In the Court of Appeal of Alberta

Citation: Alberta Health Services v Pawlowski, 2022 ABCA 254

Date: 20220722
Docket: 2101-0234AC
2101-0276AC
2101-0275AC

Registry: Calgary

Docket: 2101-0234AC

Between:

Alberta Health Services

Respondent

- and -

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

Not Parties to the Appeal

- and -

John Doe(s), Artur Pawlowski and Dawid Pawlowski

Appellants

Docket: 2101-0276AC

And Between:

Alberta Health Services

Respondent

- and -

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

Not Parties to the Appeal

- and -

John Doe(s), Artur Pawlowski and Dawid Pawlowski

Appellants

- and -

Canadian Civil Liberties Association

Intervenor

Docket: 2101-0275AC

And Between:

Alberta Health Services

Respondent

- and -

Christopher Scott

Appellant

- and -

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

Not Parties to the Appeal

- and -

Canadian Civil Liberties Association

Intervenor

The Court:

The Honourable Justice Barbara Lea Veldhuis
The Honourable Justice Michelle Crighton
The Honourable Justice Jo'Anne Strekaf

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice Germain
Dated the 28th day of June, 2021
(2021 ABQB 493, Docket: 2101 05742)

Appeal from the Order by
The Honourable Justice Germain
Dated the 13th day of October, 2021
Filed on the 2nd day of November, 2021
(2021 ABQB 813, Docket: 2101 05742)

Appeal from the Order by
The Honourable Justice Germain
Dated the 13th day of October, 2021
Filed on the 2nd day of November, 2021
(2021 ABQB 812, Docket: 2101 05742)

Memorandum of Judgment

The Court:

Introduction

[1] On May 6, 2021, Alberta Health Services (AHS) obtained an *ex parte* injunction to prevent illegal public gatherings in contravention of public health orders aimed at protecting the health of Albertans from the threat posed by the COVID-19 pandemic (the injunction).

[2] All three appellants, Christopher Scott, Artur Pawlowski, and Dawid Pawlowski, were found in contempt of the injunction and sanctions were imposed on them for that contempt. Mr Scott does not challenge the contempt finding but appeals the sanctions imposed on him. Artur and Dawid Pawlowski appeal both the finding of contempt made against them as well as the sanctions imposed.

Background

[3] The World Health Organization declared the novel coronavirus (COVID-19) to be a pandemic in March 2020. By May 2021, Alberta was in the third wave of the pandemic. Evidence before the court below showed that there were 666 people in Alberta hospitals due to COVID-19 and 146 in the ICU as of May 4, 2021. More than 2100 Albertans had died due to COVID-19. Hospital resources were strained, leading to the cancellation of surgeries and concerns that other medical care might have to be triaged if hospitalizations continued to rise.

[4] In response to these concerns, Alberta's Chief Medical Officer of Health (CMOH) implemented public health measures in the form of CMOH orders made pursuant to the *Public Health Act*. CMOH Order 19-2021, issued May 6, 2021, included requirements for mandatory masking and restrictions on indoor and outdoor gatherings, including capacity limits and physical distancing requirements.

[5] AHS became aware that Mr Scott and others were organizing and promoting public gatherings to protest and breach the requirements of CMOH orders. In particular, Mr Scott was promoting a gathering and campout at the Whistle Stop Café, a business operated by Mr Scott, planned for May 8, 2021, in contravention of CMOH orders.

[6] On May 6, 2021, AHS applied under the *Public Health Act* for an *ex parte* injunction to enforce the CMOH orders. The injunction named as respondents Mr Scott, Whistle Stop (2012) Ltd. (the business operated by Mr Scott), Glen Carritt, John Doe(s) and Jane Doe(s).

[7] Paragraph 1 of the injunction provided:

> 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:
>
> > 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.

[8] The injunction defined an "Illegal Public Gathering" as one that does not comply with the requirements in current orders of the Chief Medical Officer of Health (defined as CMOH Orders), including but not limited to masking requirements, attendance limits on indoor or outdoor gatherings, and physical distancing requirements. The injunction also stated that a person is "deemed to have Notice of this Order if that person is shown a copy of the Order, or it is posted in plain sight where it can be easily read by them, or if it is read to them".

