific locations but are ineffective at preventing them from moving elsewhere and at fixing the problem of persistent non-compliance.<sup>160</sup> He noted that “there is a substantial risk that granting an injunction now will simply move the encampment to another neighbourhood in the city, which would not be in the public interest.”<sup>161</sup> He also found that CRAB Park was a better encampment site than other nearby public spaces, for reasons similar to those I have already canvassed in relation to the Port Authority parking lot next door. “It is difficult to see,” he concluded, “how the public interest is served by risking the relocation of the camp to an area that will more directly impact surrounding residents.”<sup>162</sup>

Second, Kirchner J found that for some defendants at least, “daytime sheltering is a necessity or, at least decamping every morning and carrying their possessions throughout the day is a substantial hardship,” and concluded that “[a]n injunction compelling everyone to decamp each morning would truly be a ‘blunt instrument’ that will capture those for whom a more nuanced approach might be called for.”<sup>163</sup> Third, he pointed to “the lack of evidence that the encampment poses a serious health or safety risk or harm to the public.”<sup>164</sup> Finally, Kirchner J challenged the typical view that homeless encampment residents are flouting the law:

These deponents do not show disdain, contempt, or mockery of the *Bylaw*. Their evidence is of real hardship in complying with it. This may well explain why these campsites persist and are quickly re-established in one location after they are closed in another.<sup>165</sup>

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<sup>159</sup> *Thornhill*, *supra* note 24 at para 76.

<sup>160</sup> *Bamberger*, *supra* note 7 at para 185, citing *Adamson #1*, *supra* note 64 at para 185.

<sup>161</sup> *Ibid* at para 177.

<sup>162</sup> *Ibid* at para 189.

<sup>163</sup> *Ibid* at paras 191, 194.

<sup>164</sup> *Ibid* at para 198.

<sup>165</sup> *Ibid* at para 212.

The grounds relied on by Kirchner J do not just support my argument for rethinking “exceptional circumstances,” they speak to factors that are already recognized as such, including situations where an injunction would be ineffective or cause an injustice. It is true that Kirchner J cited these circumstances as grounds to adjourn the injunction application rather than to deny it, but they are clearly relevant to the latter decision.

The considerations that led Kirchner J to decline to issue an injunction applied with equal force in *VFPA v Brett* and should have led Hinkson CJSC to refuse the injunction requested in that case. Indeed, they are present in most homeless encampment cases. *Bamberger* thus charts a hopeful new course for adjudicating homeless encampment interlocutory injunction applications.

My second critique of the courts’ approach to statutory injunctions is that a relaxed test may be appropriate to protect democratically elected and accountable government actors, but it is not at all evident why it should protect unelected, democratically unaccountable actors such as a port authority, health authority or crown corporation. It has occasionally been extended to private actors, at least where a statute authorizes them to seek an injunction to restrain violation of its provisions.<sup>166</sup> But this extension is anomalous. It is hard to identify a public interest to weigh against the harm and inconvenience to the enjoined party in such cases. The less the applicant resembles an elected, democratically accountable government, the less eager a court should be to lower the threshold for an injunction. The Port Authority in *VFPA v Brett*, for example, was not democratically elected and had little accountability to the public.<sup>167</sup>

By the same logic, statutory injunctions should not be awarded to protect private interests.<sup>168</sup> For example, to the extent that the injunction sought by the Port Authority in *VFPA v Brett* was to protect the interests of private terminal operators, shipping lines, trucking companies, railways and shippers as opposed to the public interest in promoting Canada’s trade policy, it should not have enjoyed special treatment.

My third and final argument on this issue is that courts should hesitate to issue a statutory injunction where the statute in question provides clear enforcement methods. Granted, there is plenty of authority for the proposition that the courts will not interfere with a government actor’s decision to sue for an injunction rather than pursue other enforcement avenues to enforce a statute.<sup>169</sup> The BC Court of Appeal has, however, warned that the jurisdiction to grant injunctions to enforce statutory obligations “must be exercised carefully” and that where “there is a clear method of enforcement set out in the statute, the court should not grant injunctive relief unless the statutory provision is shown

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<sup>166</sup> Eg *Shaughnessy Heights Property Owners’ Assoc v Northup* (1958), 12 DLR (2d) 760 (BCSC) at 763 (granting injunction pursuant to private act that prohibited multiple-family residences and authorized any resident of the affected neighbourhood to seek injunction to restrain violations).

<sup>167</sup> It is worth acknowledging in this connection that port authorities are subject to federal privacy and access to information legislation.

<sup>168</sup> *AG v Sheffield Gas Consumers Co* (1853), 3 De GM & G 304 at 311-12, 43 ER 119, quoted in Sharpe, *supra* note 154 at para 3.160 n 41 (“in the present case, though the Attorney-General’s name is used, it is impossible not to see that the suit has been instituted more from regard to private than to public good.”)

<sup>169</sup> Eg *Montreal (City) v Morgan*, 60 SCR 393, [1920] 3 WWR 36, 54 DLR 165, *leave denied* (1920), 60 SCR v (JCPC); *Polai*, *supra* note 143. There is also ample authority for the proposition that a government’s decision not to pursue criminal charges does not disentitle the court to enjoin potentially criminal behaviour at the suit of an affected party. Eg *MacMillan Bloedel Ltd v Simpson*, [1996] 2 SCR 1048; *Teal Cedar Products Ltd v Rainforest Flying Squad*, 2022 BCCA 26 at para 30.

to be inadequate in some respect,” such as where the penalties are too small to affect behaviour, the harmed party cannot invoke the provision or serious harm would result from the delay inherent in invoking statutory remedies.<sup>170</sup> The Court reiterated this concern in 2022 when it said that “the availability of means other than an injunction to prevent unlawful conduct—such as provincial statutory offences ... is particularly relevant when it is *government* seeking to obtain an injunction because it has greater ability to access and enforce alternative remedies” than does a private party.<sup>171</sup> This concern is almost completely absent from the BC homeless encampment injunction case law. There was no discussion in *VFPA v Brett*, for example, whether or how the statutory enforcement means available to the port authority via the *Regulations* or trespass to property legislation were inadequate.

