Reconsidering the Test for Interlocutory Injunctions Affecting Homeless Encampments: A critical assessment of BC case law

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Citation Information

DOI: https://doi.org/10.60082/2817-5069.3980
https://digitalcommons.osgoode.yorku.ca/ohlj/vol61/iss1/4

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Abstract
Using a 2020 decision in which a judge granted an interlocutory injunction evicting a homeless encampment from an unused, unfenced, publicly-owned parking lot in the midst of the COVID-19 pandemic as a springboard, I present the first comprehensive survey of British Columbia homeless encampment injunction decisions, revealing a whopping 85% success rate when governments seek interlocutory injunctions against encampments. The stakes are high: Interlocutory injunction applications dominate homeless encampment litigation, exposing encampment residents to continual displacement and elevated risks of isolation, illness, violence, and death. I argue that courts hearing applications for interlocutory injunctions against homeless encampments on publicly-owned land should apply the full three-pronged RJR-MacDonald framework; apply a strong prima facie case standard to the first prong; avoid prejudging complex, contested evidential or legal issues at the interlocutory stage, on the basis of affidavit evidence alone; and raise the bar for interlocutory injunctions to a height that reflects the fundamental interests at stake in homeless encampment cases.

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Reconsidering the Test for Interlocutory Injunctions Affecting Homeless Encampments: A critical assessment of BC case law

STEPAN WOOD

Using a 2020 decision in which a judge granted an interlocutory injunction evicting a homeless encampment from an unused, unfenced, publicly-owned parking lot in the midst of the COVID-19 pandemic as a springboard, I present the first comprehensive survey of British Columbia homeless encampment injunction decisions, revealing a whopping 85% success rate when governments seek interlocutory injunctions against encampments. The stakes are high: Interlocutory injunction applications dominate homeless encampment litigation,

1. Canada Research Chair in Law, Society and Sustainability, and Director, Centre for Law and the Environment, Allard School of Law, University of British Columbia (“UBC”). I was involved on a pro bono basis with Vancouver Fraser Port Authority v Brett. 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 UBC 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 British Columbia 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 article is dedicated to the people they represent: the residents of homeless encampments.
exposing encampment residents to continual displacement and elevated risks of isolation, illness, violence, and death. I argue that courts hearing applications for interlocutory injunctions against homeless encampments on publicly-owned land should apply the full three-pronged RJR-MacDonald framework; apply a strong prima facie case standard to the first prong; avoid prejudging complex, contested evidential or legal issues at the interlocutory stage, on the basis of affidavit evidence alone; and raise the bar for interlocutory injunctions to a height that reflects the fundamental interests at stake in homeless encampment cases.

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. 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 phenomenon of homeless encampments, by effectively removing the already inappropriately low bar for granting interlocutory injunctions to evict homeless encampments from publicly-owned land.

The encampment in question began on 8 May 2020, just as the clearance of 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.

2. Vancouver Fraser Port Authority v Brett, 2020 BCSC 876 [VFPA v Brett].
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)* (“*RJR-MacDonald*”)—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, the Port Authority 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.

The decision’s treatment of the test for an interlocutory injunction was problematic for four main reasons. First, in allowing the trespass and statutory injunction tests to displace the three-pronged *RJR-MacDonald* test, it went against the weight of British Columbia (“BC”) authority, which insists rightly that the full *RJR-MacDonald* test applies whenever defendants’ Charter rights are at play. This is almost always the case in homeless encampment litigation. Trespass or statutory breach 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 are true in most homeless encampment cases, including this one. Third, the decision inappropriately prejudged complex, contested constitutional and evidentiary issues at the interlocutory stage, on the basis of affidavit evidence alone. Finally, the decision ignored the principle that an interlocutory injunction is a drastic and extraordinary remedy.

The first problem—short-circuiting the *RJR-MacDonald* test—went against the weight of authority, 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

3. [1994] 1 SCR 311 [*RJR-MacDonald*].
on the basis of affidavits alone, and have made interlocutory evictions the norm rather than the exception in such cases. The low bar applicants already faced in such cases was more or less removed in VFPA v Brett, highlighting the need to raise the bar closer to a height at which it can do justice to the rights and interests at stake in homeless encampment cases.

In Part I, I describe the VFPA v Brett case. I begin Part II by presenting the first comprehensive survey of all reported BC homeless encampment injunction decisions this century (Part II(A)). The rest of Part II is devoted to demonstrating that applicants for interlocutory injunctions against homeless encampments must satisfy all three prongs of the RJR-MacDonald test (Part II(B)), that the test for the first prong is a “strong prima facie case” (Part II(C)), and that courts should stop deciding complex, contested constitutional and evidential issues at the interlocutory stage, on the basis of affidavit evidence alone (Part II(D)). I conclude by arguing that courts must reassert the drastic and extraordinary character of interlocutory injunctions and repudiate the tendency, demonstrated clearly by the case law to date, to treat interlocutory injunctions as the norm in homeless encampment litigation.

I. 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, 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.” The Port Authority, a federal government agency created by letters patent issued under the Canada Marine Act, managed the land as an agent of the federal Crown. The encampment site was 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

4. The parking lot was a rough parallelogram around 130 m long and 50 m wide, with an area of around 6,300 m². The grassy area was a triangle of around 2500 m², for a total of around 8,800 m² or 0.9 ha. Dimensions estimated by the author using the “measure distance” tool in Google Maps.
5. VFPA v Brett, supra note 2 at para 4.
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.**

NOTES: Pre-encampment Google Earth Pro satellite image of the vicinity of the encampments discussed in this article, showing (1) VFPA parking lot (site of encampment in **VFPA** v **Brett**), (2) CRAB Park and (3) Strathcona Park (sites of later encampments), (4) Oppenheimer Park (site of earlier encampment), (5) cruise ship terminal, (6) SeaBus terminal, (7) heliport, (8) CPR rail yard, (9) Centerm container terminal.

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.\(^7\) 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, 100 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 unused, 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 15 May 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 (“Regulations”).\(^8\) The Port Authority served the defendants with notice of the action and interlocutory application on 20 May.\(^9\) After some extensions, the parties ultimately filed more than 900 pages of documents and 82 minutes of video evidence.\(^10\)

The Port Authority’s application requested an interlocutory injunction requiring the occupants to vacate and cease occupying the site, remove all tents,

\(^7\) 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.

\(^8\) See VFPA v Brett, supra note 2 (Notice of Civil Claim), citing Port Authorities Operations Regulations, SOR/2000-55 [Regulations].

\(^9\) Ibid (Notice of Application).

\(^10\) Ibid (Application Record); Ibid (Written argument, Applicant); Ibid (Written argument, Respondents). The application record, updated on 4 June 2020, spanned 824 pages. The written arguments of the applicant and respondents spanned 45 pages and 32 pages, respectively. Several affidavits were also filed at the last minute.
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.\textsuperscript{11}

Chief Justice Hinkson heard the application on 4 and 9 June 2020 and gave judgment on 10 June. He granted the injunction as requested except for shortening its duration to fifteen days and omitting the police enforcement clause.\textsuperscript{12} He held that the Port Authority was entitled to an injunction under either or both of two exceptions to \textit{RJR-MacDonald}: one for trespass, the other for statutory injunctions.

The trespass exception holds that “\textit{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.”\textsuperscript{13}

In BC, it is often cited to two leading cases, \textit{Terbasket v Harmony Co-ordination Services Ltd} (“\textit{Terbasket}”)\textsuperscript{14} and \textit{Board of School Trustees of School District No 27 (Cariboo-Chilcotin) v Van Osch} (“\textit{Van Osch}”).\textsuperscript{15} Chief Justice Hinkson 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,”\textsuperscript{16} 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 \textit{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

\textsuperscript{11.} \textit{Ibid} at para 116.