[9] Mr Scott was properly served with a copy of the injunction on May 7, 2021, and the injunction was read to him at that time. Notwithstanding this, his planned event on the Whistle Stop Café grounds went ahead on May 8, 2021, with between 300 and 400 people in attendance. Mr Scott was arrested by the RCMP on May 8, 2021, after they observed hundreds of people disobeying CMOH orders at the event he had organized. Mr Scott remained in custody until May 10, 2021, at which time he was released.

[10] The appellants, Artur and Dawid Pawlowski (collectively, the Pawlowskis), operate a Street Church in Calgary which, during April and May 2021, held services in violation of CMOH orders. On May 8, 2021, members of the Calgary Police Service provided the injunction to the Pawlowskis at a gathering in and around the church and arrested them shortly after they left, having concluded they were in breach of the injunction. The Pawlowskis remained in custody until May 10, 2021, at which time they were released.

[11] The injunction was amended on May 13, 2021, on the application of a third party and with the consent of AHS, to remove the phrase "or independently to like effect" in paragraph 1. Thereafter, the opening paragraph of the injunction read: "The named individual Respondents and any other person acting under their instructions or in concert with them and with Notice of this Order, shall be restrained anywhere in Alberta from…".

Contempt and sanction hearings for Mr Scott

[12] On June 28, 2021, following a contempt hearing, the chambers judge found beyond a reasonable doubt that Mr Scott was served with the injunction, had actual knowledge of the conduct prohibited by it, and persisted in a public and defiant matter in disobeying it. He found Mr Scott in contempt of the injunction: *Alberta Health Services v Scott*, 2021 ABQB 490. Those findings and conclusions have not been appealed and are well-supported by the record.

[13] On September 15, 2021, the chambers judge heard submissions on sanction with respect to Mr Scott's contempt. AHS proposed a 21-day sentence and sought costs. Mr Scott submitted that community service and a small fine was appropriate and opposed any order for costs.

[14] The chambers judge found that Mr Scott's conduct was extremely aggravating, as he engaged in direct and public defiance of a court order designed to save people's lives by keeping them socially distant, away from groups, and wearing masks in public. He found that there were few mitigating factors and most of those put forward were "justifications and a rewrite of history". The chambers judge acknowledged that Mr Scott "shows some respect for the Court" as he had not been identified as acting in disobedience of the injunction since his arrest.

[15] The chambers judge concluded that further jail time would be inappropriate and sentenced Mr Scott to three days in prison, which was deemed fully satisfied and served by his time spent in custody following his arrest. He was also ordered to pay a fine of $20,000 and costs of $10,922.25. Mr Scott was put on probation for 18 months and required to complete 120 hours of community service and obey all AHS health orders related to COVID-19. The chambers judge also ordered that Mr Scott remain in Alberta except to attend a family emergency or health matter (the mobility provision), and to include a disclaimer when speaking against government orders or recommendations, in a public gathering or forum, including electronic social media (the qualified speech provision). The disclaimer was to read:

> 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.

[16] The sanction decision, released on October 13, 2021, is the subject of Mr Scott's appeal: *Alberta Health Services v Scott*, 2021 ABQB 812.

Contempt and sanction hearings for the Pawlowskis

[17] In May 2021, AHS brought a separate contempt application against the Pawlowskis for breaching the injunction. The Pawlowskis denied they were in contempt, arguing they were not named in the injunction and it did not apply to them, there was improper or no service of the injunction, they were not made aware of the prohibitions set out in the injunction, and it was uncertain whether the injunction applied to church services.

[18] The chambers judge disagreed with the Pawlowskis' submissions. He concluded that the application of the injunction was not restricted to those connected with the named respondents. Rather, it applied to all individuals who willingly breached the operative terms of the injunction after having received notice of it. Although the opening paragraph of the injunction was amended (and its scope arguably narrowed) on May 13, 2021, at the time of the Pawlowskis' arrest no connection to the named respondents was required to identify potential contemnors. The chambers judge held that the use of John Doe and Jane Doe in the style of cause made clear that the injunction was intended to apply to individuals not specifically named. He found the Pawlowskis were effectively served with the injunction, had full knowledge of it and the prohibitions contained in it, and knew the injunction applied to them. He found the Pawlowskis were in contempt of the injunction when they participated in and attended an Illegal Public Gathering (their church service) in Calgary on the morning of May 8, 2021: see *Alberta Health Services v Pawlowski*, 2021 ABQB 493.