### *Putting trespass in its place*

I argued above that the existing case law, properly understood, confirms that the so-called trespass exception does not displace the *RJR-MacDonald* framework. I will now go farther and argue that the existing case law is nevertheless wrong in its treatment of trespass in interlocutory injunction applications. This argument has three parts: first, courts should take a broader view of what constitutes a valid defence to a trespass claim; second, they should apply the trespass principle only where the defendants’ conduct is indisputably unlawful; and third, they should not allow an applicant to claim simultaneously that its private property rights are being violated and that it is vindicating public rights.

First, BC courts have taken too narrow a view of the defence available to a respondent once the applicant makes out a *prima facie* case of trespass. Balcombe LJ in *Patel* said that “the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be trespass.”<sup>172</sup> BC courts have interpreted this as meaning that the defendant must show that its “continuing possession is as of right.”<sup>173</sup> In the context of homeless encampments, Mackenzie ACJSC opined that a claim that a municipal bylaw infringes encampment residents’ constitutional rights cannot “amount to a ‘colour of right’ as defined in the *Trespass Act*”:

‘Colour of right’ is a right of property. It is not a defence based on *Charter* rights. I therefore agree with the City that the defendants are trespassing on the Art Gallery Lands under the *Trespass Act* and the common law.<sup>174</sup>

This holding is in line with Ross J’s ruling in *Adams* that the defendants were not asserting a property right to occupy public land.<sup>175</sup> It is therefore no surprise that homeless encampment residents have not succeeded in showing that their “continuing possession” was “as of right” in the two BC homeless encampment cases in which the trespass test was

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<sup>170</sup> *Cambie Surgeries Corp v British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para 34.

<sup>171</sup> *Teal Cedar Products*, *supra* note 169 at para 40 (emphasis in original).

<sup>172</sup> *Patel*, *supra* note 19 at 859.

<sup>173</sup> *Terbasket*, *supra* note 132 at para 25; *Van Osch*, *supra* note 20 at para 14.

<sup>174</sup> *O’Flynn-Magee*, *supra* note 50 at para 71.

<sup>175</sup> *Adams* (BCSC), *supra* note 4 at para 132.

applied.<sup>176</sup> But this standard is unduly narrow. While showing possession “as of right” or with “colour of right” should certainly suffice, the fundamental character of the rights at stake in homeless encampment cases and the potential severity of their deprivation should invite a more liberal approach. Evidence that defendants do not have viable alternative shelter and that evicting them would pose a serious risk to their life and health should suffice to displace a simple trespass analysis and trigger a thorough weighing of harms and (in)conveniences in homeless encampment cases.

There is support for such an approach in the trespass injunction case law itself. In *Patel*, Neill LJ, concurring, wrote that the key question is whether the right claimed by the defendant to do what it has done and is doing is independent of the wishes of the plaintiff, rather than a mere concession made by them out of toleration or good neighbourliness.<sup>177</sup> This, rather than the precise legal source or character of the alleged right, is the emphasis in *Patel* and the cases cited therein.

This logic should encompass defences based on constitutional rights. A right not to be deprived of life, liberty and security of the person, for example, exists independently of the wishes of the owner of publicly-owned land on which homeless individuals seek shelter. It is also important to emphasize, with Neill LJ, that “[a]t this stage, of course, the respondents’ task is not to prove this right on the balance of probabilities, but only to put forward some evidence of its existence which goes beyond the stage of mere assertion.”<sup>178</sup> And it is worth recalling Lamer CJC’s admonition, in *Committee for the Commonwealth of Canada*, that government “cannot make its ownership right a justification for action the only purpose and effect of which is to impede the exercise of a fundamental freedom.”<sup>179</sup>

In short, the question in injunction applications based on claims of trespass should not be whether the defendant’s continuing possession of the land is as of right, but whether the defendant claims a right to do what it is doing that is independent of the applicant’s wishes. This analysis is particularly important in cases raising *Charter* issues, in which the defendant’s constitutional rights must be weighed against the applicant’s claim for relief.

Second, trespass should not weigh heavily in favour of an injunction where the defendant’s conduct is not indisputably unlawful. In *Gateway Casinos v BCGEU*, Bauman J rejected the plaintiff’s argument that it need not establish irreparable harm or balance of convenience once it showed a *prima facie* case of trespass, because the activity of the defendant trade union was not “indisputably unlawful.”<sup>180</sup> That case revolved around the scope of a statutory “safe harbour” prohibiting actions for petty trespass to land to which a member of the public ordinarily has access, arising out union activity occurring at or near but outside entrances and exits to an employer’s workplace. This issue does not arise in homeless encampment cases, but one of the considerations cited by the court as tipping the balance of convenience in favour of an injunction was that the defendant union could easily carry on its organizing activities from the public sidewalk surrounding the facility.<sup>181</sup> This

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<sup>176</sup> *Evans*, *supra* note 57; *VFPA v Brett*, *supra* note 2.

<sup>177</sup> *Patel*, *supra* note 19 at \_\_ (“it is for the respondents to show that they have some right which is independent of the wishes of the appellants to do that which they seek to do and have done”).

<sup>178</sup> *Ibid.*

<sup>179</sup> *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 155 (quoting Hugessen JA in the court below).

<sup>180</sup> *Gateway Casinos v BCGEU*, 2007 BCSC 1175 at para 20.

<sup>181</sup> *Ibid* at para 30.

factor should apply by analogy to tilt the balance in the opposite direction in homeless encampment cases, to the extent that the defendants cannot easily find shelter elsewhere.

Third, courts should not allow public sector landowners to have their cake and eat it too, by being treated simultaneously as a private landowner entitled to an injunction to restrain trespass and a public authority entitled to a statutory injunction to restrain contravention of legislation. So far *VFPA v Brett* is the only homeless encampment case in which a BC court has done so, and it should be the last. In that case, Hinkson CJSC allowed the Port Authority to claim that it was merely a landowner enforcing its private property rights and at the same time a public authority enforcing public rights. An applicant should not be allowed to have it both ways. Either it comes to court as a public authority seeking to enforce compliance with legislation enacted in the public interest, or it comes as a private actor seeking to protect its private property rights.

