Court of Queen's Bench of Alberta

Citation: Alberta Health Services v Pawlowski, 2021 ABQB 493

Date: 20210629
Docket: 2101 05742
Registry: Calgary

Between:

Alberta Health Services

Applicant

- and -

Artur Pawlowski & Dawid Pawlowski

Respondents

Reasons for Decision
of the
Honourable Mr. Justice A.W. Germain

A. Introduction

[1] On May 6, 2021, Alberta Health Services (AHS) obtained a court order from Associate Chief Justice J. Rooke, targeting the Respondent Christopher Scott and other respondents named as John Doe(s) and Jane Doe(s), to assist in enforcing Covid -19 community compliance. AHS alleges the Respondents have breached this Order and as a result are guilty of contempt of a court order. For the reasons outlined in this ruling, I agree with the submission of AHS and cite Pastor Artur Pawlowski and Dawid Pawlowski in contempt.

[2] I have also issued two other rulings involving Pastor Artur Pawlowski and Christopher Scott relating to the same or similar issues. The same legal principles apply in each case. I have

purposely repeated myself throughout the rulings so each can provide transparency about my ruling without resort to the companion rulings. The companion rulings are ***AHS v Street Church***, 2021 ABQB 489 and ***AHS v. Scott***, 2021 ABQB 490.

B. Background

[3] The World Health Organization declared the Novel Coronavirus (Covid -19) to be a pandemic in March 2020. This prompted the Canadian Government to make health recommendations and provincial health authorities to impose Public Health Orders. These affected the liberties of the citizens for the greater community goal of their protection, from a virus of which initially, little was known. By May 2021, Alberta was in what medical experts called the third wave of the pandemic. Active cases in Alberta (including cases of more dangerous variants that had developed elsewhere in the world) caused increasing numbers of Covid-19 infections. AHS took steps to reduce the impact of this third wave, as both hospitals and the intensive care wards became dangerously overcrowded.

[4] Some Albertans, including Pastor Artur Pawlowski and his brother Dawid Pawlowski (the Respondents), openly flaunted the efforts of AHS to control the third wave of the virus in Alberta. In response, AHS obtained an Injunctive Order from Associate Chief Justice Rooke on May 6, 2021 (the Rooke Order).

[5] The Respondents operate a Street Church in Calgary (the Church) which, during the month of April and May 2021, was holding Saturday church services in deliberate violation of the efforts of AHS to control the spread of the Covid 19 virus by limiting crowds, requesting social distancing, and requiring that face masks be worn in any public area.

[6] The Rooke Order, restrained Albertans (identified as John and Jane Does) from:

> (i) Organizing an in-person gathering, including requesting, inciting or inviting others to attend an “Illegal Public Gathering”;
>
> (ii) Promoting an Illegal Public Gathering via social media or otherwise; or
>
> (iii) Attending an Illegal Public Gathering in a public or private place.

[7] The Rooke Order defined an “Illegal Public Gathering” as any gathering that did not comply with the requirements of current CMOH Orders (Chief Medical Officer of Health Orders) including, but not limited to:

> (a) Masking requirements;
>
> (b) Attendance limits applicable to indoor or outdoor gatherings; and
>
> (c) Minimum physical distancing requirements.

[8] On May 8, 2021, members of the Calgary Police Service (CPS) observed the Respondents in and around the Church and concluded they were in breach of the Rooke Order. They were both arrested shortly after the Respondents left the church. They were released by court order on Monday, May 10, 2021 after appearing before the Court of Queen’s Bench. On May 23, 2021, I heard an application to determine if the Respondents were in breach of the Rooke Order and if so, if their breach amounted to a contempt.

[9] The Respondents were intentional objectors to the restrictions imposed by AHS. If the Rooke Order applied to them, they were in breach of it. The dispute in this case is whether AHS

has proven that the Respondents' breaching of the Rooke Order made them in contempt of that Order.

