

In the Court of Appeal of Alberta

Citation: Alberta Health Services v Pawlowski, 2021 ABCA 392

Date: 20211201
Docket: 2101-0276AC
Registry: Calgary

Between:

Alberta Health Services

Respondent
(Respondent)

- and -

Artur Pawlowski, Dawid Pawlowski and John Doe(s)

Applicants
(Appellants)

- and -

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

Not Parties to the Application or Appeal

**Oral Reasons for Decision of
The Honourable Justice Jo'Anne Streckf**

Application for a Stay Pending Appeal

**Oral Reasons for Decision of
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Introduction

[1] In May and April of 2021, Alberta Health Services (AHS) obtained two orders from the Court of Queen's Bench. These orders were both designed to assist with enforcing COVID-19 community compliance with AHS Health Orders made in response to the COVID-19 pandemic. The applicants, Dawid and Artur Pawlowski, are brothers. Artur was found in breach of both orders; Dawid was found in breach of one order; and both were found guilty of civil contempt: *Alberta Health Services v Street Church*, 2021 ABQB 489; and *Alberta Health Services v Pawlowski*, 2021 ABQB 493 [the Contempt Orders]. Following a subsequent hearing, the following sanctions were imposed on Artur: 2021 ABQB 813 [the Sanction Order] at paras 46, 48 and 52:

- 1) a sentence of three days in prison, deemed fully satisfied and served;
- 2) a fine of \$23,000;
- 3) 18 months' probation, during which he will be required to keep the peace and be of good behavior, obey all AHS Health Orders relating to COVID-19, and provide 120 hours of community service work at a rate 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 but excluding the Street Church Ministry;
- 4) a requirement that he remain in the Province of Alberta during the period of his probation, unless he obtains the consent of his probation officer for a temporary absence in the event of a family emergency ("travel restrictions"); and
- 5) a requirement that during the period of his probation, when publicly speaking against AHS Health Orders and health recommendations, that he indicate the following ("qualified speech provisions"):

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.

- 6) a costs award of \$15,733.50 for the order breached both by him and Dawid, and thus payable jointly and severally by both the applicants;
- 7) a costs award of \$4,758.75 for the order breached only by Artur;
- 8) The fine and costs awards were subject to the following payment terms:
 - i. Interest of 3% per annum compounded semi-annually, not in advance, starting January 1, 2022;
 - ii. The ability of the Provincial Treasurer or AHS to register a charge and lien against any property in Artur's name;
 - iii. Artur was given 36 months to pay the total debt owing provided he pay not less than \$500 per month;
 - iv. The collection provisions were without prejudice to AHS and the Provincial Treasurer of Alberta applying for imprisonment in the event of a default of payment of the fine; and
 - v. Artur was to provide an accurate and fully completed Form 13 as approved in the Civil Enforcement Regulation within 30 days, and do so every six months, and to attend questioning under oath.

[2] The order against Dawid, set out in paragraph 47 of the Sanction Order, is identical to the order against Artur, except for two differences: first, Dawid was ordered to pay a fine of \$10,000; and second, the length of his probation is one year.

[3] The applicants have appealed the Sanctions Order and seek a stay of enforcement of that order pending its appeal. Since the application was filed, the applicants have paid the costs and fines awarded against them in full. As a result, it is not necessary to address those aspects of the Sanction Order on this application.

Test for a stay pending appeal

[4] Rule 14.48 of the *Alberta Rules of Court* provides that a stay pending appeal can be granted by a single appellate judge. The test is set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at pp 334-335. The applicant must establish that:

1. there is a serious question to be considered on appeal;
2. the applicant will suffer irreparable harm if the stay is not granted; and
3. the balance of convenience favors granting the stay.

(*Vaccaro v Twin Cities Power, LLC*, 2014 ABCA 146 at para 6; *Modry v Alberta Health Services*, 2015 ABCA 31 at para 4)

Serious Question

[5] Whether the appeal is arguable is a low threshold. “It does not require an examination of the merits of the case, but rather simply involves an assessment of whether the appeal is frivolous or vexatious”: *Polansky Electronic Ltd v AGT Limited*, 2000 ABCA 46 at para 11, citing *RJR-MacDonald Inc v Canada (AG)*. AHS concedes that the first stage of the test has been met. I agree.

Irreparable Harm

[6] Irreparable harm “is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other”: *RJR-MacDonald Inc v Canada (AG)* at para 64.

[7] AHS concedes that the applicants may suffer irreparable harm if a stay of the qualified speech provisions is not granted pending the appeal.

[8] AHS denies that the evidence put forward by the applicants established that they would suffer irreparable harm if travel restrictions and remaining probation terms are not stayed.

[9] Without deciding the issue, I am satisfied that the applicants have demonstrated that the qualified speech provisions and the travel restrictions arguably affect their mobility rights and rights to free expression guaranteed by the *Charter of Rights and Freedoms*. If these are set aside on appeal, the impairments cannot be remedied and thus constitute irreparable harm

[10] The applicants have not demonstrated on the evidence that the community service requirement or other probation conditions constitute irreparable harm in the circumstances.

Balance of Convenience

[11] The balance of convenience stage requires the Court to consider which of the parties would suffer greater harm if the stay were, or were not, granted. Public interest considerations are applied at this stage. There is a public interest in upholding the rule of law and the enforcement of court orders that are *prima facie* valid, pending their review.

[12] To the extent that AHS submits that the applicants do not come to court with clean hands seeking relief as they have breached health orders granted by the Chief Medical Officer since the Sanction Order was granted, the appropriate authorities are at liberty to seek to enforce such orders or the provisions in the Sanction Order as they see fit.

[13] In the circumstances, I am of the view that an appropriate balance of the competing interests on these applications would be to stay the qualified speech and travel restriction provisions of the order and direct the appeal proceed on an expedited basis. The remaining provisions of the Sanction Order shall continue to apply pending its appeal.

Conclusion

[14] I am granting a partial stay of enforcement with respect to the qualified speech and travel restriction provisions of the Sanctions Order pending the applicants' appeal. The parties are directed to cooperate to have the appeal heard on an expedited basis and to forthwith contact the case management officer to schedule filing deadlines and a date for the hearing of the appeal.

Application heard on November 25, 2021

Reasons filed at Calgary, Alberta
this 1st day of December, 2021

Strekaf J.A.

Appearances:

K.P. Fowler

J.D. Siddons

for the Respondent

S.C. Miller

for the Applicants