

Court of Queen's Bench of Alberta

Citation: Alberta Health Services v Scott, 2021 ABQB 812

Date:20211015
Docket: 2101 05742
Registry: Calgary

Between:

Alberta Health Services

Applicant

- and -

Christopher Scott, Whistle Stop (2012) Ltd.,
Glen Carritt, John Doe(s), Jane Doe(s)

Respondent

**Reasons for the Sanction 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 (the Rooke Order) targeting the Respondent Christopher Scott and others to assist in enforcing community compliance with restrictions imposed by AHS directed at mitigating the risk posed by the novel coronavirus (COVID-19). AHS also obtained an order from Justice Gates on April 23, 2021 (the Gates Order) directed at the “Street Church” to permit the inspection of the church facilities to confirm compliance with AHS Health Orders.

[2] I found that Christopher Scott breached the Rooke Order and was thus in contempt of a court order (*Alberta Health Services v Scott*, 2021 ABQB 490). In companion rulings I also found others in breach of the Rooke Order and the Gates Order. These include:

- a. Kevin Johnston (*Alberta Health Services v Johnston*, 2021 ABQB 508);
- b. Dawid Pawlowski in breach of the Rooke Order; and
- c. Pastor Artur Pawlowski in breach of both the Rooke Order and the Gates Order (*Alberta Health Services v Street Church*, 2021 ABQB 489; and *Alberta Health Services v Pawlowski*, 2021 ABQB 493).

[3] During the sanction phase of these contempt procedures, Kevin Johnston concluded his case with a negotiated a settlement that did not result in a written ruling, but to the extent it became of limited precedent value, I will refer to it in this ruling.

[4] In my analysis, I intend to repeat my general observations through all of the sanction matters to allow each decision to contain a complete review of my thought process. In addition to this ruling, I have also issued a second ruling *AHS v Pawlowski*, 2021 ABQB 813 (sanction ruling).

B. Background

[5] The World Health Organization declared COVID -19 a pandemic in March 2020. By September 2021, Alberta was in what medical experts called the fourth wave of the pandemic. Ironically, Mr. Scott is being sanctioned at a time when the threat to Albertans from COVID-19 has never been greater. It had been hoped that as Alberta opened for business during the summer of 2021, the worst was behind us; it has turned out to be the opposite. From the perspective of COVID-19, Alberta has been and is in its worst shape ever concurrently with these sanction hearings. It is not an overstatement that Christopher Scott has contributed to this ominous health situation by his defiance of the health rules and his public posturing, which encourages others to doubt the legitimacy of the pandemic and to disobey the health orders designed to protect them.

[6] We have asked the Canadian Federal Government for help as well as the Canadian military. Most therapeutic surgeries have been cancelled. ICU units (despite emergency expansion) are overwhelmed. Notwithstanding the wide availability of statistically safe and statistically successful vaccinations against COVID-19, the impact on Alberta in terms of health, human suffering and economic impact has never been worse. Paradoxically or perhaps statistically relevant when we were fully locked down in March 2020 there were relatively few cases. Today virtually everybody in Alberta knows at least one person that has died from COVID-19 and many more that have experienced difficult illness and persistent symptomology.

C. The Position of the Parties

[7] The position of AHS is that Mr. Scott had been warned that he faced arrest and contempt sanction if he went ahead with the rally at his restaurant after he was served with the Rooke Order. Despite this, he was publicly defiant as hundreds of people showed up to support his protest of the COVID-19 Public Health Orders (AHS Health Orders).

[8] In light of this, AHS asserts that nothing short of a jail sentence is satisfactory. They propose 21 days in jail. As this is a civil case, AHS also asserts they are entitled to costs and they propose costs of Schedule C, column 1, of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*), plus a multiple to those costs of 2.5 times.