C. The Position of the Parties

[10] The position of AHS is that they have established by their affidavit evidence and the admissions of the Respondents, the Rooke Order was breached by the Respondents after it was granted. They say that this breach amounts to a contempt beyond a reasonable doubt because the three criteria (knowledge, certainty of the terms of the order, and deliberate conduct) exist in this case to prove contempt beyond a reasonable doubt

[11] While the Respondents are prepared to tacitly admit that they were in breach of the Rooke Order, they assert that the battleground in this case is not the existence of the Rooke Order, but whether it applies to them. They submit that it does not because there was improper or no service on them, they were not made aware of the prohibitions set out in the Order, they were not named in the Order, and it is uncertain whether it applied to church services. The position taken by learned defence counsel will be amplified as each of the Respondents' defences are considered in turn.

D. Legal Analysis

1. The Facts

[12] The evidence of Detective K. Laustsen is substantially confirmed by the videoed exhibits attached as exhibits to her affidavit and is not significantly disputed in the opposing affidavits filed by the Respondents. If a picture is worth a thousand words, a video, particularly those as graphic as the exhibits attached to the Lausten affidavit, is worth a million words.

[13] If anything, the affidavit understated the combative, insulting manner in which the Respondents conducted themselves on May 8, 2021 – this being the date of the service of the Rooke Order upon them and their subsequent arrest by the CPS.

[14] I can do no better then to quote from the Laustsen affidavit (modified for time continuity, and with irrelevant discourse removed) as the cornerstone of the facts in this case:

> 17. I watched [a video of a Livestream Event 1 (start 9:28 am May 8, 2021),] of which the following is a summary of my observations:
>
> a. At approximately 9:32 am, an interview was conducted with A. Pawlowski inside the Church, of which the following is a summary:
>
> i. A. Pawlowski is observed not wearing a mask, speaking to people not wearing masks, and not practicing social distancing;
>
> ii. A. Pawlowski explains his interpretation of the Court Injunction;
>
> iii. A. Pawlowski explains his belief that .....;
>
> iv. A. Pawlowski explains the phone call he received from CPS explaining "the new law that you cannot oppose the Government";

v. A. Pawlowski is portrayed in this video as a leader in the Church, as observed during the interview and his interactions with attendees inside the Church;

vi. I captured a 4-minute portion including the above noted observations of Livestream Event 1 and saved it as Exhibit H;

b. At approximately 9:58 am, an interview was conducted with D. Pawlowski outside the Church, of which the following is a summary:

i. D. Pawlowski is observed not wearing a mask, speaking to people not wearing masks, and not practicing social distancing;

ii. D. Pawlowski references Pfizer explaining the Government and witches are “in on it,” brewing potions, they want people to obey and be a slave; and

iii. I captured a 2-minute portion including the above noted observations of Livestream Event 1 and saved it as Exhibit I.

18. I watched the Livestream Event 2, (Start at 9:58 am May 8, 2021) , and made the following observations:

a. At approximately 9:59 am on May 8, 2021, Reicher provided "pre-announcements" to the attendees, of which the following is a summary:

i. Reicher read the CPS Advisory to attendees. The following portion was read verbatim:

> The Calgary Police Service continues to work with our provincial partners to address those who are inclined to ignore the public health orders in place to keep our communities safe.
>
> In addition to the enforcement framework that was announced earlier in the week, Alberta Health Services has obtained a Court of Queen’s Bench Order that applies to gatherings including protests, demonstrations and rallies - this is a significant development.
>
> This Order imposes new restrictions on organizers of protests and demonstrations requiring compliance with public health orders in effect relating to masking, physical distancing, and attendance limits. In the event of non-compliance, the Order provides enforcement powers, including powers of arrest, for those that are organizing, promoting and attending any public gathering where public health orders are not being followed.
>
> We continue to work with our partners and the community to stop the spread of COVID-19. We ask those who may be considering organizing or participating in any outdoor events to ensure they are familiar with public health order requirements and to do their part to prevent further spread of the virus.