\textsuperscript{12.} \textit{Ibid} at paras 117-18, 131. The issue of police enforcement clauses is beyond the scope of this article. See \textit{e.g.} Kate Mitchell, “Challenging the Use of Police Enforcement Clauses in Ontario” (2018) 38 Can Fam LQ 85.

\textsuperscript{13.} \textit{VFPA v Brett}, \textit{ibid} at paras 38-39, quoting \textit{Patel v WH Smith (Eziot) Ltd}, [1987] 1 WLR 853 (CA) at 858-59 (per Balcombe LJ) \textit{[Patel]}.

\textsuperscript{14.} 2003 BCSC 17 \textit{[Terbasket]}.

\textsuperscript{15.} 2004 BCSC 1827 \textit{[Van Osch]}.

\textsuperscript{16.} \textit{VFPA v Brett}, \textit{supra} note 2 at para 76.
authority over the area." 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.

The statutory injunction test, known in BC as the Maple Ridge (District) v Thornhill Aggregates Ltd (“Thornhill”) rule after the leading case, 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.” 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. 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 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.\(^22\)

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.*”\(^23\) 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.\(^24\)

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,”\(^25\) 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.\(^26\) 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.”\(^27\) 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

\(^{22}\) *Ibid* at para 57.
\(^{23}\) *Ibid* at para 98.
\(^{24}\) *Ibid* at para 101.
\(^{25}\) *Ibid* at para 102.
\(^{26}\) *Ibid* at para 107.
\(^{27}\) *Ibid* at para 105.
storage during the expansion of the adjacent Centerm container terminal—did not support a finding of irreparable harm.\textsuperscript{28}

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 wherever they wish to set up an encampment” or permit unsafe encampments.\textsuperscript{29} Chief Justice Hinkson 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.”\textsuperscript{30} This finding was critical to his decision to issue the injunction, just as his finding that adequate shelter was not available was crucial to his decisions in other cases to deny injunctions to clear homeless encampments.\textsuperscript{31} In my view, his finding of alternative shelter in this case was based on a highly lopsided and incomplete view of the evidence, but exploration of that issue is beyond the scope of this article.\textsuperscript{32}

Chief Justice Hinkson also rejected the defendants’ evidence of the benefits of encampments in general, and of this one in particular, and 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 uncritically 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

\textsuperscript{28} Ibid at para 103.
\textsuperscript{29} Ibid at paras 108-109.
\textsuperscript{30} Ibid at para 114.
\textsuperscript{31} See Abbotsford (City) v Shantz, 2015 BCSC 1909 at para 82 [Shantz #3]; Prince George (City) v Stewart, 2021 BCSC 2089 at paras 67-68 [Stewart].
lands, and into the ocean near the encampment."\textsuperscript{33} 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 16 June 2020, arresting forty-six people.\textsuperscript{34} Soon afterward, the Port Authority enclosed the entire site with a chain link fence topped with barbed wire and secured with padlocked gates.\textsuperscript{35} 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, two kilometres away on the other side of the DTES.\textsuperscript{36} 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 and amid growing concerns about fire safety, crime, and toxic drug overdose,\textsuperscript{37} the Park Board, city, and province reached an agreement on 31 March 2021 to work together to end the encampment by 30 April and prevent future encampments.

\textsuperscript{33} VFPA v Brett, supra note 2 at para 80. The only evidence for some of these findings of fact was inadmissible hearsay, an issue I address elsewhere. See Wood, "A Tale of Two (Tent) Cities," \textit{supra} note 32.


\textsuperscript{35} Personal observation, confirmed by post-eviction Google Street View imagery.


in the city.\textsuperscript{38} Pursuant to this agreement, the Park Board ordered all tents and unauthorized structures to be removed from the park by 30 April 2021.\textsuperscript{39} 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.\textsuperscript{40} Housing rights advocates complained that the deadline was arbitrary, the housing options inadequate, and the decampment process traumatic.\textsuperscript{41} 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.”\textsuperscript{42}

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. 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 8:00 a.m.\textsuperscript{43} After several weeks, in July 2021, the Park Board issued an order banning all temporary overnight shelters and structures in CRAB Park.\textsuperscript{44} 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,\textsuperscript{45} “leaving many tent city residents once again with nowhere to go.”\textsuperscript{46} Some residents stayed in defiance of the orders, while others

\textsuperscript{38} See Memorandum from the Ministry of Attorney General and Minister Responsible for Housing, City of Vancouver, and Vancouver Board of Parks and Recreation (31 March 2021), “Memorandum of Understanding on Support for Unsheltered Vancouver Residents,” online (pdf): <parkboardmeetings.vancouver.ca/files/MOU-SupportingUnshelteredVancouverResidents-BC-COV-PB-20210331.pdf> [perma.cc/P7L2-CQB6].


\textsuperscript{40} Ibid.

\textsuperscript{41} Lisa Steacy, “Strathcona Park decampment ‘stressful, tense’ for residents,” \textit{News 1130} (1 May 2021), online: <www.citynews1130.com/2021/05/01/strathcona-park-decampment> [perma.cc/UQ82-WZHW].

\textsuperscript{42} Prasad, supra note 39.


\textsuperscript{44} \textit{Bamberger v Vancouver (Board of Parks and Recreation)}, 2022 BCSC 49 at para 3 [Bamberger].

\textsuperscript{45} Ibid.

moved out. Those who stayed were partially vindicated in January 2022, when a
court quashed the Park Board’s orders and ordered it to reconsider them.47 This
decision temporarily suspended the cycle of displacement at CRAB Park, but it
continued elsewhere48 and could resume there at any time.

As a bitter postscript, Chrissy Brett died suddenly in June 2022, at the age of
forty-seven. More than a firebrand for housing, anti-poverty, and Indigenous
rights,49 she was remembered by her family in fuller terms:

From the time she could walk and talk, she was helping take care of others; anyone
in need had a friend in Christine. While growing up in Dawson Creek, she excelled
in music, arts, public speaking, competitive swimming, and helping take care of
her sister and family. She even managed to surprise us with a surprise party for
our 25th Anniversary! In maturity, she offered her talents to those challenged with
homelessness and injustice, first in Victoria and later in Vancouver.50

This obituary only begins to convey a sense of the rich and complex humanity
of Chrissy Brett and countless others who struggle to achieve lives of dignity for
marginalized members of Canadian society.