[19] The chambers judge heard submissions on sanction for the Pawlowskis' contempt on September 15, 2021, at the same time as the Scott sanction hearing. AHS submitted that a jail sentence was required and proposed imprisonment of 21 days for Artur Pawlowski and 10 days for Dawid Pawlowski. AHS also sought costs. The Pawlowskis argued that a small fine or no further sanction was appropriate, and they objected to costs being ordered. They also argued that their *Charter* rights were violated as they were improperly detained and not afforded the right to counsel following their arrest.

[20] The chambers judge released his sanction decision on October 13, 2021: *Alberta Health Services v Pawlowski*, 2021 ABQB 813. He found the Pawlowskis' conduct was extremely aggravating as they went out of their way to make their arrest a news spectacle and engaged in direct and public defiance of a court order designed to save people's lives by keeping them socially distant, away from groups, and wearing masks in public. The chambers judge found the following circumstances were not mitigating: the religious overtone to the service conducted by Artur Pawlowski on May 8; the fact that he had little or no notice and therefore little time to apply sober second thought to his conduct; and the fact that he is entitled to free speech in a democratic country. The chambers judge also noted that Artur Pawlowski "taunted me to imprison him", refused to apologize to the court, went on a speaking tour in the United States after he was found guilty of

contempt, and that his activism gave him the ability to raise money and gain public notoriety. With respect to Dawid Pawlowski, both counsel submitted that his sanction should be less than that of Artur Pawloski. The chambers judge rejected the Pawlowskis' submission that their *Charter* rights had been violated when they were arrested. He also stated that in contempt proceedings, if the *Charter* is engaged after the events that led to the arrest and apprehension, any *Charter* breaches should go to issues of sanction and not a stay of proceeding.

[21] Artur Pawlowski was sentenced to three days in prison, which was deemed fully satisfied and served by his time in custody following his arrest. He was ordered to pay a fine of $20,000 and placed on probation for 18 months, during which he was required, among other things, to complete 120 hours of community service and obey all AHS health orders related to COVID-19. He was also ordered to remain in Alberta except to attend a family emergency or health matter (the mobility provision), and to include the same disclaimer when speaking against government orders or recommendations, in a public gathering or forum, including on electronic social media, as that imposed on Mr Scott (the qualified speech provision).

[22] Dawid Pawlowski was sentenced to three days in prison, which sentence was deemed fully satisfied and served. He was ordered to pay a fine of $10,000 and placed on probation for 12 months, with the same conditions as those imposed on Artur Pawlowski.

[23] Costs were ordered against the Pawlowskis jointly and severally in the amount of $15,733.50 for breach of the injunction.

Appeals by Scott and the Pawlowskis

[24] Mr Scott appeals the sanction decision only (Appeal No 2101-0275). He does not appeal the finding of contempt made against him.

[25] The Pawlowskis appeal both the contempt finding (Appeal No 2101-0234) and the sanction decision (Appeal No 2101-0276).

[26] The appeals were heard together. A partial stay of the mobility and qualified speech provisions was granted pending hearing of the appeals: see *Alberta Health Services v Scott*, 2021 ABCA 391 and *Alberta Health Services v Pawlowski*, 2021 ABCA 392. The Canadian Civil Liberties Association (CCLA) was granted leave to intervene on the appeals to address the constitutionality of the qualified speech provision.

Scott's appeal of the sanction order

Standard of Review

[27] The appropriate sanction for civil contempt is a discretionary decision reviewed for reasonableness. As this Court has noted, "'the reviewing court may not substitute its own discretion unless it finds that the chambers judge did not give sufficient weight to relevant considerations; proceeded arbitrarily, on wrong principles or on an erroneous view of the facts; or there is likely to be a failure of justice'": *Envacon Inc v 829693 Alberta Ltd*, 2018 ABCA 313 at para 60, citing *Hover v Metropolitan Life Insurance Company*, 1999 ABCA 123.