ii. I captured a 3-minute 52 second portion including the above noted observations of Livestream Event 2 and saved it as Exhibit J.

b. At approximately 10:36 am on May 8, 2021, attendees of the Church are singing, of which the following is a summary (edited by me):

i. (not repeated)

ii. I counted the number of individual heads visible in the recording and identified 84. As there were several areas obstructed by other people, I estimate attendance numbers of the Church were between 85-100 people;

iii. I captured a 45 second portion including the above noted observations of Livestream Event 2 and saved it as Exhibit K.

[15] Paragraph 19 of the Laustsen affidavit deals with the service of the Rooke Order on May 8, 2021. Key portions are set out below with superfluous and irrelevant wording removed:

19. I watched the Livestream Event 3, (started 10:38 am May 8, 2021), and made the following observations:

a. Approximately 10:58 am on May 8, 2021 members of the CPS attended the front door of the Church, of which the following is a summary:

i. A large gathering had formed outside, consisting of approximately 20 people, a mix of masked and unmasked participants. This group followed CPS to the door of the Church;

ii. An unknown male opened the front door of the Church and advised "we are having a religious service." Music could be heard playing from inside;

iii. D. Pawlowski presented himself at the front door and engaged in conversation with Cst. Develter;

iv. As observed in the video, I noted the attendees deferred to D. Pawlowski as being in charge, the person with the authority of the Church to speak to CPS and the matter that brought them to attend the Church;

v. Cst. Develter told D. Pawlowski the purpose of CPS's attendance was to serve the Court Injunction. D. Pawlowski replied "if you want to serve it, serve it at the altar." Cst. Develter declined and advised service had been made and placed the Court Injunction, observed in a plastic covering, on the ground in front of D. Pawlowski. D. Pawlowski stated "if you want to serve it, serve it like a man";

vi. The surrounding crowd began to encroach on officers and to shout "get out, get out." As CPS disengaged from the Church, people began to follow them off the property, continuing to shout at CPS members, some becoming aggressive towards members;

vii.

viii. D. Pawlowski followed CPS members off the property shouting "Where were you yesterday when there were 100s of people on the patios." Dawit [sic] continued to walk down the street following CPS members to their vehicles;

ix. D. Pawlowski continued to speak to the video recording, unmasked, not maintaining social distance. People are observed shouting at police and

neighbouring community residents outside watching from their yards wearing masks;

x. I captured a 12-minute 2 second portion including the above noted observations of Livestream Event 3 and saved it as Exhibit M.

[16] The affidavit of Detective Laustsen continues with a reference back to the in-church services which were videoed and posted live. In Detective Laustsen's affidavit, she describes at para 20 events that transpired after the direct service of the Rooke Order had been made on Dawid Pawlowski. Due to Dawid Pawlowski's belligerence, the service was actually made by dropping a copy of the Rooke Order in a plastic see-through bag at his feet. Under the circumstances, including his wilful refusal to accept the document, his insistence that it be served at the altar, and his verbal attack on the CPS following the service of the order; I conclude beyond a reasonable doubt that he knew what was being served upon him and was wilfully and deliberately refusing to take the document for the purpose of potentially enabling him to subsequently argue that he wasn't served.

[17] Let me now continue (but with the removal of superfluous, often hateful and disrespectful commentary by the speakers) with the comments from Detective Laustsen taken from her affidavit and supported by the attached video exhibits, of events which occurred after the service of the Rooke Order:

20. I watched the Livestream Event 2, (started 9:58, running 2.5 hours, May 8, 2021), and made the following observations (continued from paragraph 18):

a. Approximately 11:03 am on May 8, 2021, A. Pawlowski speaks to attendees and invites leaders up to the front podium, of which the following is a summary:

i. A Pawlowski invited any attendee present in the Church running for political office or in a church leadership position, to come to the front to pray for current leaders;

ii. 11 people attended the front, including D. Pawlowski, standing shoulder to shoulder across the front stage area. No one was wearing masks or practicing social distancing;

iii. A Pawlowski makes critical remarks about .....; and

iv. I captured a 4-minute portion including the above noted observations of Livestream Event 2 and saved it as Exhibit N.

b. At approximately 11:06 am on May 8, 2021, A. Pawlowski speaks to attendees from the front podium, of which the following is a summary:

i. A. Pawlowski speaks about .....;

ii. A Pawlowski makes disparaging comments about.....;

iii. I captured a 9-minute portion including the above noted observations of Livestream Event 2 and saved it as Exhibit 0.

c. Approximately 11:19 am on May 8, 2021, A. Pawlowski speaks to attendees from the front podium, of which the following is a summary:

i. A Pawlowski references a passage from .....

ii. A. Pawlowski describes how a “Swat” team came to the door stating “they send a swat team, just a few minutes ago, there was a swat team outside those doors. A swat team for a Church, a swat team for a peaceful assembly. A swat team against a Pastor. Not against a gang, not against terrorists, no, they reward terrorists....”;

iii. A. Pawlowski makes critical remarks about .....;

iv. A. Pawlowski makes disparaging remarks about all.....

v. A. Pawlowski states that .....;

vi. A. Pawlowski claims those who believe in the current pandemic are “brain washed”; and

vii. I captured a 11-minute 40 second portion including the above noted observations of Livestream Event 2 and saved it as Exhibit P.

d. Approximately 11:31 am on May 8, 2021, A. Pawlowski speaks to attendees from the front podium, of which the following is a summary:

i. A. Pawlowski asked a question to the audience: “What wrong am I doing today,” and then answers by stating “I am just standing here, socially and physically distanced from you, more than six feet, I’m exempt, I don’t have to wear a mask, so why do they hate me so much? Because I am teaching you. That’s the only crime I have committed. I am teaching you the truth and the truth shall set the captives free”;

ii. A. Pawlowski stated “they are threatening them, they’re telling them they aren’t allowed to do that, saying it’s against the law, **they brought an Injunction from a Court**, (emphasis mine) I don’t know what kind of court. Not the court of the lands. Not the Court according to the Charter of Rights and Freedoms.” .....;

iii. .....

iv. I captured a 1-minute 30 second portion including the above noted observations of Livestream Event 2 and saved it as Exhibit Q.

[18] Later, on Saturday, May 8, 2021, both Artur Pawlowski and his brother Dawid Pawlowski were seen driving away from the Church. Their vehicle was stopped by CPS and they were arrested with some difficulty and resistance.

[19] By 10:58 a.m. in the morning, Dawid Pawlowski was in fact actually served with the Rooke Order. Given his refusal to accept the Rooke Order, I am satisfied that dropping the Order at his feet was an acceptable form of personal service. His comments to the CPS, as they elected to depart (to preserve the peace), also make clear his knowledge about what he had been served with.

[20] Shortly thereafter, but in any event before 11:03 a.m., I find Pastor Artur Pawlowski had full knowledge of the Rooke Order and I draw an inference that he had received directly or indirectly a copy of it. His detailed knowledge of it, identified in his comments captured on video, militate against any other inference.

[21] From the above, I find as a fact that both Dawid and Artur Pawlowski were effectively served with the Rooke Order, had full knowledge about it and the prohibitions contained therein, and further that they knew the Order applied to them.

[22] I am satisfied on the evidence that the Respondents each received good and sufficient notice of the Rooke Order.

[23] Despite this, they continued to conduct and participate in the church service, a prohibited public gathering, contrary to the prohibitions contained in the Rooke Order. No other finding on these facts is possible.