II. CLARIFYING THE TEST FOR INTERLOCUTORY
INJUNCTIONS IN HOMELESS ENCAMPMENT CASES

The goal of this article may seem narrow and technical in comparison to the
human dimensions of the housing crisis, but it is important to clarify the proper

47. Bamberger, supra note 44 (granting petition by encampment residents for judicial review,
on the grounds that the orders lacked procedural fairness and could not be reasonably
justified in light of the available evidence, and adjourning petition by Park Board for an
injunction evicting the encampment, pending Park Board’s reconsideration of its orders).
48. See e.g. Winston Szeto, “Bylaw officers removing people without homes from camp
near downtown Kelowna,” CBC News (24 October 2022), online: <www.cbc.ca/
news/canada/british-columbia/kelowna-rail-trail-homeless-camping-site-1.6628107>
[perma.cc/5ZFL-P8DF].
49. See David P Ball, “Chrissy Brett remembered as a tireless advocate for homeless
people, Indigenous rights,” CBC News (19 July 2022), online: <www.cbc.ca/
news/canada/british-columbia/homeless-advocate-chrissy-brett-dies-1.6524794>
[perma.cc/D7XK-HTGX].
50. “Obituary of Christine Margery ‘Chrissy’ Brett,” (29 July 2022), online: Victoria
Times Colonist <www.legacy.com/ca/obituaries/timescolonist/name/christine-brett-
obituary?id=39974716>, [perma.cc/5NKF-A667]. In another bitter postscript, the cycle
of displacement resumed at CRAB Park in April 2024. Jen St. Denis, “Vancouver Razed
CRAB Park’s Tent City. What’s Next?” The Tyee (10 April 2024), online: <www.thetyee.ca/
News/2024/04/10/Vancouver-Razed-CRAB-Park-Tent-City/> [perma.cc/2HT2-T8XK].
test for interlocutory injunctions in the context of homeless encampments because interlocutory injunction applications dominate homeless encampment litigation in BC. Only a few homeless encampment cases have been decided finally on the merits, including Victoria (City) v Adams (“Adams”) and Abbotsford (City) v Shantz (“Shantz”), 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 (“Charter”) and could not be justified under section 1 of the Charter. 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 rather than removing encampments. The stakes are high for defendants: They face eviction from their homes, however provisional they may be, to streets or parks where they are displaced continually and often face elevated risks of isolation, sickness, violence, harassment, and death.

Before proceeding, it is worth emphasizing that the articulation and application of the test for interlocutory injunctions was not the only problem with VFPA v Brett. The decision also pre-emptively neutralized the defendants’ constitutional defences by applying an inappropriate “public arena” test to section

51. 2008 BCSC 1363 [Adams SC], aff’d 2009 BCCA 563 [Adams CA].
52. Shantz #3, supra note 31.
54. For the other reported final decisions on the merits, see Johnston v Victoria (City), 2010 BCSC 1707, aff’d 2011 BCCA 400 [Johnston] (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); Stewart, supra note 31 (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); Bamberger, supra note 44 (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 II. See Adams SC, supra note 51; Johnston.
55. 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).
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 lopsided way in favour of the applicant. In this article I restrict myself to the question of the proper test for granting an interlocutory injunction in such cases. 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.

I begin by presenting the first survey of all reported BC homeless encampment injunction decisions from 2000 to 2022 (Part II(A)). The most striking fact revealed by the survey is that applications for interlocutory injunctions against homeless encampments during this period had a whopping 85% success rate. By contrast, final injunctions had only a 25% success rate, suggesting that when the vital interests and rights at stake in homeless encampment cases are given fuller attention, justice tends to favour encampment residents. My survey thus prompts serious reflection about whether courts are too hasty to issue interlocutory injunctions in such cases.

The survey also confirms that BC case law favours the full RJR-MacDonald inquiry in the context of homeless encampments. In Part II(B) I delve into the case law in more detail, arguing that this position is correct and that courts are wrong to short-circuit the RJR-MacDonald test. I then argue that the courts should actually apply a more demanding “strong prima facie case” standard to the first prong of the inquiry (Part II(C)), and should not prejudge complex, contested constitutional and evidentiary issues at an interlocutory stage (Part II(D)). I conclude by arguing that the high rate at which courts grant injunctions against homeless encampments neglects the fundamental principle that they should be a drastic and extraordinary remedy.

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A. A SURVEY OF BC HOMELESS ENCAMPMENT INJUNCTION DECISIONS, 2000-2022

In 2011, the Associate Chief Justice of the Supreme Court of British Columbia, Anne Mackenzie, noted that “there is an issue about which test applies” on an application for an interlocutory injunction evicting a homeless encampment from publicly owned land. Eleven years later, BC courts are still making inconsistent pronouncements on this point. To get a clear picture of the jurisprudence, I surveyed all reported BC homeless encampment injunction decisions this century, which to my knowledge has not been done before. The survey identified the legal test(s) the courts have applied to applications for interlocutory injunctions affecting homeless encampments, the total number of homeless encampment injunction decisions in this period (interlocutory, final in chambers, and final after trial), and the outcomes of these decisions (injunctions granted or denied).

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 from 2000 to 2022. 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 inegalitarian order.” Indeed, expression was integrated into the very structures the residents used for shelter in VFPA v Brett. The court file included photographs of tents and shelters draped with memorials to missing and murdered Indigenous women and girls, and with slogans such as “Never Surrender” and “Protect Our Land Defenders.”

I included both interlocutory and final decisions in the survey, but for obvious reasons I included only the former 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 courts’ reasoning in

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57. Vancouver (City) v O’Flynn-Magee, 2011 BCSC 1647 at para 21 [O’Flynn-Magee].
those cases. For decisions that were appealed, I counted the decisions at first instance and on appeal as a single decision. I classified the test applied by the court based on the appeal decision, since the choice of test is a legal question with lasting relevance beyond the case. The outcome, however, I classified based on the initial decision, since in most homeless encampment cases the initial decision effectively determines the outcome on the ground even if it is later reversed on appeal.

My research identified a total of twenty-four homeless encampment injunction decisions in BC dating from 2002 to 2022 (see the Appendix). Of these, twenty (83%) were interlocutory and four were final. Two (both of them interlocutory) were appealed, one (Provincial Rental Housing Corp v Doe ("PRHC")) being reversed, and the other (Vancouver (City) v Maurice ("Maurice")) affirmed. Of the twenty interlocutory decisions, thirteen (65%) applied the RJR-MacDonald test, three (15%) did not decide which test applied, two (10%) applied the Thornhill statutory injunction test, one (5%) applied the Terbasket/Van Osch trespass exception, and one (5%) applied both the Thornhill test and trespass exception independently.

The earliest interlocutory decisions date from 2002, the latest 2022. Decisions employing the RJR-MacDonald test are spread over the entire study period. Those applying the Thornhill statutory injunction test almost bookend the period, with one in 2002 (Maurice) and two in 2020 (VFPA v Brett and

59. For example, see Adams SC, supra note 51 at paras 11 and 17. Justice Ross noted that Justice Stewart had earlier granted an interim injunction evicting the homeless encampment in that case, while Justice Johnston had later denied a permanent injunction in the same case. See also Saanich (District) v Brett, 2018 BCSC 1648 at para 79 [Saanich v Brett #1]. Justice Branch referred to a decision in which Justice MacKenzie had granted the city of Duncan, BC an injunction prohibiting an encampment there. However, both of the referenced decisions are unreported.

60. Provincial Rental Housing Corp v Doe, 2002 CarswellBC 3738 (SC (TD)) [PRHC SC], rev’d sub nom Provincial Rental Housing Corp v Hall, 2005 BCCA 36 [PRHC CA]; Maurice CA, supra note 20.


62. O’Flynn-Magee, supra note 57; Abbotsford (City) v Shantz, 2013 BCSC 2426 [Shantz #1]; Prince George (City) v Johnny, 2022 BCSC 282 [Johnny].

63. Maurice SC, supra note 20; Smith, supra note 55.

64. Fraser Health Authority v Evans, 2016 BCSC 1708 [Evans].

65. VFPA v Brett, supra note 2.
Victoria (City) v Smith (“Smith”). The Terbasket/Van Osch trespass exception is a latecomer, being applied once in 2016 (Fraser Health Authority v Evans (“Evans”)), and again in 2020 (VFPA v Brett), both times by Chief Justice Hinkson. Finally, three decisions declined to decide the test (Vancouver (City) v O’Flynn-Magee (“O’Flynn-Magee”) or did not articulate it (Shantz; Prince George (City) v Johnny (“Johnny”)).