[9] The position of the defence is that this is an inappropriate case for jail as Mr. Scott is otherwise a law-abiding citizen who has become a spokesman for policies in opposition to the severity of the AHS Health Orders. They assert that community service and a small fine is appropriate. They also assert that costs are not appropriate as AHS utilized staff lawyers to handle these proceedings and would have been paid in any event.

D. Legal Analysis

1. An Overview about Sanctions for Contempt in Alberta

[10] While contempt proceedings in Alberta provide those accused of contempt many protections afforded individuals charged with criminal offences, there are some differences. They remain at their root a civil procedure. Processes relating to civil procedures are codified in the *Rules* and any sanction hearing requires a review of the *Rules* as a starting point.

[11] Rule 10.53 entitled **Punishment for civil contempt of Court** sets out the following:

- (1) Every person declared to be in civil contempt of Court is liable to any one or more of the following penalties or sanctions in the discretion of a judge:
 - (a) imprisonment until the person has purged the person's contempt;
 - (b) imprisonment for not more than 2 years;
 - (c) a fine and, in default of paying the fine, imprisonment for not more than 6 months;
 - (d) if the person is a party to an action, application or proceeding, an order that (i) to (iv) not applicable

[12] In *Law Society of Alberta v Beaver*, 2021 ABCA 163 [*Beaver*], the Court of Appeal cited *Builders Energy Services Ltd v Paddock*, 2009 ABCA 153 [*Paddock*], for a list of criteria to consider when crafting a penalty for contempt. These are

- a. the proportionality of the sentence to the wrongdoing;
- b. the presence of aggravating or mitigating factors;
- c. deterrence; and
- d. the reasonableness of any fine or term of imprisonment (the "**Paddock Factors**").

[13] Rule 10.53 of the *Rules* is purposely broad because it covers a myriad of situations. Nor is it exhaustive of the remedies a court may impose. By example, in *Ouellet v BM*, 2010 ABCA 240, at para 62, our Alberta Court of Appeal approved a sanction which included community service.

[14] Most contempts occur within the context of civil litigation between parties. Typical in this array would be breaches of orders to supply documentation or information, present exhibits for review, return children to the other parent as required by a parenting order, or return property following a final or interim court order. Where the dispute is solely between the litigants and does not have a community impact, imprisonment is rare. Rare but not unheard of. By example in an unreported 2004 case Justice M. Bielby imprisoned an individual until he produced a mounted big game trophy that had been taken from other family members in an estate fight. This was an application of Rule 10.53 (1)(a) as the contempt could be purged by delivering up the

item that had been ordered returned. After the contemnor spent a short time in jail, the big game trophy was “discovered”.

[15] Fines are a significant tool utilized to control contempt. While they do result in a judgment debt in favour of the Provincial Treasurer [*Makis v Alberta Health Services*, 2020 ABCA 168 at para 66] there is one significant difference between a fine for contempt and an unpaid civil debt. When a fine for a breach of a court order is imposed the failure to pay that fine can result in imprisonment. Conversely, no contempt lies for the failure to pay a judgment debt, so for that failure the successful party must resort to other collection techniques.

[16] When considering a fine, it is prudent that the judge imposing the sanction inquire about the contemnor’s ability to pay. This inquiry was made of Mr. Scott through his counsel. Taking the evidence at the sanction hearing in its entirety, it appears clear that Mr. Scott has resources to pay a significant fine if it is ordered. The relationship between costs and fines has also been identified in the courts. Court costs awarded in a contempt procedure are payable to the successful applicant but still add to the impact of the sanction. It is important for a sanctioning judge to consider the total global effect of any fine and court costs to avoid a disproportionately high penalty imposed on a contemnor.

[17] While modest fines can work for many breaches they may not be appropriate in all cases. There is a second broad category of contempt proceedings in which a public order is challenged. Breaches of these types of orders can have significant community impact. There are at least two subsets of these breaches. The first subset in this group are breaches of healthcare orders which could affect the health of innocent third parties. The second subset occurs in labour, or environmental disputes, or protests against government legislation. For example, notwithstanding back to work orders, a group of employees defy the order and refuse to go back to work.