2. The Standard of Proof

[24] A judge considering whether a contempt of a court order has occurred must determine the existence of the below discussed three essential elements to a level of proof beyond a reasonable doubt. The Supreme Court of Canada in ***R v Starr***, 2000 SCC 40 (at para 50) described proof beyond a reasonable doubt as something less than absolute certainty, but much greater than probable guilt. This is the standard that I propose to apply.

3. The Test for Contempt

[25] Three elements are required for a finding of contempt:

> (1) That the order alleged to have been breached must state clearly and unequivocally what should and should not be done;
>
> (2) That the party alleged to have breached the order must have had actual knowledge of it; and
>
> (3) The party allegedly in breach must have intentionally done the act that the order prohibited or intentionally failed to do the act that the order compelled (***Carey v Laiken***, 2015 SCC 17 at paras 32-35 [***Carey***]).

[26] Even if the test is made out beyond a reasonable doubt, if a respondent has taken reasonable steps to comply with the order, the Court retains the discretion to deny an application for contempt (***Carey*** at para 47).

4. Applying the Test to the Facts

[27] On May 8, 2021, when the Respondents were arrested, the first paragraph of the Rooke Order read as follows:

> 1. The named individual Respondents and any other person acting under their instructions or in concert with them or **independently to like effect** and with Notice of this Order, shall be restrained anywhere in Alberta from (emphasis mine):
>
> a. organizing an in-person gathering, including requesting, inciting or inviting others to attend an “Illegal Public Gathering”;
>
> b. promoting an Illegal Public Gathering via social media or otherwise;
>
> c attending an Illegal Public Gathering of any nature in a “public place” or a “private place,” which each have the same meaning as given to them in the Public Health Act.

[28] The Rooke Order also went on to define certain of the above terms. With respect to the alternate arguments of counsel, I conclude that the Rooke Order, as it existed on May 8, 2021, was both clear and unequivocal, in that it told potential contemnors that they could neither organize, attend or promote public gatherings nor incite others to do so. The Respondents did all of this, but at a bare minimum, both of the Respondents were present at an illegal public gathering (the church service) and had knowledge of the Rooke Oder.

[29] As the issues of service, notice and knowledge were a cornerstone of the Respondents' answer to the contempt allegation, I have already explained why I have concluded both Pastor Artur Pawlowski and Dawid Pawlowski were both effectively served with and had knowledge of the Rooke Order. The bulletin from the CPS in this case may have been enough to prove notice, but I need not go that far because we have videos that show Dawid Pawlowski being served with the Rooke Order and Pastor Artur Pawlowski discussing with attendees at the Church his knowledge of the Rooke Order.

[30] I need not dwell on the third part of the contempt test. Both the Pawlowski brothers make a virtue of their civil disobedience in relation to the restrictions imposed upon them by the Covid - 19 AHS Public Health Orders. Their defiant posturing caught on the videos make clear that their breach was not accidental, but wilful and deliberate.

[31] I conclude that Pastor Arthur Pawlowski and his brother Dawid Pawlowski did have factual knowledge of the Rooke Order and during a church service conducted in Calgary on Saturday morning May 8, 2021, they were in breach of the Order. This begs the question: are they guilty of contempt? Their defences follow.

5. Discussion of the Defences Raised

i. The Impact of the Wording Change to the Rooke Order

[32] After the arrest of the Respondents, counsel for the named Respondent, Christopher Scott, and others appeared again before Associate Chief Justice Rooke and achieved a change in the wording of the Rooke Order. This change took effect May 13, 2021. Paragraph 1 became paragraph 2 and removed the words "independently to like effect." The Respondents concede that they must take the Rooke Order as it existed on the day it affected them. Although they cannot take the benefit of what they submit narrowed, to the point of exclusion, the Respondents from the operation of the Rooke Order; they submit that this change should go to my discretion to not hold them in contempt.