In terms of outcomes, seventeen of the twenty applications for interlocutory injunctions (85%) were granted, while only three (15%) were denied (Figure 2, left cluster). If anything, these figures overstate the effective denial rate, since one of the injunctions that was denied at first was granted upon reapplication a few months later (British Columbia v Adamson (“Adamson”)). Only two decisions can really be seen as unequivocally denying interlocutory injunctions. In Vancouver City v Wallstam (“Wallstam”), the court refused to grant an interlocutory injunction to clear an encampment from a vacant city-owned lot that was slated for development as social housing. In Johnny, the court denied an interlocutory injunction to evict an encampment from a publicly-owned green space that the city had petitioned unsuccessfully to clear just a few months earlier in Prince George (City) v Stewart (“Stewart”). To be fair, one decision granting an interlocutory injunction was reversed on appeal, but this happened three years after the encampment had been cleared—cold comfort indeed for the defendants (PRHC).

Outcomes were very different in final decisions (Figure 2, middle cluster). Injunctions were denied in two of the four final decisions (Shantz and Stewart),

66. Maurice SC, supra note 20; VFPA v Brett, ibid; Smith, supra note 55.
67. Supra note 64.
68. Supra note 2.
69. Supra note 57.
70. Shantz #1, supra note 62. In Johnny the test was not articulated because the injunction was refused due to the applicant city’s failure to fulfill the conditions of an earlier order, not due to the application of one of the established tests for granting an interlocutory injunction.
71. British Columbia v Adamson, 2016 BCSC 584 [Adamson #1]; British Columbia v Adamson, 2016 BCSC 1245 [Adamson #2].
72. 2017 BCSC 937 [Wallstam].
73. Supra note 62.
74. Supra note 31.
75. PRHC CA, supra note 60.
both decided by Chief Justice Hinkson. In another, Bamberger v Vancouver (Board of Parks and Recreation) (“Bamberger”), the case was adjourned. In that case the court granted a petition by encampment residents to set aside the Vancouver Park Board’s orders banning the 2021 CRAB Park encampment discussed in Part I. It simultaneously adjourned the Park Board’s petition for a statutory injunction evicting the encampment, pending reconsideration of the Park Board’s orders. The sole final decision to grant an injunction against a homeless encampment, Saanich (District) v Brett (“Saanich v Brett”), was unopposed and the legal basis for the injunction untested. It would be fair to say, then, that contested applications for final, permanent injunctions against homeless encampments in BC have a zero per cent success rate this century. Granted, the number of decisions is too small to reach firm conclusions, but this only highlights the fact that interlocutory injunction applications dominate this field.

To put these figures into context, consider the Yellowhead Institute’s 2019 analysis of injunction cases arising out of disputes over resource extraction and other activity on Indigenous territories without Indigenous consent. That study revealed that 76% of injunction applications by companies against First Nations were granted, versus 19% of injunction applications by First Nations against companies and 18% of applications by First Nations against governments. The report provoked widespread media attention and public outcry. My survey shows that the success rate for interlocutory injunctions against homeless encampments in BC (85%) is significantly higher than that in the Yellowhead Institute report.

76. Shantz #3, supra note 31; Stewart, supra note 31. I classified the result in Stewart as “injunction denied” even though Chief Justice Hinkson 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.

77. Supra note 44.

78. Saanich v Brett #2, supra note 54. Justice Branch had earlier granted an interim injunction against a homeless encampment. See Saanich v Brett #1, supra note 59. In the later case of Saanich v Brett #2, he granted a permanent injunction against the same encampment, but the defendants—having long since been evicted—did not oppose the later order.

79. See Yellowhead Institute, Land Back: A Yellowhead Institute Red Paper (Yellowhead Institute, October 2019) at 10, 30.

Even when final decisions are included, the overall success rate of 75% (Figure 2, right cluster) is on par with the Yellowhead Institute report. If disproportionate injunction success rates are a cause for concern in disputes over Indigenous lands and resources, they should also raise alarm bells in relation to disputes involving people experiencing homelessness.

FIGURE 2. BC HOMELESS ENCAMPMENT INJUNCTION DECISIONS, 2000-2022, BY OUTCOME.

In terms of type of proceeding, only one of the final decisions, Shantz,81 was made after a trial. The other three (Saanich v Brett, Stewart, and Bamberger)82 were heard in chambers, without oral testimony or cross-examination, as were all the interlocutory injunction proceedings as far as I could tell. This is no surprise: summary proceedings in chambers, with affidavit evidence only and

81. Shantz #3, supra note 31.
82. Saanich v Brett #2, supra note 54; Stewart, supra note 31; Bamberger, supra note 44.
no cross-examination, are the norm for interlocutory applications and for final hearings for statutorily authorized injunctions in BC.83

It is worth noting that two well-known encampment cases, Adams84 and Johnston v Victoria (City),85 were not included in the survey 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.”86 But the trial and appeal decisions in Adams were concerned only with the defendants’ counterclaim that the city’s parks bylaw was unconstitutional.87 The city’s request for an injunction was not at issue.

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 statutory injunction test or the Terbasket/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 decisions at first instance (Part II(B)(1)), before considering what the Court of Appeal for British Columbia has said on the subject (Part II(B)(2)). I argue that RJR-MacDonald is, indeed, the proper test to be applied in such cases, and proceed in Part II(B)(3) to discuss how claims of trespass or statutory violation ought to be incorporated into it.

1. THE WEIGHT OF BC AUTHORITY SUPPORTS RJR-MACDONALD

In decisions spanning from 200388 to 2019,89 BC courts ruled repeatedly and explicitly that RJR-MacDonald is the appropriate test “where Charter arguments are meaningfully raised in the application.”90 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

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83. See BC, Supreme Court Civil Rules, BC Reg 168/2009, rr 1-2(4) (petitions and applications), 8-1 (applications), 10-4 (pretrial injunctions), 22-1 (chambers proceedings) [BC Rules]. The previous Rules, in effect before 2010, had broadly similar effect.
84. Supra note 51.
85. Supra note 54.
86. Saanich v Brett #1, supra note 59 at para 52.
87. See Adams SC, supra note 51 at para 28; Adams CA, supra note 51 at para 19.
88. See Scott, supra note 55.
89. Abramsford (City) v Shantz, 2013 BCSC 2612 at para 20 [Shantz #2].
the law was proved to be invalid,” those cases did not involve any challenge to the constitutional validity of the legislation in question. 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. As Justice Duncan 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 question here favours an approach which takes into account Charter issues rather than the consideration of a pure statutory breach approach to injunctive relief.

Chief Justice Hinkson adopted Justice Duncan’s analysis in the 2016 Adamson case involving a homeless encampment on the grounds of a courthouse, noting that “[t]his 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.”

In Nanaimo (City) v Courtoreille (“Courtoreille”), a case involving an encampment in downtown Nanaimo in 2018, Justice Skolrood 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.

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 Justice Skolrood 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.”

91. Mickelson, supra note 88 at para 18.
93. Vancouver Board of Parks and Recreation v Williams, 2014 BCSC 1926 at para 60 [Williams].
94. Adamson #1, supra note 71 at para 35.
95. Nanaimo (City) v Courtoreille, 2018 BCSC 1629 at para 110 [Courtoreille]. See also Saanich v Brett #1, supra note 59 at para 40; Scott, supra note 55 at para 30 (to the same effect).
96. Courtoreille, supra note 95 at para 111. See also Wallstam, supra note 72 at para 36 (finding that Charter issues were raised despite no material being filed to that end in response to the application).
And in the 2022 Bamberger decision, Justice Kirchner 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.”