#### (iv) Conclusion: It is time to pick the bar up off the ground

With few exceptions, the current homeless encampment injunction case law in BC law reflects a highly distorted weighing of the fundamental interests at stake. The case law pits interests in recreation, comfort, aesthetics and orderliness against the health, safety and survival of people experiencing homelessness, and almost always finds that the former interests outweigh the latter. *VFPA v Brett* went even farther, ruling effectively that a property owner's abstract entitlement to the use of its land outweighs homeless people's interest in health, safety and survival.<sup>182</sup> *VFPA v Brett* and the few other BC decisions that allow trespass and statutory injunction principles to short-circuit or dominate the *RJR-MacDonald* inquiry effectively drop the already low bar for interlocutory injunctions against homeless encampments onto the ground, because government owners can almost always make the case that the defendants are technically trespassing or violating some enactment, even if no tickets have been issued or charges laid.

As if this were not enough, I will now show that not only are courts wrong to relax the *RJR-MacDonald* test, they should actually strengthen it by applying a "strong *prima facie* case" standard to the first prong.

### C. The standard for the first prong is a strong *prima facie* case

The first prong of the *RJR-MacDonald* test deals with the merits of the applicant's case. Normally, the applicant need only show that there is a "fair" or "serious" question to be tried. This is a low threshold and involves only a cursory consideration of the merits to determine that the plaintiff's case is not frivolous or vexatious.<sup>183</sup> A higher threshold of a "strong *prima facie* case" must be met in certain circumstances, however. One is when issuance of the injunction will amount to a final determination of the action.<sup>184</sup> Another is when the applicant seeks a mandatory injunction.<sup>185</sup> Both of these circumstances are true

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<sup>182</sup> *VFPA v Brett*, *supra* note 2 at para 107 ("most importantly ... the plaintiff is entitled to the use of its land").

<sup>183</sup> *CBC*, *supra* note 116 at para 12.

<sup>184</sup> *RJR-MacDonald*, *supra* note 3 at 338.

<sup>185</sup> *CBC*, *supra* note 116.

in most homeless encampment cases. And yet not a single such case in BC of which I am aware has applied this higher threshold. *VFPA v Brett* is therefore not alone in this respect.

First, as a practical matter, an interlocutory injunction evicting a homeless encampment usually brings the case to an end. Eviction is the main remedy sought by the government plaintiffs in such cases. Once it is granted they have no reason to go to trial. Moreover, eviction is a fatal blow to the defendants due to the difficulty defence counsel have maintaining contact with dispersed homeless clients after eviction and the unlikelihood that the trial court would ultimately order an encampment restored, even if the defendants prevail at trial. The best defendants can usually hope for is to be allowed to remain where they are until trial, when they will have a chance to argue that their removal would violate the *Charter*.

BC judges have occasionally recognized that granting an interlocutory injunction evicting a homeless encampment will effectively put an end to the case. Hinkson CJSC, for example, noted in one case that an interlocutory injunction “often becomes the entire remedy in an action,”<sup>186</sup> while Walsh J commented that “typically, the injunction becomes the final remedy.”<sup>187</sup>

The law is clear: the higher threshold of a strong *prima facie* case must be met if the injunction would amount to a final determination.<sup>188</sup> The circumstances in which this exception applies are legion, despite the Supreme Court’s prediction that they would be rare.<sup>189</sup> As noted, they are present in most homeless encampment cases.

Second, since 2018 Canadian law has been clear that the strong *prima facie* case standard also applies to mandatory injunctions, when the Supreme Court of Canada ruled in *R v CBC* that “on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant’s case at the first stage of the *RJR-MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case.”<sup>190</sup> Justice Brown explained the rationale for this higher standard:

A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise “put the situation back to what it should be”, which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, “the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial”. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in

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<sup>186</sup> *Adamson #1*, *supra* note 54 at para 18, quoting *Premium Weatherstripping Inc v Ghassemi*, 2016 BCCA 20 at para 7.

<sup>187</sup> *Wallstam*, *supra* note 54 at para 49.

<sup>188</sup> See also *Prince Rupert Grain Ltd v Grain Workers’ Union, Local 333*, 2002 BCCA 641; *Gateway Casinos*, *supra* note 180; *Sam*, *supra* note 126; *Taseko Mines Ltd v Tsilhqot’in National Government*, 2019 BCSC 1507; *O’Brien & Fuerst Logging Ltd v White*, 2019 BCSC 2011.

<sup>189</sup> Sharpe, *supra* note 154 at para 2.210; Berryman, *supra* note 117 at 43.

<sup>190</sup> *CBC*, *supra* note 116 at para 15 (emphasis in original).

favour of the plaintiff, further demand what the Court described in *RJR-MacDonald* as “extensive review of the merits” at the interlocutory stage.<sup>191</sup>

Distinguishing between a mandatory and prohibitive injunction can be difficult and requires the judge “to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought”:

In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.<sup>192</sup>

If the practical consequence of the injunction is to require the defendant “to undertake a positive course of action, such as taking steps to restore the *status quo*” to what it was before the cause of action arose, the injunction is mandatory.<sup>193</sup>

The injunction sought in *VFPA v Brett* contained both mandatory and prohibitive language. It required the defendants to vacate and cease occupation of the site; remove all tents, shelters, personal chattels, rubbish and other things; and refrain from re-entering the Occupied Area except as authorized by the Port Authority.<sup>194</sup> This injunction was similar to those in other homeless encampment cases, which often require the defendants to do some combination of the following:

- Vacate and cease to occupy or reside at the site;
- Remove all tents, structures, shelters, personal belongings, fences or obstructions;
- Comply with fire safety orders or municipal bylaws;
- Verify their identity to the plaintiff with government-issued picture identification or submit to the creation of a picture identity document;
- Declare to the plaintiff their intentions regarding transition into housing; and
- Cease erecting tents, structures and shelters, setting fires or depositing waste at the site.

All but the last of these clearly require the defendants to undertake a positive course of action. The last can be interpreted as requiring them to refrain from certain actions. The injunctions also typically include terms that are clearly prohibitive, for example requiring the defendants not to re-enter, trespass on, occupy or otherwise use or interfere with the use of the site, or not to hinder, obstruct or prevent the plaintiff from entering the site and carrying out the terms of the order. But in substance and practical effect, these injunctions are mandatory: they require the defendants to take positive steps to dismantle the encampment, vacate the site and restore the pre-encampment *status quo*. This falls squarely within Justice Brown’s definition of a mandatory injunction.

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<sup>191</sup> *Ibid* (citations omitted); see also *West Moberly First Nations v British Columbia*, 2018 BCSC 1835 at para 229; *Yellow Cab Company Ltd v Passenger Transportation Board*, 2020 BCSC 162 at para 28.