[33] I conclude that the Rooke Order of May 6, 2021, does not restrict enforcement of it to those connected to the named target Christopher Scott and the Whistle Stop Café. Instead, it applies to all individuals willing to breach the operative terms of the Order after having received notice of it. A connection to the Whistle Stop Café or its operators was not (at least on May 8, 2021) a necessary requirement to identify potential contemnors on the date of this arrest. I will leave for another case the impact of the wording change.

[34] The Respondents further assert that the phrase "independently to like effect," found in the May 6, 2021 version of the Rooke Order cannot be read to apply to church services in Calgary, but instead means similar to the targeted events. However, a plain reading of the Rooke Order (as it existed on May 8, 2021) suggests the phrase "like effect" relates to the planning and

participation in public events. I respectfully disagree with the Respondents' interpretation of the Rooke Order.

[35] A religious service to which the public is invited is a gathering. It was not necessary, in my view, for the Rooke Order to specifically identify religious services as a type of public gathering to which the Order was directed. Further, the use of nominal respondents - the John Doe and Jane Doe in the style of cause of the Order make clear that the Order was intended to cover individuals not specifically named in the Order. One way of looking at this issue would be to consider whether such individuals would be caught by the Rooke Order if they, objectively and acting reasonably, could "see" themselves in it. Would it be objectively reasonable for them, on review of the Order, to identify themselves with the conduct that was prohibited. If so the order is unambiguous.

ii. Are the Respondents Bound by this Ex Parte Order?

[36] Counsel for the Respondents points out that although the Respondents had a pre-existing unpleasant relationship with the Department of Justice over Covid -19 restrictions, they were neither named nor notified when AHS appeared before Associate Chief Justice Rooke to obtain the Rooke Order. The assertion is that I should conclude that the Rooke Order was never intended to apply to them. They point to some of the discussion between ACJ Rooke and the litigants on May 6, 2021, as implying a restriction in the intent of the reach of the Rooke Order. I reject this argument. AHS is not to be confabulated with the Department of Justice. They are a health organization with order making power, while the Department of Justice is, among other things, a law enforcement prosecutorial department.

[37] AHS had the legal and statutory right to apply for an injunction on an ex parte basis. They did so. The fact that the Respondents neither personally received notice nor are specifically named in the Rooke Order does not prevent independent enforcement of it against them. The fact that there was a discussion in court about who might be caught up in the Order was just that: a discussion. The Rooke Order must be interpreted based on what it said and the message it conveyed; not the discussion leading up to it. Many orders of this nature are obtained on an ex-parte basis, so much so that the *Alberta Rules of Court*, Alta Reg 124/2010 recognize this practice. See r 6.4. This argument is also cut down by the fact that Pastor Artur Pawlowski was videotaped talking about the action taken by AHS and reviewing the press announcement from CPS, and appears, after being told by a third party, to assume the Rooke Order applies to religious services.

iii. Are the Respondents Bound by the Rooke Order as "John Does?"

[38] This will not be the first nor likely the last time that parties not specifically identified in a court injunction are prosecuted on an allegation of being in contempt of it. The concept is not new. British cases recognized this ability in the courts over 100 years ago. In Canada, it has been recognized particularly in the area of public order breaches, intellectual property breaches or labour law breaches, that "John Does" are commonly utilized and identified in the orders.

[39] While the process has been criticized, others have also identified that it reduces the multiplicity of litigation, and serves as a warning for others who might contemplate acting in defiance of court orders. Canadian courts are an important protection in a rule of law jurisdiction. The rule of law would quickly break down if court orders could be avoided, ignored or

disobeyed with impunity, simply because every potential contemnor was not identified specifically.