[28] The deferential standard of review recognizes, among other things, the advantaged position of the sanctioning judge. However, where the sanctioning judge has committed an error in principle that had an impact on the sanction, the appellate court must sanction anew. The approach was described in *College of Physicians and Surgeons of British Columbia v Ezzati*, 2021 BCCA 422 at para 51:

> As in criminal sentence appeals, appellate intervention with a sanction imposed for civil contempt is only justified when a sentencing judge has committed an error in principle that had an impact on the sentence or imposed a demonstrably unfit sentence: *Roumanis* at paras. 22–24; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 90; *R. v. Lacasse*, 2015 SCC 64 at paras. 41, 44; *R. v. Friesen*, 2020 SCC 9 at paras. 25–29. If an appellant demonstrates the judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis without deference to the existing sentence, even if that sentence falls within the applicable range. In doing so, however, deference must be shown to the judge's findings of fact and identification of aggravating and mitigating factors, to the extent that they are not affected by error in principle: *Friesen* at para. 28.

Issues on appeal

[29] On appeal Mr Scott submits that the chambers judge erred by:

1. imposing sanctions that were excessive and disproportionate;
2. failing to follow a fair procedure with respect to the mobility and qualified speech provisions crafted by the chambers judge, which were not requested by AHS nor the subject of submissions by the parties;
3. imposing sanctions that were demonstrably unfit and unreasonably and disproportionately violated his rights to mobility and freedom of expression under the Charter of Rights and Freedoms.

[30] He asks this Court to reduce the quantum of the fine imposed to that which he has paid and to dispense with the balance of the sanctions.

The mobility and qualified speech provisions are set aside by consent

[31] The mobility and qualified speech provisions were not requested by AHS, nor were the parties invited to make any submissions before the chambers judge imposed them. Shortly before the hearing of this appeal, on June 3, 2022, AHS advised in writing that it would consent to an appeal order varying the sanctions order to remove these provisions. AHS acknowledged at the oral hearing of the appeal that the provisions offend the *Charter of Rights and Freedoms*.

[32] We are satisfied that the mobility and qualified speech provisions should be set aside. A judge sanctioning for civil contempt, like a sentencing judge, should alert counsel before imposing a sanction that exceeds or is significantly different from that sought by the other party and afford counsel the opportunity to address the proposed sanction. The failure to provide an opportunity to address proposed sanctions that were not raised by the parties offends the rules of natural justice and the *audi alternam partem* principle.

[33] Moreover, we share the concerns raised by the parties and intervenor regarding the constitutionality of the impugned provisions. Courts have held that s 2(b) of the *Charter* includes freedom from being compelled to express a particular message: see, eg, *Alberta v AUPE*, 2014 ABCA 197 at para 41 and the cases cited therein. In this case, the restrictions imposed on Mr Scott by the impugned provisions were unrelated to his contemptuous conduct and, in the circumstances, unreasonably infringe his freedom of expression and mobility rights.

Consideration of appropriate sanction

[34] We are satisfied that the procedure followed by the chambers judge in imposing the mobility and qualified speech provisions and the effect of those sanctions on Mr Scott's constitutional rights amounts to an error in principle that requires us to consider afresh the appropriate sanction to address Mr Scott's contempt. The fact that Mr Scott was subject to these restrictions for approximately six weeks from the date the sanctions were imposed on October 13, 2021 until they were stayed pending appeal on December 3, 2021 is relevant to a consideration of that appropriate sanction.

[35] "Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process": *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, 89 DLR (4th) 609 at para 50. Contempt proceedings have two purposes; the primary purpose is to ensure compliance with court orders and a second is to punish the contemnor: *Ouellet v BM*, 2010 ABCA 240 at para 60. The factors which the court should consider include the proportionality of the sentence to the wrongdoing, the presence of aggravating and mitigating factors, deterrence, reasonableness of a fine and appropriateness of incarceration: *Builders Energy Services Ltd v*

Paddock, 2009 ABCA 153 at para 13; *Law Society of Alberta v Beaver*, 2021 ABCA 163 at para 78.

[36] There are several factors in this case that support the imposition of a significant sanction for Mr Scott's contempt. First, violation of an injunction to prevent illegal public gatherings in the middle of the COVID-19 pandemic, obtained by AHS pursuant to its authority under the *Public Health Act*, can have serious consequences to the public health of the citizens of Alberta. Deterrence of individuals who would elect to violate such an injunction is a paramount consideration in these circumstances.