<sup>192</sup> *CBC*, *ibid* at para 16.

<sup>193</sup> *Ibid*; see also *TELUS Communications Inc v Shaw Communications Inc*, 2020 BCSC 1354 at para 49.

<sup>194</sup> *VFPA v Brett*, *supra* note 2 at para 116.



Courts have held that injunctions aimed at terminating a defendant's wrongful occupation of land and restoring the plaintiff's rightful occupation are mandatory. For example, an injunction restraining defendants from leasing certain lands to third parties and from interfering with or preventing the applicant's use of those lands was held to be mandatory despite its apparently prohibitive language, because in essence the applicant sought to restore his earlier occupation of land that he claimed the defendants were occupying wrongfully. The court explained:

In this case, Mr. Wilson is asking for more, in my view, than an order that simply requires the defendants to refrain from acting. Granted, the portion of the injunctive relief that would restrain the defendants from entering into third party leases would not require any positive action on their part. But Mr. Wilson seeks more than that. He wants an order that would restrain the defendants from preventing or interfering with him as he returns his cattle to the east pasture, and uses that land. At present, the defendants have possession and control of that land. Mr. Wilson's cattle are not currently on that pasture land, and have not been for more than a year. Therefore, the practical effect of the order Mr. Wilson seeks is that the defendants would be required to take a positive course of action, namely vacating the east pasture in favour of Mr. Wilson until the dispute is resolved. This would amount to what Justice Brown described in para. 15 of *CBC* as "taking steps to restore the *status quo*", or to "put the situation back to what it should be" from Mr. Wilson's perspective. An order that requires such action is, in injunctive relief terms, mandatory.<sup>195</sup>

This is precisely what the injunctions in *VFPA v Brett* and most other homeless encampment cases have sought. Yet strangely, not one BC homeless encampment interlocutory injunction decision of which I am aware discusses the mandatory or prohibitive character of the order sought, though a few have referred to them as mandatory without discussion.<sup>196</sup> None, not even those decided after *CBC*, has applied the strong *prima facie* case standard. Only one decision even mentions this standard, but takes no position on it. In the 2022 case of *Johnny*, the City of Prince George characterized the injunction it sought as mandatory and argued that *CBC* was the governing test—namely, *RJR-MacDonald* with a strong *prima facie* case as the standard for the first prong.<sup>197</sup> The court neither accepted nor rejected this submission, nor did it articulate a test for issuing the injunction. Rather, it found that the City had breached Hinkson CJSC's prior order denying the City's petition for a final injunction clearing the same encampment.<sup>198</sup> Under that earlier order, the encampment was permitted to stay unless and until the City demonstrated available and accessible housing and daytime facilities for its occupants. The court held that the City had not satisfied these preconditions for dismantling the encampment and was thus not entitled to an injunction.<sup>199</sup>

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<sup>195</sup> *Wilson v Adams Estate*, 2019 SKQB 39 at para 42.

<sup>196</sup> Eg *Mickelson*, *supra* note 78 at para 1; *Sterritt*, *supra* note 97 at para 1; *Saanich v Brett #1*, *supra* note 52 at para 44.

<sup>197</sup> *Johnny*, *supra* note 77 at paras 30-31.

<sup>198</sup> *Stewart*, *supra* note 7.

<sup>199</sup> *Johnny*, *supra* note 77 at para 83.

The standard applied to the first prong of the *RJR-MacDonald* framework matters because “serious question” is a significantly lower bar than “strong *prima facie* case.” Justice Brown described the latter threshold in *CBC*:

Common to all these formulations [of “strong *prima facie* case”] is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.<sup>200</sup>

This is not merely a higher threshold for the plaintiff’s affirmative case. It also changes the scope of inquiry. Defences are excluded from the serious question analysis because they are not part of the plaintiff’s affirmative case, though they may be considered at the balance of convenience stage.<sup>201</sup> This applies to *Charter* defences, as Pitfield J explained in *Mickelson*:

Counsel for the defendants claimed that I should factor their constitutional objections into the determination whether the Parks Board has demonstrated that there is a fair question to be tried. With respect, I disagree. In relation to this condition, the question is whether the applicant has demonstrated that it has raised a question to be tried. The issue must be assessed from the applicant’s perspective and not from the perspective of any defence that may be advanced by a defendant. ... Constitutional validity is not part of the Parks Board case. Constitutional invalidity is part of the defence case.<sup>202</sup>

By contrast, the strong *prima facie* case standard requires the court to factor the strength of the defences raised by the defendant, including *Charter* claims, into the initial merits stage of the analysis.<sup>203</sup>

Commentators and courts have objected that applying the strong *prima facie* case threshold for mandatory interlocutory injunctions will hinder access to justice for individuals who allege violation of their constitutional rights.<sup>204</sup> This concern does not arise in homeless encampment eviction cases. It arises when *individuals* apply for interlocutory injunctions in support of proceedings they have instituted *against government* actors. Courts have balked at applying the strong *prima facie* case threshold, for example, to applications for interlocutory injunctions requiring government to provide

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<sup>200</sup> *CBC*, *supra* note 116 at para 17 (citations omitted).

<sup>201</sup> *Mickelson*, *supra* note 78 at para 23; *O’Flynn-Magee*, *supra* note 50 at para 54; *Courtoreille*, *supra* note 85 at paras 77, 90; *Saanich v Brett #1*, *supra* note 52 at para 84.

<sup>202</sup> *Mickelson*, *ibid*; see also *Courtoreille*, *ibid* at para 76.

<sup>203</sup> See, eg, *Fernandes v Legacy Financial Systems, Inc*, 2020 BCSC 885 at para 26 (“there is a strong *prima facie* case, and no obvious defences”); *Quizno’s Canada Restaurant Corp v. 1450987 Ontario Corp*, 2009 CanLII 20708 (ON SC) at para 90 (“In reaching my conclusions about the strength of the case ..., I have considered the [defendants’] argument that they have a strong defence and counterclaim”).