[40] In the context of this case, there has been an increase over time during the pandemic of open disobedience of AHS Public Health Orders. With infinite time and resources, AHS could return to court multiple times per day to get injunctions which they feel are needed to protect the public. This is not practical. ***MacMillan Bloedel Ltd v Simpson***, [1996] 2 SCR 1048, 1996 CanLII 165 [***MacMillan***] confirms that injunctions against the public at large, identified as John Doe and Jane Doe, are legally enforceable in Canada. At para 31, MacLachlan J stated:

> It may be confidently asserted, therefore, that both English and Canadian authorities support the view that non-parties are bound by injunctions: if non-parties violate injunctions, they are subject to conviction and punishment for contempt of court. The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey. The only issue -- and one which has preoccupied courts both in England and, to a lesser extent, here -- is whether the wording of the injunction should warn non-parties that they, too, may be affected by including language enjoining the public, or classes of the public, from committing the prohibited acts.

[41] Earlier, at para 27, McLachlin J explained, anyone who disobeys an "order or interferes with its purpose may be found to have obstructed the course of justice and hence be found guilty of contempt of court." See also para 40.

[42] At para 42, McLachlin J advised it is not essential that the order refer to unknown persons. "However, the long-standing Canadian practice of doing so is commendable because it brings to the attention of such persons the fact that the order may constrain their conduct."

[43] The Supreme Court most recently affirmed ***MacMillan*** in ***Google Inc v Equustek Solutions Inc***, 2017 SCC 34, where Abella J at para 28 wrote:

> Google's first argument is, in essence, that non-parties cannot be the subject of an interlocutory injunction. With respect, this is contrary to the jurisprudence. Not only can injunctive relief be ordered against someone who is not a party to the underlying lawsuit, the contours of the test are not changed. As this Court said in ***MacMillan Bloedel Ltd v Simpson***, injunctions may be issued "in all cases in which it appears to the court to be just or convenient that the order should be made . . . on terms and conditions the court thinks just."

[44] Applying ***MacMillan*** in ***Siksika Nation v Crowchief***, 2016 ABQB 596**,** where Mr. Crowchief was supported by several unnamed and unknown band members in protesting the perceived lack of consultation during the construction of a housing development, Hunt McDonald J concluded at para 78:

> Therefore, I find that naming Unknown Defendants in this action does not invalidate it. The order for an injunction in this case is enforceable against all persons, including those who are not parties to the action, who violate it; those who violate it may be found guilty of contempt for interfering with justice provided they have received notice of the injunction and any subsequent application for contempt.

[45] As it relates to the Covid-19 pandemic, in ***Nova Scotia (Attorney General) v Freedom Nova Scotia***, 2021 NSSC 170, Norton J cited ***MacMillan*** while granting an injunction to the Province of Nova Scotia to prevent a large in-person gathering to protest Covid-19 restrictions. The decision emphasized the practice of clear wording and including the designation of "John Doe, Jane Doe or Persons Unknown." At para 36, Norton J explained:

> It is appropriate that the order includes clear language that law enforcement officers and other law enforcement agencies will enforce the prohibitions. It is appropriate to include notice that law enforcement officers will arrest and charge anyone in breach of the prohibitions.

[46] In this case, video-recorded evidence attached as exhibits to the affidavits clearly confirm that the Respondents and their key circle of supporters openly discussed the Rooke Order and knew and expressed recognition that it applied to them. The wording of the Rooke Order as it existed on May 8, 2021, when they were arrested, made clear that they were caught within the wording of the Order and they were among the others identified in the Order.

iv. Does the Manner of the Arrest of the Respondents and their Detention Constitute a Breach of the *Charter* that can lead to a s 24 Remedy of a Stay of the Contempt Proceedings?

[47] The Respondents assert that when they were arrested in the early afternoon on Saturday, May 8, 2021, and not brought before me to deal with interim release until the afternoon of May 10, 2021, their *Charter* rights were violated. They assert first that they were improperly detained and were not afforded the right to counsel. This they say provides them with a *Charter* remedy that would effectively stay the contempt application. The position of AHS is to the contrary.