On the other side of the ledger are three decisions holding Thornhill to be the applicable test. In the first and most influential of these, Maurice, Justice Lowry granted the City of Vancouver an injunction to clear an encampment from the public sidewalk outside the derelict 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. Justice Lowry held that Thornhill was the proper test for the injunction even if the respondents’ Charter rights were engaged (although he held they were not), 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.” Justice Lowry 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.

97. Bamberger, supra note 44 at para 174. The court declined to decide this point, however, opting instead to adjourn the injunction application (ibid at para 175).
98. 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 62 at para 21. This decision appears to be based on the Thornhill rule, but it 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.”
99. SBC 1953, c 55, s 571(1) (now s 334(1)).
100. In O’Flynn-Magee, supra note 57 at para 23, Justice Mackenzie wrote that Justice Lowry “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 SC, supra note 20 at paras 30–31.
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.102

Thornhill was later treated as the authoritative test in two 2020 decisions, VFPA v Brett and Smith. In the first of these, as discussed earlier, Chief Justice Hinkson 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.103 He also held that the defendants’ Charter rights were not meaningfully engaged because the publicly-owned parking lot was private property.104 In Smith, Justice Mayer 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 the Maurice litigation.105 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.106

In two other decisions, the court did not hold that Thornhill was the controlling test but nonetheless endorsed it to a significant extent. In Vancouver Board of Parks v Sterritt, Justice Meiklem 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 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.”107

In O’Flynn-Magee, Associate Chief Justice Mackenzie 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.108

102. Ibid at para 22.
103. See VFPA v Brett, supra note 2 at para 57.
104. Ibid at para 98. I criticize this conclusion elsewhere. See Wood, “Public Land,” supra note 56.
105. The relevant provision in Smith was the Community Charter, SBC 2003, c 26, s 274(1), while that in Maurice was the Vancouver Charter, supra note 99, s 571(1) (now s 334(1)). Both authorize local governments to apply for injunctions to enforce bylaws.
106. See Smith, supra note 55 at paras 34, 39.
107. 2003 BCSC 1421 at para 5 [Sterritt].
108. O’Flynn-Magee, supra note 57 at paras 21, 24. The quotation is from para 21.
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 preemptively 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.\(^{109}\)

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*\(^ {110}\) and *VFPA v Brett*.\(^ {111}\) No other BC judge has taken this approach. In both cases Chief Justice Hinkson 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*, 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.”\(^ {112}\) He went on to hold that even if the trespass exception applied, the question of whether the defendants had some colour of right to be there “is not an issue to be resolved on this application for interim relief.”\(^ {113}\)

The trespass exception also arose obliquely in two other BC cases. In *O’Flynn-Magee*, Associate Chief Justice Mackenzie referred to it briefly, but

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110. *Supra* note 64.
111. *Supra* note 2.
112. *Adamson #1*, *supra* note 71 at para 26.
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.\(^{114}\) In addition, as we shall now see, the BC Court of Appeal in 2005 repudiated Justice Loo’s evident application of the trespass exception in \textit{PRHC}, though it did not rule explicitly what the proper test was and actually left the waters muddier than they were before.\(^{115}\)

2. THE COURT OF APPEAL FOR BRITISH COLUMBIA HAS MUDDIED THE WATERS

The Court of Appeal for British Columbia 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 \textit{Maurice}, the court upheld Justice Lowry’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 \textit{Thornhill} was the correct test:

\begin{quote}
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.\(^{116}\)
\end{quote}

But the legal foundation for the injunction was not at issue on appeal—the grounds for appeal were purely procedural;\(^{117}\) so this statement was \textit{obiter dicta}.

In the companion case, \textit{PRHC}, the court reversed Justice Loo’s decision granting the PRHC, a provincial crown corporation, an \textit{ex parte} interlocutory injunction to clear the encampment from the Woodward’s building itself. The PRHC brought a civil action in trespass and applied \textit{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.”\(^{118}\) Justice Loo accepted this characterization and implicitly applied

\begin{flushleft}
\begin{footnotesize}
\item[114] Supra note 57 at para 71.
\item[115] \textit{PRHC} SC, supra note 60.
\item[116] \textit{Maurice} CA, supra note 20 at para 34.
\item[117] Ibid at para 2.
\item[118] \textit{PRHC} SC, supra note 60 at para 1.
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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.” The Court of Appeal reversed Justice Loo’s decision on due process grounds, holding that she 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. 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.

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 Justice Rowles’s 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.”

It is probably a reflection of the BC courts’ general hostility to homeless encampments that while the Court of Appeal’s decision in Maurice, which went against encampment occupants, has been cited in at least seven BC homeless encampment decisions, its decision in PRHC, which favoured the occupants, has not been cited in a single such case.

119. Ibid at para 10.
120. Although the application was ex parte, a lawyer acting for some occupants heard about it and appeared at the hearing.
121. See PRHC CA, supra note 60 at paras 20, 60-62.
122. Ibid at paras 20, 56, 58, respectively [emphasis added].
123. See Victoria (City) v Thompson, 2011 BCSC 1810 [Thompson] (granting interlocutory injunction to clear Occupy Victoria encampment from public park); OFlynn-Magee, supra note 57; 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); Courtoirelle, supra note 93; VFPA v Brett, supra note 2; Smith, supra note 55; and Bamberger, supra note 44.
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 almost two decades after these decisions were issued in 2005.

It is also significant that these Court of Appeal for British Columbia decisions predated the landmark *Adams* case holding that a municipal ban on erecting temporary overnight shelter on public land violated the *Charter*.124 *Adams* changed the constitutional landscape of homeless encampment litigation, casting doubt on the precedential value of earlier 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.”125 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*.126

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

124. See *Adams CA*, *supra* note 51.
tests were already somewhat unsettled in Canadian law. These recent pronouncements by the Supreme Court of Canada reinforce the conclusion that \textit{RJR-MacDonald} is the only test for interlocutory injunctions.

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

3. \textit{RJR-MacDonald} ACCOMMODATES CLAIMS OF TRESPASS OR STATUTORY VIOLATION

Saying that \textit{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 \textit{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 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.

I. 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. 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 \textit{RJR-MacDonald} inquiry.

127. See \textit{e.g.} Jeffrey Berryman, \textit{The Law of Equitable Remedies}, 2nd ed (Irwin Law, 2013) at 95-98 (statutory injunctions), 203-10 (injunctions to enjoin trespass).
128. \textit{Google, supra} note 125 at para 25.
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.\(^{129}\) It is flexible enough to accommodate circumstances like those that faced Chief Justice Hinkson in *Evans* and *VFPA v Brett*. Chief Justice Hinkson’s rigid application of the *Thornhill* and trespass exceptions brings to mind the warning of Justice McLachlin (as she then was), in the leading BC case on the test for interlocutory injunctions, against “slavish adherence to precise formulae.”\(^{130}\) A recent BC decision reiterated what numerous courts have said:

> While this threepart 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 all of the circumstances.\(^{131}\)

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 superior 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* does not apply.”\(^{132}\)

Chief Justice Hinkson’s characterization of the sites in *Evans* and *VFPA v Brett* as private property does not withstand scrutiny.\(^{133}\) 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.\(^{134}\) 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

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132. *Evans*, *supra* note 64 at para 49.
133. I develop this argument in more detail elsewhere. See Wood, “Public Land,” *supra* note 56.
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.