[18] The root of the problem is that they challenge the authority of the courts in a public and community disruptive way and bring the administration of justice into disrespect. These breaches can be extremely challenging. No judge wants to imprison striking nurses or protesting priests, but as many judges have noted, we don’t get to pick and choose the orders we wish to obey and the ones we don’t. If this was permitted in a free and democratic society we would quickly disintegrate into a society where the rule of law was ignored.

[19] In *AMEC Foster Wheeler Americas Ltd v Attila Dogan Construction and Installation Co Inc*, 2016 ABQB 305 at para 13, Associate Chief Justice N.M. Wittmann observed that the central idea of sanctioning contempt is that courts have a right to protect the dignity of their own proceedings and are entitled to discipline. Conduct that tarnishes, undermines or impedes the Court’s role in society as the principal administrator of justice must be discouraged.

[20] In considering an appropriate sanction for contempt some attention must be given to whether the contemnor apologized for the contempt. While an apology will not extinguish a contempt, a heartfelt apology may ameliorate a sanction. However, the converse is not correct; a failure to apologize should not add a punitive element to the sanction, it simply deprives the contemnor of any mitigation that might be achieved through an apology.

2. Contemporary Precedents (COVID-19 related)

[21] In *AHS v Johnston*, our sanction hearing was pre-empted by a joint submission of an appropriate sanction. I am mindful that Mr. Scott was expressing some of the same objections that Mr. Johnston was expressing and has been found in contempt of the same order. Therefore, in the interests of parity and consistency it is important that I identify the Johnston sanction as a precedent. It is not binding on me as it was negotiated by members of the bar; however, their negotiations were at arm’s length and represent a pragmatic effort to balance the interests of the

contemnor against society. Mr. Johnston's case was worse than Mr. Scott's in that Mr. Johnston offended three orders, in a more aggressive and arguably violent way. Both contemnors have one similarity in that they each served three days in jail after breaching the Rooke Order. Ultimately, Mr. Johnston was sanctioned to 40 additional days in jail and ordered to pay costs of \$20,000. He also had certain continued prohibition orders put in place against him.

[22] In *AG of Ontario v the Trinity Bible Chapel at al*, 2021 ONSC 1169, the Court dealt with a church and its elders that held church service contrary to prevailing public health orders. The judgment makes clear that the presiding Justice felt constrained by some of the fines that had been handed out in other community contempt cases. The contemnor's admitted their civil disobedience, and the Crown was not asking for jail. The church was fined \$15,000 while various church elders incurred smaller fines totaling \$23,000. All were obliged to pay costs totaling \$45,000.

[23] In *R v The Church of God (Restoration) Aylmer*, 2021 ONSC 3452, a church and its two ministers were fined a total of \$48,000.00 and had costs assessed against them of \$68,000.00. These are the most contemporary cases concerning COVID-19 situations.

[24] Tying together my sanction decisions, I have also decided in a separately released ruling to treat Pastor Artur Pawlowski and his brother Dawid Pawlowski somewhat similarly to the treatment I am imposing in this case on Mr. Scott.

3. Applying the Paddock Factors to Mr. Scott

[25] Christopher Scott was the first target of the Rooke Order. He was the only individual identified by name in the Order against whom sanctions were sought. AHS became concerned about Mr. Scott's increasing public defiance centered around his restaurant in rural Alberta. He had publicly announced and broadly broadcast on social media that the government was not going to shut him down and that he was going to have a rally on May 8, 2021. Mr. Scott was personally served with the Rooke Order on May 7 but went ahead with the rally. Hundreds of people attended, most not wearing masks nor socially distancing.

[26] From this it can be seen that Mr. Scott's conduct was extremely aggravating. He engaged in both direct and public defiance of a court order designed to save peoples lives. From the perspective of proportionality his sanction must be significant.