<sup>204</sup> Eg Kent Roach, *Constitutional Remedies in Canada*, 2<sup>nd</sup> ed (Toronto: Thomson Reuters, 2019) (looseleaf) at para 7.171.

online schooling in the context of a *Charter* challenge launched by parents against a government's COVID-19 pandemic back to school plan,<sup>205</sup> and requiring the government to release someone held in immigration detention.<sup>206</sup>

This concern does not arise where a *government actor* applies for an interlocutory injunction and defendants invoke the *Charter* in their defence, which is the case in most homeless encampment litigation.<sup>207</sup> In fact, the same concern for access to justice supports the strong *prima facie* case standard in such cases, because this standard lowers the barriers to litigating homeless defendants' *Charter* claims on the merits by raising the threshold for government plaintiffs to shut down the entire case pre-emptively at the interlocutory stage.

Unfortunately, none of the issues discussed in this section was raised in *VFPA v Brett*. The defendants conceded that the Port Authority raised a serious question and did not argue for the higher threshold of a strong *prima facie* case. This was a missed opportunity to bring BC homeless encampment case law into line with Supreme Court of Canada jurisprudence.

#### **D. Courts should avoid prejudging contested constitutional and evidential issues**

The question of the correct threshold for the merits prong of the *RJR-MacDonald* analysis is closely connected to the question of whether courts should attempt to resolve highly contested constitutional and evidential issues at the interlocutory stage. As we saw, the strong *prima facie* case standard requires an assessment not just of the plaintiff's claim but of the respondent's defences, to determine whether the plaintiff is ultimately likely to prevail at trial. This inquiry can easily draw courts into dangerous territory as they attempt to settle complex, contested questions of fact and law on affidavit evidence alone. This problem is not unique to the strong *prima facie* case test but permeates the adjudication of interlocutory injunction applications in homeless encampment cases.

The difficulties in deciding complex, contested question of fact and law at an interlocutory stage are well known. The parties—especially the defendants—usually have not prepared their cases fully or engaged in any discovery. The court must decide the application on affidavits alone, usually without the benefit of cross-examination and with few other means to assess credibility when evidence conflicts. And it must do so in haste, with little time for deliberation. In the foundational case of *American Cyanamid*, Lord Diplock remarked:

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.<sup>208</sup>

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<sup>205</sup> *Karounis c Procureur général du Québec*, 2020 QCCS 2817 at para 12.

<sup>206</sup> *Calin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 731 at para 14.

<sup>207</sup> In rare cases, homeless people file suit and apply for an interlocutory injunction against governments. See, eg, *Black v Toronto (City)*, 2020 ONSC 6398.

<sup>208</sup> *American Cyanamid Co v Ethicon Ltd*, [1975] A.C. 369, [1975] 1 All ER 504 (HL) at 510 (*American Cyanamid*), quoted in *Metropolitan Stores*, *supra* note 82 at 130.

The leading text on injunctions in Canada puts it this way:

At this early stage of the proceedings, the parties will not have fully prepared the case and the judge hearing the matter as an interlocutory motion will have less time to sift the factual and legal issues than at trial. ... Usually, the case will be presented on affidavits. Without the benefit of pleadings and full discovery, the factual and legal issues may well be only roughly defined and, perhaps, not even fully investigated by the parties themselves. It will often be difficult, and sometimes impossible, to predict accurately the final result.<sup>209</sup>

This general concern is accentuated in cases raising *Charter* issues. The Supreme Court of Canada emphasized in *RJR-MacDonald* that “the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding” are compounded in constitutional litigation by “the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.”<sup>210</sup> Earlier, in *Metropolitan Stores*, the Court warned:

Constitutional adjudication is particularly unsuited to the expeditious and informal proceedings of a weekly court where there are little or no pleadings and submissions in writing, and where the Attorney General of Canada or of the Province may not yet have been notified as is usually required by law.<sup>211</sup>

The difficulty is also accentuated in cases where the strong *prima facie* case standard applies. This standard often demands consideration of contested questions with strong factual components “that should in principle be decided at trial after full evidence has been presented, for both the plaintiff and the defence.”<sup>212</sup> Parties are tempted in such cases “to treat interlocutory proceedings as an effective preliminary trial, when the conditions traditionally thought necessary to make that effective, such as examination of witnesses, legal argument, and contemplative judicial time, are not present.”<sup>213</sup>

The inappropriateness of premature resolution of contested issues at the interlocutory stage has been recognized in some homeless encampment cases. Chief Justice Hinkson himself, in one of the rare BC cases refusing an interlocutory injunction to clear a homeless encampment from public land, emphasized that “many of the plaintiffs’ contentions are in dispute and cannot be resolved on affidavit evidence alone.”<sup>214</sup> Key issues on which the affidavits conflicted in that case, as in many homeless encampment

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<sup>209</sup> Sharpe, *supra* note 154 at para 2.70.

<sup>210</sup> *RJR-MacDonald*, *supra* note 3 at 335. See also *O’Flynn-Magee*, *supra* note 50 at para 41 (“constitutional arguments are properly examined at the trial of the matter to provide the parties sufficient time to prepare and to allow the Attorney General the opportunity to intervene”).

<sup>211</sup> *Metropolitan Stores*, *supra* note 82 at 130.

<sup>212</sup> *Ville de Montréal-Est c 2775328 Canada Inc*, 2018 QCCS 4951 at para 58 (my translation) (*Montréal-Est*).

<sup>213</sup> Berryman, *supra* note 117 at 32.

<sup>214</sup> *Adamson #1*, *supra* note 64 at para 182.

cases, included fire hazards, general health and safety, crime, interference with other uses of the site, the availability and feasibility of alternative shelter, and defendants' cooperation with or obstruction of public authorities.<sup>215</sup> Hinkson CJSC concluded that he was "unable to resolve many of these factual disagreements on affidavit evidence alone."<sup>216</sup>

The solution to this dilemma in interlocutory applications to clear homeless encampments from public land is neither to relax the strong *prima facie* case standard for the merits stage, nor to treat the interlocutory proceeding like a mini-trial. Rather, if determination of the application depends on complex, contested issues of fact and law that cannot and should not be resolved on the basis of affidavit evidence alone, the courts should reassert the extraordinary character of interlocutory injunctive relief. They should err on the side of caution and dismiss the application so that the contested evidentiary and constitutional issues can be addressed fully at trial.<sup>217</sup> They might also expedite the trial, as Justice Sharpe suggests in the leading text and as Hinkson CJSC did in *Adamson*.<sup>218</sup>