Chief Justice Hinkson 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 Chief Justice Hinkson 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, Justice Walsh refused to apply the trespass exception or the 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. 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.” 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 implicitly 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 was not intended for public use, or was leased or licensed to a private party, and even on privately-owned property, courts have applied the RJR-MacDonald

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134. Wallstam, supra note 61 at para 38.
135. Courtoreille, supra note 61 at para 11.
test to interlocutory injunction applications. 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. 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. In these cases the courts considered irreparable harm and the balance of convenience, even though the defendants were “inarguably trespassing.”

Just four months later, Chief Justice Hinkson 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 also 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. 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 Chief Justice Hinkson properly dismissed as speculative.

The general jurisprudence on the trespass exception also supports the 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 v WH Smith (Eziot) Ltd* (“**Patel**”), in which Lord Justice Balcombe 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 a trespass. Then the court must consider

136. See *e.g.* **Canadian Forest Products Inc v Sam**, 2011 BCSC 676 at paras 71-72, rev’d in part on other grounds 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 paras 21-22; **Marine Harvest Canada Inc v Morton**, 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.

137. See *e.g.* **Canadian Pacific Railway Ltd v Doe**, 2020 BCSC 388 at para 43 [**CPR v Doe**]; **Canadian National Railway Co v Doe**, 2020 ONSC 8225 at para 6.

138. See **Vancouver Fraser Port Authority v Doe**, 2020 BCSC 244 at para 3.

139. **CPR v Doe**, *supra* note 137 at para 47.

140. See **VFPA v Brett**, *supra* note 2 at para 103.
the application of the principles set out in American Cyanamid Co. v. Ethicon Ltd…. in relation to the grant or refusal of an interlocutory injunction.141

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, 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 defendants stood to be harmed substantially by transferring possession of the disputed land to the plaintiffs before trial.142

The subsequent leading BC cases of Van Osch and Sol Sante Club v Biefeld 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,”143 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.”144 On the other hand, despite so holding they both went on to apply the full RJR-MacDonald analysis.145

In 2020, a month after Chief Justice Hinkson decided VFPA v Brett, 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

141. Supra note 13 at 858-59.
142. See Terbasket, supra note 14 at paras 24-28.
143. 2005 BCSC 1908 at para 18.
144. Van Osch, supra note 15 at para 14.
145. Ibid (“In spite of having reached the foregoing conclusion, I have also assessed the test of balance of convenience” at para 15); Sol Sante Club, supra note 143 (“Nevertheless, I will go on to consider the issues of irreparable harm and balance of convenience” at para 21).
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 respondents’ health, safety, and survival are at stake. To apply Justice Quijano’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 among 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 lives and welfare 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.

II. 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. 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 resembles 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. Another example is federal or provincial statutes authorizing a government minister to apply for an injunction to restrain violations of the statute. 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. 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. In either case, once the government plaintiff has demonstrated that the defendants have breached a statute or bylaw, the courts will refuse an injunction only in exceptional circumstances.

The Supreme Court of Canada explained the rationale for this principle succinctly in *Polai v City of Toronto* (“*Polai*”): the plaintiffs in such cases are

148. See e.g. *Vancouver Charter*, supra note 99, s 334(1); *Community Charter*, supra note 105, s 274(1).
149. See e.g. *Saskatchewan (Minister of Environment) v Redberry Development Corp.*, [1987] 4 WWR 654 (Sask QB) [*Redberry QB*], aff’d [1992] 2 WWR 544 (Sask 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 Manufacturing Inc* (1997), 150 DLR (4th) 193 (BC CA) [*Alpha Mfg*] (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 (BC SC (TD)) [*Okanagan Indian Band SC*], aff’d sub nom *British Columbia (Minister of Forests) v Adams Lake Band*, 2000 BCCA 315 [*Okanagan Indian Band CA*] (provincial statute authorizing designated minister to apply to court for order directing compliance with, or restraining violation of stop order issued under statute).
152. See *Thornhill*, supra note 19 at para 9; *Burnaby (City) v Oh*, 2011 BCCA 222 at para 41, leave to appeal to SCC refused, 2011 CanLII 79128 (SCC).
“seeking to protect and enforce a public right.”

Justice Schroeder 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.

[The 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.]

Associate Chief Justice MacKenzie 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.

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. 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, Justice Lowry 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 200 people,

153. [1973] SCR 38 at 41 [Polai SCC], aff’g Toronto (City) v Polai (1969), 8 DLR (3d) 689 (ONCA) [Polai CA].
154. Polai CA, supra note 153 at paras 40, 42.
155. O’Flynn-Magee, supra note 57 at para 27.
156. See Metropolitan Stores, supra notes 92 and accompanying text; Williams, supra note 93 and accompanying text.
and perhaps more to come, to continue unabated.”\textsuperscript{157} 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.\textsuperscript{158} In 2020, the court in \textit{Smith} said the same of city officials’ harassment of homeless people and the need for self-isolation during the COVID-19 pandemic.\textsuperscript{159}

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.”\textsuperscript{160} 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.\textsuperscript{161} 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 unpleasing conditions in public places.

Some courts have reduced the inquiry to whether the defendants are flouting the law.\textsuperscript{162} Going even further, in \textit{VFPA v Brett}, Chief Justice Hinkson dispensed with the exceptional circumstances inquiry altogether, reciting numerous ways in which the defendants were violating port authority regulations and concluding

\begin{itemize}
\item \textsuperscript{157} \textit{Maurice SC, supra} note 20 at paras 17-18, 22.
\item \textsuperscript{158} See e.g. \textit{Okanagan Indian Band SC, supra} note 149 at para 60; \textit{Maurice SC, supra} note 20 at para 21; \textit{O’Flynn-Magee, supra} note 57 at para 48.
\item \textsuperscript{159} \textit{Smith, supra} note 55 at para 33.
\item \textsuperscript{160} \textit{Maurice SC, supra} note 20 at para 20. See also \textit{Smith, supra} note 55 at para 29; \textit{O’Flynn-Magee, supra} note 57 at para 47. Outside the homeless encampment context, see \textit{Alpha Mfg, supra} note 149 at para 32; \textit{Okanagan Indian Band SC, supra} note 149 at para 55.
\item \textsuperscript{161} See e.g. \textit{VFPA v Brett, supra} note 2 at paras 28-30 (referring to defendants’ persistent refusals to leave after being notified of alleged violations repeatedly).
\item \textsuperscript{162} See e.g. \textit{Williams, supra} note 93 (referring to defendants’ “expressions of intention to continue to flout the law” at para 50).
\end{itemize}
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.\footnote{163.
VFPA v Brett, supra note 2 at para 57. Elsewhere the court explicitly rejected the defendants’
evidence about COVID-19 risks and precautions (ibid at 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 (ibid at para 35).}

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 obeyed is outweighed by the hardship an injunction would
impose upon the defendant,”\footnote{164. Robert J Sharpe, Injunctions and Specific Performance
(Canada Law Book, 2019) (loose-leaf updated 2020, release 29) at para 3.150; Redberry QB, supra note 149 at 660; Alpha Mfg, supra note 149 at para 30; Thornhill, supra note 19 at para 9.}
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.”\footnote{165. Thornhill, supra note 19 at para 9. See also Sterritt, supra note 107 at para 5.}
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.\footnote{166. Okanagan Indian Band CA, supra note 149 at para 11.}
Rather, I am suggesting that, in applications for
injunctions to enforce legislation against residents of homeless encampments,
the public interest for which governments are responsible for is broader and
more nuanced than just 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 Justice Brooke, 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.  

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.”  