[27] In the context of this case, as a general proposition and as the case law analysis reveals, the position of AHS that there should be some imprisonment for Mr. Scott is not unreasonable. This individual breached a court order issued in favour of a health authority designed to protect people by keeping them socially distant, away from groups, and wearing masks in public. While I respect that these are all intrusions on personal liberty they are not sacrifices that would offend the *Canadian Charter of Rights and Freedoms* and they are not egregious sacrifices. The restrictions were directed at keeping people alive. Fundamental to this debate, which is roaring in Alberta, and getting louder and louder as more and more people die, is that the person you kill may not be yourself. One medical doctor recently compared the rule breakers as someone who might drive impaired. Often when they crash it is innocent victims that suffer the injury.

[28] Mr. Scott has few mitigating factors as most of those expressed by his lawyer were justifications and a rewrite of history not mitigating factors. As submitted by his lawyer, he was expressing fair comment about that which he strongly believes: AHS and the government were unduly restrictive particularly on small businesses and their fight against the COVID-19 virus comes with unintended consequence. Mr. Scott in a free and democratic society is entitled to espouse these views, but not in a manor that breaches court orders.

[29] Despite this, it is clear that he shows some respect for the Court. AHS confirms that after Mr. Scott was released from prison following his initial arrest in May 2021, he has not been subsequently identified as an individual acting in disobedience of the Rooke Order. It does seem that the short period of time Mr. Scott was in jail after his initial arrest did focus his attention on the seriousness of this matter.

[30] During the sanction hearing, Mr. Scott addressed the Court. He is entitled to be opposed to the elements of the AHS Health Orders that effectively locked down the business world and prevented businesses like his from operating fully. He apologized to the Court and advises that he declined other activist opportunities after getting out of jail. As for the obvious health risk to others who attended his rally, he expresses the wish that they would have worn their masks and stayed more distant, but this is after-the-fact rewriting of history. On the date in question, Mr. Scott was ferociously vocal in his opposition of the AHS Health Orders. Even during the sanction hearing, based on his statement to the Court, he does not see nor seem to recognize the serious health situation the province is in.

[31] His lawyer points out that on the very day of the sanction hearing others were picketing about some aspect of the AHS Health Orders they opposed and a large crowd had gathered at one of the Calgary hospitals. Virtually every responsible elected official and community leader has decried these protests at hospitals which add stress and disappointment to healthcare workers who are in some cases laying down their lives so that others may live. I do not believe this submission enhances Mr. Scott's request for leniency. Perhaps if Mr. Scott had not been released from jail or perhaps if he gets a sentence of further imprisonment others might decide to stay home and obey health orders rather than risk the health of others. Nevertheless, I must consider Mr. Scott's apparent obedience of the Rooke Order after his initial brush with the law as either mitigating or at least a factor that adds no aggravation to his situation. This was also his first adjudication that he was a contemnor, and much like a felon being sentenced in a criminal context, he is entitled to a certain amount of leniency as a first offender.

[32] Mr. Scott's activism against the COVID-19 health measures gave him significant personal benefit. While he asserted that he was broke and getting further in debt because of COVID-19, his celebrity status as a conscientious objector generated \$120,000.00 of crowd-funded money, which became part of a \$160,000 down payment that allowed him to purchase the physical assets in which he was running his restaurant and the related lands and campground, and thus he become an owner rather than a lessee. When challenged about this at the hearing Mr. Scott indicated that donors were not taken advantage of because his funding campaign was all about the restaurant. This is disingenuous. Mr. Scott personally benefitted to the tune of \$120,000. To entice contributions, he indicated that he would pay forward the donations to a charity of the donor's choice if they asked. Apparently, donors funding about \$8,000.00 did ask that their donation be forwarded, but the donated money has not been paid forward and remains with Mr. Scott. In short, Mr. Scott's open defiance of the AHS Health Orders and the Rooke Order enriched him by \$120,000.00.