[37] Second, Mr Scott's conduct showed a deliberate disregard for the authority of the court. After being served with the injunction and with full knowledge of its terms, Mr Scott announced via public media that his planned event would proceed, in clear breach of the terms of the injunction. This conduct demonstrates blatant contempt of the court process and must be sanctioned to ensure compliance with court orders and maintain public confidence in the administration of justice.

[38] Mr Scott has experienced some significant consequences as a result of being found in contempt, which must be considered when determining the appropriate sanction. He was arrested and spent approximately three days in custody, and was subject to the now vacated mobility and qualified speech provisions for approximately six weeks before a stay of those provisions was granted pending appeal. He also spent approximately 8 months on probation, during which time he was required to perform community service.

[39] We have concluded that a term of incarceration is appropriate to reflect the seriousness of Mr Scott's breach of an injunction obtained to protect the public health. The three days which Mr Scott spent in custody following his arrest, when coupled with the other sanctions, was sufficient for that purpose, particularly as his conduct following his release reflected no further breaches of the injunction. In addition, Mr Scott should be subject to a fine, which we have set at $10,000, after taking into account the serious nature of his breach of the injunction, the other sanctions imposed on him and the circumstances surrounding and nature of the mobility and qualified speech provisions to which he was subject for approximately six weeks prior to the granting of a stay pending appeal.

Conclusion and costs on Scott appeal

[40] The appeal is allowed in part. The mobility and qualified speech provisions of the sanction order are set aside for the reasons set out above. The sanctions imposed by the chambers judge are replaced with the following sanctions for the appellant's contempt of the injunction:

1. A sentence of three days in prison, which is deemed fully satisfied and served;
2. A fine of $10,000, less credit for all amounts paid by the appellant to date, which may be paid at the rate of $500/month, failing which payments shall immediately become due and payable in its entirety; and
3. Probation for a period of approximately 8 months to the date of this order on the terms prescribed by the chambers judge, which is deemed fully satisfied.

[41] The chambers judge awarded costs to AHS for the proceedings below at 2.5 times column one. This method of calculating costs was reasonable. Costs are awarded as follows, calculated on that basis, plus reasonable disbursements:

1. AHS was successful in the contempt proceeding before the chambers judge, which was not appealed, and is entitled to the costs of that proceeding;
2. Costs awarded for the sanction hearing are set aside and AHS and the appellant shall each bear their own costs of that proceeding;
3. The primary focus of this appeal related to the mobility and qualified speech provisions of the sanction order, which were set aside with the consent of AHS, provided shortly prior to the oral hearing. In the circumstances, the appellant is awarded his costs for the proceedings in this Court.

Pawlowskis' appeal of the contempt finding

Standard of Review

[42] The standard of review on an appeal from a contempt citation varies with the issue: *Oommen v Capital Region Housing Corporation*, 2017 ABCA 143 at para 14, leave to appeal to SCC refused, 2018 CanLII 505 (SCC):

> Where the appeal involves a question of law, the standard of review is correctness: *Koerner v. Capital Health Authority*, 2011ABCA 289 at para 5, 515 AR 392 [Koerner]. Where the issue relates to the exercise of discretion, the standard is one of reasonableness: *Broda v. Broda*, 2004 ABCA 73 at para 8, 346 AR 376. The findings of fact and inferences of fact underlying a finding of contempt are reviewed for palpable and overriding error: *Koerner* at para 5. The finding of contempt in a particular case involves the application of a legal standard to the facts, meaning it is a mixed question of fact and law and it is reviewable on the palpable and overriding error standard: *Koerner* at para 5.

Issue on appeal

[43] The Pawlowskis raise several issues on appeal, the first of which is that the chambers judge erred in finding that the injunction was clear and unequivocal such that it applied to them. Because of our conclusion with respect to this issue, we have not considered the other issues raised.

Does the injunction apply to the Pawlowskis?

[44] All parties agree that the chambers judge correctly outlined the three elements that must be established beyond a reasonable doubt for a finding of civil contempt, as set out in *Carey v Laiken*, 2015 SCC 17 at paras 32-35:

(1) The order alleged to have been breached must state clearly and unequivocally what should and should not be done;

(2) 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 prohibits or intentionally failed to do the act that the order compels.