In *VFPA v Brett*, many of the Port Authority's contentions of fact and law upon which its application for an interlocutory injunction depended raised complex issues and were vigorously contested on the affidavit evidence. Hinkson CJSC's determination that the application was governed by the trespass and statutory injunction doctrines, not by the full *RJR-MacDonald* framework, led him to emphasize what he saw as the clear, essentially uncontested evidence of trespass and breach of regulations, while de-emphasizing the much more ambiguous and contested evidence relevant to the private or public character of the site, the nature and availability of *Charter* defences, the impacts of the COVID-19 pandemic on the case, the defendants' motivations in establishing the encampment, and all the factual matters usually at issue in homeless encampment cases—including health and safety, security, drug use, crime, sanitation, noise, available shelter alternatives, defendants' interactions with authorities, benefits of the encampment for its residents and impacts of the encampment on the surrounding community. He ignored or summarily dismissed much of the defendants' evidence on these points and uncritically accepted much of the applicant's. He both resolved "conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend" and decided "difficult questions of law which call for detailed argument and mature considerations," contrary to Lord Diplock's admonition.<sup>219</sup>

Resolution of complex, contested evidential and legal issues on affidavit evidence alone is also a problem in proceedings for final orders in some homeless encampment cases. In BC, if an enactment authorizes application to a court for an order, the case must proceed by way of petition, which is a summary proceeding heard in chambers.<sup>220</sup> Evidence is tendered by affidavit. Discovery of documents, oral examinations for discovery and pretrial conferences are unavailable.

As noted earlier, BC statutes authorize municipalities (and in the case of Vancouver, the Parks Board) to apply to court to enforce, or restrain contravention of, local bylaws.<sup>221</sup>

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<sup>215</sup> *Ibid* at paras 108, 182.

<sup>216</sup> *Ibid* at para 51.

<sup>217</sup> See, eg, *Montréal-Est*, *supra* note 212 at para 59.

<sup>218</sup> Sharpe, *supra* note 189 at para 2.230; *Adamson #1*, *supra* note 64 at para 187.

<sup>219</sup> *American Cyanamid*, *supra* note 208 at 510.

<sup>220</sup> Supreme Court Civil Rules, *supra* note 71, Rules 1-2(4), 2-1(2).

<sup>221</sup> *Community Charter*, *supra* note 95, s 274(1); *Vancouver Charter*, *supra* note 89, s 334(1).

If these local government bodies wish to obtain an injunction against a homeless encampment on land they own or manage, they thus have a choice between commencing a petition for a statutorily-authorized injunction and commencing a civil action for an injunction (often accompanied by a declaration, for example of trespass, nuisance or breach of bylaw). In practice, most homeless encampment injunctions in BC, interlocutory or final, have been sought in the context of civil actions.<sup>222</sup> Only a handful have been sought in the context of petitions, though the frequency of petitions is increasing.<sup>223</sup>

The problems with adjudicating injunctions affecting homeless encampments are less severe in petitions than in interlocutory applications. Petitions typically come on for hearing with more notice and less urgency, allowing the parties more time to gather evidence and formulate arguments and the court more time to deliberate. But they pose the same challenge of resolving disputes of material fact and law on the basis of affidavits alone, usually with no cross-examination.

In both petitions and interlocutory applications, the chambers judge has discretion to order cross-examination on affidavits,<sup>224</sup> but there is nothing in the reported decisions I have read to suggest that this has been done. The chambers judge also has discretion to order trial of a petition or interlocutory application.<sup>225</sup> The jurisprudence holds that the court should set a petition down for trial where there are disputes of fact or law and the party requesting trial is not bound to lose.<sup>226</sup> The BC Court of Appeal recently clarified that conflicts in affidavit evidence must relate to a material fact or raise a triable issue to justify converting a petition to an action.<sup>227</sup>

The fact that both interlocutory applications and petitions for injunctions against homeless encampments typically raise complex, contested issues of fact and law that cannot easily be resolved on affidavit evidence alone has not stopped courts from deciding them in most cases, but it is worth noting two cases in which BC judges exercised their discretion to convert petitions into actions and set them down for trial. In *Courtoreille*, the court ordered the City of Nanaimo's petition onto the trial list because of the issues it raised:

While a summary proceeding will often be appropriate for dealing with straightforward bylaw infraction or zoning matters, the issues that arise in this case are more complex. In particular, the response to petition filed by the respondents

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<sup>222</sup> *PRHC*, *supra* note 53; *Maurice*, *supra* note 25; *Mickelson*, *supra* note 78; *Sterritt*, *supra* note 97; *Provincial Capital Commission v Johnston*, 2005 BCSC 1397; *O'Flynn-Magee*, *supra* note 50; *Shantz #1*, *supra* note 55; *Shantz #2*, *supra* note 78; *Williams*, *supra* note 83; *Shantz #3*, *supra* note 5; *Adamson #1*, *supra* note 64; *Adamson #2*, *supra* note 64; *Evans*, *supra* note 57; *Wallstam*, *supra* note 66; *Saanich v Brett #1*, *supra* note 52; *Saanich v Brett #2*, *supra* note 7; *Scott*, *supra* note 8; *VFPA v Brett*, *supra* note 2.

<sup>223</sup> *Thompson*, *supra* note 113; *Courtoreille*, *supra* note 85; *Smith*, *supra* note 8; *Stewart*, *supra* note 7; *Bamberger*, *supra* note 7; *Johnny*, *supra* note 77. All decisions since *Smith* in 2020 have been rendered in the context of petitions, which may suggest that government plaintiffs increasingly consider this the preferable form of proceeding. See the Appendix for a breakdown of civil actions versus petitions in injunction decisions issued between 2000 and 2021.

<sup>224</sup> *Ibid*, Rule 22-1(4)(a).

<sup>225</sup> *Ibid*, Rule 22-1(7)(d).

<sup>226</sup> *British Columbia (Milk Marketing Board) v Saputo Products Canada GP / Saputo Produits Laitiers Canada SENC*, 2017 BCCA 247.

<sup>227</sup> *Ghag v Ghag*, 2021 BCCA 106.

raises constitutional issues concerning the Charter rights of homeless people. ... In my view, it is neither possible nor appropriate to determine the constitutional issues that arise in this case in a two-day summary proceeding and on the evidentiary record as it currently exists.<sup>228</sup>

In *Bamberger*, the court agreed with the defendants' contention that the Vancouver Parks Board's petition should be converted to an action to allow the constitutional issue to be pleaded and tried:

Here, the constitutional issues relating to daytime sheltering are clearly framed, though in a summary fashion. On the basis of *Courtoreille*, this is more than sufficient to refer this matter to the trial list.<sup>229</sup>

As noted earlier, however, the court ultimately decided to adjourn the matter pending the Parks Board's reconsideration of its orders clearing the encampment from CRAB Park.