[33] Like a criminal sentence, a contempt sanction must also focus on the element of deterrence. In the context of contempt of general and public orders this deterrence must be specific to the offender but also must send a message to others who could be likewise engaged. As a specific example, in the context of this history, AHS legal counsel obtained a court order against another third party who was proposing to have a rodeo. After the order was obtained, those individuals wisely decided to obey the order. If after-the-fact they now saw that a contemnor would get away with a slap on the wrist there would've been no economic reason for those individuals to ignore the order. That was an example in Alberta, outside of the context of

this case but in the context of injunctions for general health orders, where the order coupled with the downstream risk brought about the desired result. Mr. Scott must be sanctioned significantly by me in this proceeding to deter others from disobeying public health and court orders.

[34] The final suggestion from the Alberta Court of Appeal in handling sanctions for contemnor's is to ensure that both the fine or the imprisonment is reasonable. In the *Beaver* case while the Court of Appeal found the one-year sentence to be unreasonable they still considered a six-month term of imprisonment to fall within the confines of reasonableness and within the discretionary power of the sanctioning judge. From this it should be seen that Mr. Scott must be sanctioned either with a period of imprisonment as suggested by AHS, or a significant fine that will impact and influence his behaviour and that of others who would like to flaunt court orders.

4. Sanction to be Imposed on Mr. Scott

[35] AHS submits strongly that additional jail time is required to deter Mr. Scott and individuals like him. Despite this strong submission, I've decided that further jail time for Mr. Scott is inappropriate as there are more effective ways in which he can make reparations for the breach of the Rooke Order. On balance, I suspect that many reasonable individuals will view the sanctions that I impose to be more beneficial in repairing the harm Mr. Scott did to society than a short period of jail that will perhaps martyr him in the eyes of his followers.

[36] I therefore intend to handle this without additional jail time, but instead impose a very large fine, community service work, plus a requirement that whenever he is opposing the AHS Health Orders in any public forum, (including social media forums), he must also place the other side of the argument on the record.

[37] The sanctioning of a contemnor, is an individualized process. Here I have emphasized the importance of deterrence with a large fine. The Ontario cases which I cited earlier are not binding on me; however, I recognize that the fines those individuals received are less than the fine I am imposing on Mr. Scott. This is purposeful, as a large fine was the only option preventing a period of imprisonment.

[38] Mr. Scott's sanction is as follows:

- i. He is sentenced to a period of three days in prison which is deemed fully satisfied and served following his initial arrest in May 2021;
- ii. He is ordered to pay a fine of \$20,000.00;
- iii. In addition, I place Mr. Scott on 18 months probation, the terms and conditions of which will be to keep the peace and be of good behaviour, obey all AHS Health Orders relating to COVID-19, and to provide 120 hours of community service work (at a rate of not less than 10 hours per month), working at a homeless shelter, a food bank, for Meals on Wheels, or any other facility and charity where he can utilize his culinary skills to help those less fortunate than him;
- iv. He must remain in the Province of Alberta during his period of probation unless he obtains the consent of his probation officer who will authorize such temporary absences if they are for an emergency family matter. If he is not currently in the province of Alberta he must return within seven days and report in person to adult probation in Red Deer, Alberta, after his initial report he will report in person or as directed by his probation officer;
- v. The final term of his probation order will be that when he is exercising his right of free speech and speaking against AHS Health Orders and AHS health

recommendations, in a public gathering or public forum (including electronic social media); he must indicate in his communications the following:

I am also aware that the views I am expressing to you on this occasion may not be views held by the majority of medical experts in Alberta. While I may disagree with them, I am obliged to inform you that the majority of medical experts favour social distancing, mask wearing, and avoiding large crowds to reduce the spread of COVID-19. Most medical experts also support participation in a vaccination program unless for a valid religious or medical reason you cannot be vaccinated. Vaccinations have been shown statistically to save lives and to reduce the severity of COVID-19 symptoms.

E. Costs

[39] AHS's claims costs of \$10,922.25. This amount is based on appropriate items based on schedule C, column 1 in the *Rules* with a multiplier of 2 ½ times for the complexity of the case.