[48] The Rooke Order did permit CPS discretion about whether the individuals should have been released on a promise to appear before the Court of Queen's Bench or brought before a judge. The time limits of 24 hours to go before a judicial officer set out in s 503(1) of the *Criminal Code,* RSC 1985, c C-46 do not apply in this context. It would be a useful standard to apply, but there is no legal requirement that they do so. As policy, all individuals in custody should be given an opportunity to obtain release as early as possible.

[49] In *Charter* litigation, it is the individual who raises the *Charter* breach that must prove it on a balance of probabilities. Here, the video evidence discloses that at the time of their arrest, both Respondents were vociferously objecting and resisting arrest and were very volatile, angry, and unreasonable. Their arrest on Saturday meant from a practical point of view that they could not be brought before the Court of Queen's Bench any earlier than Monday, May 10, 2021. They were released on Monday, May 10, 2021.

[50] Their affidavits indicate that they were not allowed to call a lawyer, were denied basic necessities and were treated badly. Even assuming all of that to be true (although I recognize that the CPS have not had a chance to respond to those specific allegations), it would still not amount to a *Charter* remedy as high as a stay of proceedings. First AHS, the Applicant, is not the CPS, nor the Department of Justice. They are an independent health entity fighting to save lives during a global pandemic. To fasten them with allegations of wrongdoing on the part of CPS would be inappropriate.

[51] While the Court would always recommend that people taken into custody be given immediate access to a lawyer, to elevate that potential breach, in a civil context, to a stay of the

contempt proceeding would be an overzealous application of s 24 of the *Charter*. If I borrow from criminal law, *Charter* breaches which occur after the infraction most often (if they result in any remedy) either exclude evidence, or mitigate the sentence (sanction); they rarely result in a procedural stay.

[52] The Respondents' fallback position is that I should consider these breaches in the sanction phase of this contempt proceeding, if it goes that far. AHS also agrees that this is the appropriate place for this discussion. I think that is a sound proposition. As a general proposition in contempt proceedings, when the *Charter* is engaged after the events that led to the arrest and apprehension, *Charter* breaches should (barring exceptional circumstances), go to issues of sanction and not a stay of proceeding. In the criminal law process in Canada, a *Charter* breach may exclude evidence, it will less often lead to a stay of proceedings.

v. Is there a Reasonable Excuse for the Breach of the Rooke Order?

[53] This ruling, involving both Artur Pawlowski and his brother Dawid Pawlowski, was focused on the technical issues that the Respondents could not be bound by the Rooke Order because they were not named and they were not identified with the group that could reasonably be identified as John Does. However, in a companion application argued before this one, Pastor Artur Pawlowski suggested that the AHS could not succeed because they cannot negate the existence of a reasonable excuse to prevent a finding of contempt. In ***AHS v Street Church***, 2021 ABQB 489, I discuss the Alberta Court of Appeal's interpretation on "reasonable excuse." While the applicant must disprove it, and the respondent is not obliged to prove the existence of a reasonable excuse, some factual situations create a presumption in favour of the applicant that there can be no reasonable excuse. That is the case here – there is no reasonable excuse that exists on the facts that requires response from AHS.

E. Conclusion

[54] My conclusion anchors upon the common-sense reality that the Respondents breached the Rooke Order. I have found beyond a reasonable doubt that they both received effective service of the Order and also had actual knowledge of it. Despite this, they persisted in a public and defiant manner in disobeying the Rooke Order. The three essential elements of the test for contempt have been established beyond a reasonable doubt. Both Pastor Artur Pawlowski and Dawid Pawlowski were in contempt of the May 6, 2021 Order of Associate Chief Justice Rooke, when they participated in and attended an illegal public gathering (their church service) in Calgary on the morning of May 8, 2021.

[55] A future date will be set for the sanction phase of this case.

Heard on the 26th day of May, 2021.
Dated at the City of Calgary, Alberta this 28th day of June, 2021.

A.W. Germain
J.C.Q.B.A.

Appearances:

John Siddons, Alberta Health Services
for the Applicant

S. Miller, JSS Barristers for the Respondents