The concern about deciding contested issues prematurely on the basis of hurriedly assembled affidavit evidence and preliminary legal argument is borne out by comparing the results of interlocutory and final injunction proceedings. As I reported in Part 3.A, homeless encampment defendants have lost in 84% of the interlocutory proceedings but only 33% of the final proceedings in my study of BC homeless encampment injunction decisions between 2000 and 2021. This suggests that the constitutional and evidentiary issues raised by defendants in these cases will often turn out to be valid if given the chance to be developed and explored on the merits, and that disposing of them prematurely at the interlocutory stage does not do them justice.

## 4. Conclusion: It is time to reaffirm the extraordinary character of interlocutory injunctions

Underlying all of the problems I have explored in this article is a failure to uphold the basic principle that an interlocutory injunction is a "drastic"<sup>230</sup> and extraordinary remedy insofar as it restrains the enjoined party's liberty of action before the merits of the other party's claim have been proven at trial.<sup>231</sup> "Given that an interlocutory injunction is an exceptional remedy," Gascon J of the Federal Court commented recently, "compelling circumstances are required to justify the intervention of the courts and the exercise of their discretion to grant the relief."<sup>232</sup> In homeless encampment cases, however, interlocutory injunctions

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<sup>228</sup> *Courtoreille*, *supra* note 85 at paras 50, 55.

<sup>229</sup> *Bamberger*, *supra* note 7 at para 174.

<sup>230</sup> *Google*, *supra* note 115 at para 23; *Sharpe*, *supra* note 189 at para 2.10.

<sup>231</sup> See, eg, *Teal Cedar Products Ltd v Mashari*, 2021 BCCA 353 at paras 10, 13; *Edward Jones v Voldeng*, 2012 BCCA 295 at para 55; *Cambie Surgeries Corp v British Columbia (Medical Services Commission)*, 2010 BCCA 396 at paras 3, 39; *Aetna Financial Services v Feigelman*, [1985] 1 SCR 2 at 10. See also *Stewart*, *supra* note 7 at para 103, *per* Hinkson CJSC ("An injunction is an extraordinary remedy and should only be granted where there are no other alternatives").

<sup>232</sup> *Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 at para 49; see also *Letnes v Canada (Attorney General)*, 2020 FC 636 at para 34.

evicting unhoused individuals from publicly-owned land are the norm, not the exception. With a success rate of 84%, interlocutory injunctions are the norm for an entire class of cases in BC.

In 2019, a Yellowhead Institute analysis of almost one hundred injunction cases arising out of disputes between First Nations, companies and governments over resource extraction and other activity on Indigenous territories without Indigenous consent revealed that 76% of injunction applications by companies against First Nations were granted, versus 19% for injunction applications by First Nations against companies and 18% for applications by First Nations against governments.<sup>233</sup> This report was met with widespread media attention and public outcry.<sup>234</sup> The success rate for injunctions against homeless encampments in BC is even higher for interlocutory proceedings (84%), and comparable for final and interlocutory proceedings taken together (77%). If such disproportionate success rates are a cause for concern in relation to First Nations, they should also be a cause for concern in relation to people experiencing homelessness.

This transformation of interlocutory injunctions from the exception to the norm is intensified and accelerated in the few decisions, including *VFPA v Brett*, that apply the statutory injunction or trespass exception rather than the *RJR-MacDonald* three-pronged inquiry. These exceptions turn the principle of exceptionality on its head, dictating the issuance of an interlocutory injunction *unless* the defendants can show exceptional circumstances. It is no surprise that most BC courts have refused to apply these rules strictly in homeless encampment cases. The few that have applied it to evict some of the most vulnerable and marginalized members of society from their homes demonstrate rather starkly where their priorities lie.

Instead of continuing down this dark road, courts should reassert the extraordinary character of interlocutory relief. Denying interlocutory eviction injunctions and allowing these cases to go to trial on the merits would increase the pressure on governments to come up with negotiated solutions to these encampments and the homelessness crisis more broadly. It would also give courts the chance to resolve pressing legal issues including in what circumstances there might be a right to shelter day and night on public property, on the basis of fully developed evidentiary records and legal arguments.

To conclude, it might be useful to summarize my argument in the form of a framework for deciding applications for interlocutory injunctions to clear homeless encampments from publicly owned land. Courts faced with such applications should:

1. Apply all three prongs of the *RJR-MacDonald* framework, considering allegations of trespass or statutory breach, the strength of the respondents' defences including *Charter* claims, and the multifarious public and private interests at stake as part of a context-sensitive inquiry into what is most just and equitable in the circumstances.
2. Assess the first prong of *RJR-MacDonald* framework on a strong *prima facie* case standard, since the injunction sought is mandatory and will likely have the practical

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<sup>233</sup> Hayden King et al, *Land Back: A Yellowhead Institute Red Paper* (Toronto: Yellowhead Institute, 2019) 10, 30.

<sup>234</sup> Eg Jorge Barrera, "Legal playing field tilted against First Nations in resource development battles, says new report," *CBC News* (29 Oct 2019), online: CBC News, <https://www.cbc.ca/news/indigenous/yellowhead-institute-report-resource-injunctions-1.5338902>.



effect of a final determination. The applicant must show that it is very likely to succeed at trial, taking into account the defences or counterclaims raised by the defendants, including *Charter* claims. This threshold, which is significantly higher than a serious question to be tried, requires the court to be convinced not just that the plaintiff is very likely to prove its affirmative case at trial, but also that the defendants are very unlikely to mount a successful defence. Given the rapidly evolving character of the law related to homeless encampments, this should set a high bar.

3. Avoid prejudging complex, contested issues of fact or law at the interlocutory stage without the benefit of trial. If determination of the application depends on complex, contested evidentiary or legal issues that cannot and should not be resolved on the basis of affidavit evidence and preliminary argument alone, dismiss the application so that these issues can be addressed fully at trial. Consider expediting the trial to limit any ongoing harm to the parties or public.