[40] AHS's argument that Mr. Scott should be obliged to pay some court costs is compelling. By precedential background, the individuals involved in the Church of God matter in Ontario were ordered to pay \$68,000 in court costs. Here, AHS suggest a more balanced and fairer schedule C amount.

[41] I suspect that if AHS had obtained outside counsel to handle these matters legal fees might have been significantly greater than the amount claimed here. The injunctions were complex and Mr. Scott aggressively challenged the Rooke Order as well the finding of contempt such that a multiplier based on complexity is justified.

[42] Mr. Scott's counsel suggests that in-house counsel should not be paid legal costs. While there is certainly some inferential authority to that effect in Alberta, it is more the recognition of an exercise of discretion where there is no compounding of the workload of the lawyers involved. Here, however, AHS counsel had to embark on contempt proceedings at a level which would be abnormal to and which would clearly interrupt other traditional work that AHS legal counsel may engage in. This case was extremely complex, and the AHS staff lawyers were well prepared. Costs are appropriate. The amount claimed by AHS and the total amount of \$10,922.25 is approved. These costs will be paid in addition to the fine.

F. Interest, Collection Priorities, Time to Pay and Enforcement

[43] I impose the following terms relating to payment and collection of the combined fine and costs (the debt):

- i. The debt will be subject to an interest charge of 3% per annum compounded semi-annually not in advance, starting January 1, 2022;
- ii. To secure this debt the Provincial Treasurer of Alberta, (and as applicable AHS) may by court order register a charge and lien against Mr. Scott's restaurant, related equipment and the related campground and all of the lands associated with the campground and restaurant. If the registered owner is not Christopher Scott, the corporate veil is pierced to allow this court ordered charge and lien. The charge and lien created by this ruling is subordinate to any existing financing on the property and shall be postponed to any replacement financing provided the terms and conditions of

such replacement financing are no more onerous and for no greater amount of principal;

- iii. Mr. Scott will be given 36 months to pay the total debt owing from this ruling, provided he pays not less than \$500 per month on the account of it commencing November 1, 2021 . Payments shall be applied first to interest, second to costs and lastly to the fine. At the end of three years any debt that remains outstanding will be subject to enforcement by any debt collection method open to AHS or the Provincial Treasurer including foreclosure of the land;
- iv. These collection steps are without prejudice to the applicant or the Provincial Treasurer of Alberta applying for imprisonment in the event of default of payment of any part of the fine; and
- v. Within 30 days of this Order, Mr. Scott shall provide an accurate and fully completed Form 13 as approved in the Civil Enforcement Regulation, section 35.10. This is a statement of his assets and liabilities plus details by which this fine may be satisfied. He must provide this form every six months, without further order, and is subject to attending before a court reporter on notice to him and without the payment of conduct money to be questioned under oath as to his assets and liabilities and means by which he can pay this fine.

G. Conclusion

[44] I recognize that it is not possible in a judgment such as this to cover all of the eventualities that may occur, including whether a default on payment of the fine should result in a period of imprisonment, and for how long. Accordingly, I direct that in the event that any disagreement about the enforcement of any term of this ruling or any application for an amendment or variance should be brought back to me as long as I am still a sitting member of the Court of Queen’s Bench. If I am unable to act in any review capacity, counsel may approach Associate Chief Justice Rooke (and in his absence either the other Associate Chief Justice or the Chief Justice) for the assignment of a different judge to handle downstream matters.

[45] As this brings an end or at least a plateau to these contempt proceedings against Mr. Scott I would like to conclude by again thanking counsel for AHS and Mr. Scott for their professional, courteous, and responsible handling of this matter.

Heard on the 15th day of September, 2021.

Dated at Edmonton Alberta this 13th day of October, 2021

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

Appearances:

K. Fowler for Alberta Health Services
the Applicant

C. Williamson, and K. Johnston,
for the Respondent, Christopher Scott