Further support for rethinking the narrow approach courts have taken to “exceptional circumstances” is found in Chief Justice McEachern’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 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.”

The 2022 *Bamberger* case opened the door even further. There, Justice Kirchner 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. Justice Kirchner 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 Chief Justice Hinkson in *Adamson*, 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

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169. *Thornhill*, *supra* note 19 at para 76.
preventing them from moving elsewhere and at fixing the problem of persistent non-compliance. 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.” 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.”

Second, Justice Kirchner 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.” Third, he pointed to “the lack of evidence that the encampment poses a serious health or safety risk or harm to the public.” Finally, Justice Kirchner 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.

The grounds relied on by Justice Kirchner 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 Justice Kirchner cited these circumstances as grounds to adjourn the injunction application rather than to deny it, but they are clearly relevant to the latter question.

The considerations that led Justice Kirchner to decline to issue an injunction applied with equal force in VFPA v Brett and should have led Chief Justice Hinkson 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.

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170. Bamberger, supra note 44 at para 185, citing Adamson #1, supra note 71 at para 185.
171. Ibid at para 177.
172. Ibid at para 189.
173. Ibid at paras 191, 194.
174. Ibid at para 198.
175. Ibid at para 212.
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. 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.

By the same logic, statutory injunctions should not be awarded to protect private interests. 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 avenues to enforce a statute. The Court of Appeal for British Columbia has, however, warned that the jurisdiction to grant injunctions to enforce statutory obligations “must be exercised carefully,” and that where

176. See e.g. Shaughnessy Heights Property Owners’ Assoc v Northup (1958), 12 DLR (2d) 760 (BC SC(TD)) 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).
177. It is worth acknowledging in this connection that port authorities are subject to federal privacy and access to information legislation.
178. See AG v Sheffield Gas Consumers Co (1853), 3 De GM & G 304 at 311-12, cited in Sharpe, supra note 164 at para 3.160 (“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” at n 41).
179. See e.g. Montreal (City) v Morgan, [1920] 60 SCR 393, leave to appeal to the JCPC refused, 60 SCR v (30 July 1920) (PC) (WL Can); Polai SCC, supra note 153. 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. See e.g. MacMillan Bloedel Ltd v Simpson, [1996] 2 SCR 1048; Teal Cedar Products Ltd v Rainforest Flying Squad, 2022 BCCA 26 at para 30 [Teal Cedar Products].
“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 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. 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. This concern is almost completely absent from the BC homeless encampment injunction case law. There was no discussion in VFPA v Brett, for example, of the adequacy of the statutory enforcement means available to the port authority via the Regulations or trespass to property legislation.

III. 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 further 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. Lord Justice Balcombe 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 a trespass.” BC courts have interpreted this as meaning that the defendant must show that their “continuing possession is as of right.” In the context of homeless encampments, Associate Chief Justice Mackenzie 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”:

180. Cambie Surgeries Corp v British Columbia (Medical Services Commission), 2010 BCCA 396 at para 34.  
181. Teal Cedar Products, supra note 179 at para 40 [emphasis in original].  
182. Patel, supra note 13 at 859.  
‘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.\textsuperscript{184}

This holding is in line with Justice Ross’s ruling in Adams that the defendants were not asserting a property right to occupy public land.\textsuperscript{185} 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 applied.\textsuperscript{186} 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, Lord Justice Neill, 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 tolerance or good neighbourliness.\textsuperscript{187} 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 Lord Justice Neill, that “[a]t this stage, of course, the defendants’ 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.”\textsuperscript{188} And it is worth recalling Chief Justice Lamer’s admonition, in Committee for the Commonwealth of Canada v Canada, that government “cannot make its ownership right a

\textsuperscript{184} O’Flynn-Magee, supra note 57 at para 71.
\textsuperscript{185} See Adams SC, supra note 51 at para 132.
\textsuperscript{186} Evans, supra note 64; VFPA v Brett, supra note 2.
\textsuperscript{187} See Patel, supra note 13 (“it is for the defendants to show that they have some right which is independent of the wishes of the plaintiffs to do that which they seek to do and have done” at 862).
\textsuperscript{188} Ibid.
justification for action the only purpose and effect of which is to impede the exercise of a fundamental freedom.”

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, Justice Bauman 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.” That case revolved around the scope of a statutory “safe harbour” provision, barring an action for petty trespass to land to which a member of the public ordinarily has access, arising out of union activity occurring at or near but outside entrances and exits to an employer’s workplace. 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. This 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, Chief Justice Hinkson 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.

189. [1991] 1 SCR 139 at 155 (citing Hugessen J in the court below).
190. 2007 BCSC 1175 at para 20 [Gateway Casinos].
191. Ibid at para 30.
4. COURTS SHOULD RAISE 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 further, ruling effectively that a property owner’s abstract entitlement to use their land outweighs homeless people’s interest in health, safety, and survival.\(^ {192}\) *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.\(^ {193}\) 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.\(^ {194}\) Another is when the applicant seeks a mandatory injunction.\(^ {195}\) Both are true in most homeless encampment cases, and I argue in this Part that the strong prima facie case threshold must be met in such cases. My position on this point is not mere opinion. Rather, it is dictated by a 2018 Supreme Court of Canada decision.\(^ {196}\) And yet not a

\(^{192}\) See *supra* note 2 (“most importantly…the plaintiff is entitled to the use of its land” at para 107).

\(^{193}\) See *CBC*, *supra* note 126 at para 12.

\(^{194}\) See *RJR-MacDonald*, *supra* note 3 at 338.

\(^{195}\) See *CBC*, *supra* note 126.

\(^{196}\) *Ibid.*
single homeless encampment case in BC of which I am aware has applied this higher threshold.

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 reinstated, even if the defendants prevail at trial. The most 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. Chief Justice Hinkson, for example, noted in one case that an interlocutory injunction “often becomes the entire remedy in an action,”197 while Justice Walsh commented that “typically, the injunction becomes the final remedy.”198

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.199 The circumstances in which this exception applies are legion, despite the Supreme Court of Canada’s prediction that they would be rare.200 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. The Supreme Court of Canada ruled in R v Canadian Broadcasting Corp (“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.”201 Justice Brown explained the rationale for this higher standard:

197. Adamson #1, supra note 71 at para 18, citing Premium Weatherstripping Inc v Ghassemi, 2016 BCCA 20 at para 7.
198. Wallstam, supra note 72 at para 49.
199. See Prince Rupert Grain Ltd v Grain Workers’ Union, Local 333, 2002 BCCA 641; Gateway Casinos, supra note 190; Sam, supra note 136; Taseko Mines Ltd v Tsilhqot’in National Government, 2019 BCSC 1507; O’Brien & Fuerst Logging Ltd v White, 2019 BCSC 2011.
200. See Sharpe, supra note 164 at para 2.210; Berryman, supra note 127 at 43.
201. CBC, supra note 126 at para 15 [emphasis in original].
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 favour of the plaintiff, further demand what the Court described in RJR-MacDonald as “extensive review of the merits” at the interlocutory stage.

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.

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.

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. This injunction was similar to those in other homeless encampment cases, which often require the defendants to do some combination of the following: (1) Vacate and cease occupying or residing at the site; (2) remove all tents, structures, shelters, personal belongings, fences, or obstructions; (3) comply with fire safety orders or municipal bylaws; (4) verify their identity to the plaintiff with government-issued picture identification or submit to the creation of a picture identity document; (5) declare to the plaintiff their intentions

203. CBC, supra note 126 at para 16.
204. Ibid; see also TELUS Communications Inc v Shaw Communications Inc, 2020 BCSC 1354 at para 49.
205. See VFPA v Brett, supra note 2 at para 116.
regarding transition into housing; and (6) 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 prohibitive, 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.