The decision in *VFPA v Brett* presents an object lesson in how not to approach these issues. It incorrectly allowed the trespass and statutory injunction tests to short-circuit the three-pronged *RJR-MacDonald* test for an interlocutory injunction; failed to apply the correct standard of proof to the first prong of the *RJR-MacDonald* test, which requires a “strong *prima facie* case” due to the mandatory character of the injunction sought and the likelihood that it will become the final remedy; inappropriately resolved highly contested evidential and constitutional issues that should not have been resolved on affidavit evidence alone; and lost sight of the drastic and extraordinary character of interlocutory injunctive relief. It is a precedent that should not stand.

## Appendix. BC Homeless encampment injunction decisions, 2000-2021

Case	Year	Decision type	Main proceeding	Site description	Result	Interlocutory injunction test
<i>Provincial Rental Housing Corp v Doe</i> , 2002 CarswellBC 3738 (SC), <i>rev'd sub nom Provincial Rental Housing Corp v Hall</i> , 2005 BCCA 36	2002 (rev'd 2005)	Interlocutory	Civil action	Boarded up building owned by provincial agency (Woodwards building, Vancouver)	Injunction denied (on appeal, reversing initial decision)	<i>RJR-MacDonald</i> (implicit)
<i>Vancouver (City) v Maurice</i> , 2002 BCSC 1421, <i>aff'd</i> 2005 BCCA 37	2002 (aff'd 2005)	Interlocutory	Civil action	Public sidewalk (outside Woodwards building, Vancouver)	Injunction granted	<i>Thornhill</i>
<i>Vancouver Board of Parks and Recreation v Mickelson</i> , 2003 BCSC 1271	2003	Interlocutory	Civil action	City park (Thornton Park, Vancouver)	Injunction granted	<i>RJR-MacDonald</i>
<i>Vancouver Board of Parks and Recreation v Sterritt</i> , 2003 BCSC 1421	2003	Interlocutory	Civil action	City park (CRAB Park, Vancouver)	Injunction granted	<i>RJR-MacDonald</i>
<i>Provincial Capital Commission v Johnston</i> , 2005 BCSC 1397	2005	Interlocutory	Civil action	Enclosed grounds of national historic site (St Ann's Academy, Victoria)	Injunction granted	<i>RJR-MacDonald</i>
<i>Victoria (City) v Thompson</i> , 2011 BCSC 1810	2011	Interlocutory	Petition	City park (Centennial Square, Occupy Victoria)	Injunction granted	<i>RJR-MacDonald</i>
<i>Vancouver (City) v O'Flynn-Magee</i> , 2011 BCSC 1647	2011	Interlocutory	Civil action	Public art gallery plaza (Occupy Vancouver)	Injunction granted	Not decided
<i>Abbotsford (City) v Shantz</i> , 2013 BCSC 2426 ( <i>Shantz #1</i> )	2013	Interlocutory	Civil action	City-owned parking lot beside public park (Abbotsford)	Injunction granted	Not decided
<i>Abbotsford (City) v Shantz</i> , 2013 BCSC 2612 ( <i>Shantz #2</i> )	2013	Interlocutory	Civil action	City park (Jubilee Park, Abbotsford)	Injunction granted	<i>RJR-MacDonald</i>
<i>Vancouver Board of Parks and Recreation v Williams</i> , 2014 BCSC 1926	2014	Interlocutory	Civil action	City park (Oppenheimer Park, Vancouver)	Injunction granted	<i>RJR-MacDonald</i>
<i>Abbotsford (City) v Shantz</i> , 2015 BCSC 1909 ( <i>Shantz #3</i> )	2015	Final, trial	Civil action	City parks and streets (Abbotsford)	Injunction denied	Not applicable

<b>Case</b>	<b>Year</b>	<b>Decision type</b>	<b>Main proceeding</b>	<b>Site description</b>	<b>Result</b>	<b>Interlocutory injunction test</b>
<i>British Columbia v Adamson, 2016 BCSC 584 (Adamson #1)</i>	2016	Interlocutory	Civil action	Courthouse grounds (Victoria)	Injunction denied	<i>RJR-MacDonald</i>
<i>British Columbia v Adamson, 2016 BCSC 1245 (Adamson #2)</i>	2016	Interlocutory	Civil action	Courthouse grounds (Victoria)	Injunction granted	<i>RJR-MacDonald</i>
<i>Fraser Health Authority v Evans, 2016 BCSC 1708</i>	2016	Interlocutory	Civil action	Unfenced portion of fenced and boarded up former public hospital (Abbotsford)	Injunction granted	Trespass
<i>Vancouver (City) v Wallstam, 2017 BCSC 937</i>	2017	Interlocutory	Civil action	Enclosed, locked vacant city-owned lot (Vancouver)	Injunction denied	<i>RJR-MacDonald</i>
<i>Saanich (District) v Brett, 2018 BCSC 1648 (Saanich v Brett #1)</i>	2018	Interlocutory	Civil action	City park and provincial highway verge (Saanich)	Injunction granted	<i>RJR-MacDonald</i>
<i>Nanaimo (City) v Courtoreille, 2018 BCSC 1629</i>	2018	Interlocutory	Petition	Enclosed, locked vacant city-owned lot (Nanaimo)	Injunction granted	<i>RJR-MacDonald</i>
<i>Saanich (District) v Brett, 2018 BCSC 2068 (Saanich v Brett #2)</i>	2018	Final, chambers	Civil action	City park and provincial highway verge (Saanich)	Injunction granted	Not applicable
<i>Maple Ridge (City) v Scott, 2019 BCSC 157</i>	2019	Interlocutory	Civil action	Undeveloped lots owned by city & provincial crown corporation; unopened road allowance ("Anita Place," Maple Ridge)	Injunction granted	<i>RJR-MacDonald</i>
<i>Vancouver Fraser Port Authority v Brett, 2020 BCSC 876</i>	2020	Interlocutory	Civil action	Unfenced federally owned parking lot & green space (Vancouver)	Injunction granted	<i>Thornhill</i> and trespass
<i>Victoria (City) v Smith, 2020 BCSC 1173</i>	2020	Interlocutory	Petition	City park (Beacon Hill, Vancouver)	Injunction granted	<i>Thornhill</i>
<i>Prince George (City) v Stewart, 2021 BCSC 2089</i>	2021	Final, chambers	Petition	City owned vacant lot and green space (Prince George)	Injunction denied (substantially)	Not applicable