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.206

This is precisely what the injunctions in VFPA v Brett and most other homeless encampment cases have sought. What an irony it would be if the higher threshold of a strong prima facie case should apply in favour of cattle, but not unhoused humans! Yet 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. 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. 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 Chief Justice Hinkson’s prior order denying the City’s petition for a final injunction clearing the same encampment. 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.

The standard for 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 a “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.

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. This applies to Charter defences, as Justice Pitfield explained in Vancouver Parks Board v Mickelson:

Counsel for the defendants claimed that I should factor their constitutional objections into the determination whether the Parks Board has demonstrated

207. See e.g. Mickelson, supra note 88 at para 1; Sterritt, supra note 107 at para 1; Saanich v Brett #1, supra note 59 at para 44.
208. See Johnny, supra note 62 at paras 30-31.
210. See Johnny, supra note 62 at para 83.
211. Supra note 126 at para 17.
212. See Mickelson, supra note 88 at para 23; O’Flynn-Magee, supra note 57 at para 54; Courtoirelle, supra note 95 at paras 77, 90; Saanich v Brett #1, supra note 59 at para 84.
that there is a fair question to be tried. With respect, I disagree. In relation to this
case, 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. 213

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. 214

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. 215 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, an application for an interlocutory
injunction requiring government to provide online schooling in the context of a Charter challenge launched by parents against a government’s COVID-19 pandemic back-to-school plan, 216 and to an application for an injunction
requiring the government to release someone held in immigration detention. 217

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. 218 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’

213. Supra note 88. See also Courtoireille, supra note 95 at para 76 (adopting Pitfield J’s reasoning).
214. See e.g. Fernandes v Legacy Financial Systems, Inc, 2020 BCSC 885 (“there is a strong prima
facie case, and no obvious defences” at para 26); Quizno’s Canada Restaurant Corp v 1450987
Ontario Corp, 2009 CarswellOnt 2280 (WL Can) (Sup Ct) (“In reaching my conclusions
about the strength of the case…I have considered the [defendants’] argument that they have
a strong defence and counterclaim” at para 90).
215. See e.g. Kent Roach, Constitutional Remedies in Canada, 2nd ed (Thomson Reuters, 2019)
(loose-leaf) at para 7.171.
216. See Karounis v Procureur général du Québec, 2020 QCCS 2817 at para 12.
218. In rare cases, homeless people file suit and apply for interlocutory injunctions against
governments. See e.g. Black v Toronto (City), 2020 ONSC 6398. In even rarer cases, they win
such injunctions. See e.g. Paige Parsons, “Judge orders slowdown in removals of Edmonton
homeless camps,” CBC News (18 December 2023), online: <www.cbc.ca/news/canada/
edmonton/judge-allows-but-slows-down-edmonton-homeless-camp-removals-1.7062623>
[perma.cc/J5LT-3MM9].
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 in line with Supreme Court of Canada jurisprudence.

D. COURTS SHOULD NOT PREJUDGE 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 Co v Ethicon Ltd, 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.219

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.220

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 section 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.”221 Earlier, in Manitoba (Attorney General) v Metropolitan Stores Ltd, 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.222

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.”223 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.”224

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

220. Sharpe, supra note 164 at para 2.70.
221. supra note 3 at 335. See also O’Flynn-Magee, supra note 57 (“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” at para 41).
222. supra note 92 at 130.
223. Ville de Montréal-Est c 2775328 Canada Inc, 2018 QCCS 4951 at para 58 [translated by author] [Montréal-Est].
224. Berryman, supra note 127 at 32.
be resolved on affidavit evidence alone.”225 Key issues on which the affidavits conflicted in that case, as in many homeless encampment 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.226 Chief Justice Hinkson concluded that he was “unable to resolve many of these factual disagreements on affidavit evidence alone.”227

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.228 They might also expedite the trial, as Justice Sharpe suggests in the leading text and as Chief Justice Hinkson did in Adamson.229

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. Chief Justice Hinkson’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

225. Adamson #1, supra note 71 at para 182.
226. Ibid at paras 108, 182.
227. Ibid at para 51.
228. See e.g. Montréal-Est, supra note 223 at para 59.
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.230

Resolution of complex, contested evidential and legal issues on affidavits 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.231 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 Park Board) to apply to court to enforce, or restrain contravention of, local bylaws.232 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.233 Only a handful have been sought in the context of petitions, though the frequency of petitions is increasing.234

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

231. See BC Rules, supra note 83, rr 1-2(4), 2-1(2).
232. See Community Charter, supra note 105, s 274(1); Vancouver Charter, supra note 99, s 334(1).
233. See PRHC SC, supra note 60; Maurice SC, supra note 20; Mickelson, supra note 88; Sterritt, supra note 107; Provincial Capital Commission v Johnston, 2005 BCSC 1397; O’Flynn-Magee, supra note 57; Shantz #1, supra note 62; Shantz #2, supra note 90; Shantz #3, supra note 31; Williams, supra note 93; Adamson #1, supra note 71; Adamson #2, supra note 71; Evans, supra note 64; Wallstam, supra note 72; Saanich v Brett #1, supra note 59; Saanich v Brett #2, supra note 54; Scott, supra note 55; VFPA v Brett, supra note 2.
234. See Thompson, supra note 123; Courtoreille, supra note 95; Smith, supra note 55; Stewart, supra note 31; Bamberger, supra note 44; Johnny, supra note 62. 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 2022.
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, 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. 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. The Court of Appeal for British Columbia 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.

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 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.

In Bamberger, the court agreed with the defendants’ contention that the Vancouver Park 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.

235. See BC Rules, supra note 83, r 22-1(4)(a).
236. Ibid, r 22-1(7)(d).
238. See Ghag v Ghag, 2021 BCCA 106.
239. Supra note 95 at paras 50, 55.
240. Supra note 44 at para 174.
As noted earlier, however, the court ultimately decided to adjourn the matter, pending the Park Board’s reconsideration of its orders to clear 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 report in Part II(A), homeless encampment defendants have lost in 85% of the interlocutory proceedings but only 25% of the final proceedings between 2000 and 2022 (and this 25% represents a single uncontested decision). This suggests that the constitutional and evidentiary claims 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.

III. 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” 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. “Given that an interlocutory injunction is an exceptional remedy,” Justice Gascon 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.” In homeless encampment cases, however, interlocutory injunctions evicting unhoused individuals from publicly-owned land are the norm, not the exception. With a success rate of 85% over the last twenty-two years, interlocutory injunctions are the norm for an entire class of cases in BC.

This transformation of interlocutory injunctions from the exception to the norm is intensified and accelerated in the few decisions, including VFPA v

241. Google, supra note 125 at para 23; Sharpe, supra note 164 at para 2.10.
242. See e.g. 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 31 (Per Hinkson CJ: “An injunction is an extraordinary remedy and should only be granted when there are no other alternatives” at para 103).
243. 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.
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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. First, courts faced with such applications should 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. Second, they should 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 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. Third, courts should 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, the court should dismiss the application so that
these issues can be addressed fully at trial. It might also 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 allowed the trespass and statutory injunction tests to short-circuit the three-pronged *RJR-MacDonald* test for an interlocutory injunction; failed to apply the “strong prima facie case” standard to the first prong of the *RJR-MacDonald* test, which applies due to the mandatory character of the injunction sought and the likelihood that it will become the final remedy; 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.
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