[45] The Pawlowskis' first argument on appeal is that the chambers judge erred in finding that the injunction clearly and unequivocally applied to them.

[46] Before entering into a discussion of that issue, we feel it is important to emphasize the necessity of obeying court orders. As the British Columbia Court of Appeal noted in *Larkin v Glase*, 2009 BCCA 321 at para 7, "citizens cannot decide individually what laws to obey and what laws to disregard". In finding the Pawlowskis in contempt, the chambers judge found that they openly flouted the efforts of AHS to control the third wave of the pandemic and were intentional objectors to CMOH orders put in place to protect public health. He concluded that, if the injunction applied to them, they were in breach of it. We see no error in these findings.

[47] The legal issue before us, however, as before the chambers judge, is whether the injunction applied to the Pawlowskis such that they could be found in contempt of it. Without condoning the actions of the Pawlowskis, we turn to that question.

[48] The "requirement of clarity ensures that a party will not be found in contempt where an order is unclear... An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning [citations omitted].": *Carey v. Laiken* at para 33.

[49] The chambers judge interpreted the language of the injunction as it existed on May 8, when the Pawlowskis were arrested, and not as it was later amended. This was the appropriate approach, which was not disputed by the Pawlowskis. He concluded that the injunction "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": para 33. He also held that the phrase in the injunctions opening paragraph, "independently to like effect", applied to church services as gatherings to which the public is invited: paras 34-35.

[50] The interpretation of the terms of a court order is a question of law reviewed for correctness: *Metcalfe Estate v Yamaha Motor Powered Products Co Ltd*, 2012 ABCA 240 at para 24; *Wagner v Wagner*, 2014 ABCA 428 at para 21.

[51] It has been held that it is the court, and not the parties, that determines the meaning of a court order. The provisions of a court order should be interpreted by reading the language of the order as a whole, in the context of the pleadings and the circumstances in which the order was granted: *Weinrich Contracting Ltd v Wiebe*, 2022 ABCA 176 at para 25; *Yu v Jordan*, 2012 BCCA 367 at para 53. In the circumstances here, the chambers judge declined to consider discussions that occurred in court at the time the injunction was granted because the injunction "must be interpreted based on what it said and the message it conveyed; not the discussion leading up to it" (para 37). We agree that a relevant circumstance in this case is that the court is asked to find someone in contempt of an order that was obtained *ex parte*. In that circumstance, whether the order is sufficiently clear and unambiguous must be determined on the face of the order, without reference to discussions that occurred when the order was granted that are beyond the knowledge of the party said to be subject to it.

[52] An *ex parte* injunction can be validly directed at individuals who are not parties to the action, and those individuals can be found in contempt for violating the injunction. "The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey": *MacMillan Bloedel Ltd v Simpson*, [1996] 2 SCR 1048, 137 DLR (4th) 633 at para 30. However, an order that purports to have that effect must contain language that alerts members of the public who may be affected by the order that they are required to obey it; that "the order's terms speak of the duty of non-parties to respect it": *MacMillan Bloedel* at paras 31 and 36. In *MacMillan Bloedel*, the Supreme Court noted that the terms of injunctions restraining members of the public from interfering with logging operations had been amended to make them clearer and fairer, by removing "legal language which some members of the public might not have understood" and replacing it with more precise language specifying what was prohibited.

[53] When determining who is subject to an order, the words used in the order must be clear and, like the language of a statutory instrument, are presumed to have been included for a reason. There are two aspects to paragraph 1 of the injunction:

1. Identifying the persons to which the injunction applies:

   "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, ..."

2. Identifying the nature of the prohibited conduct:

   "...shall be restrained anywhere in Alberta from:

   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."

[54] It is the first aspect of paragraph 1 that is at issue here. The injunction does not state that it applies to all persons with notice of the injunction, nor to all persons with such notice including the named respondents, which is essentially the interpretation of the scope of the order adopted by the chambers judge and AHS. Rather, it identifies four categories of persons who are subject to the order: (i) "the named individual Respondents"; (ii) "any other person acting under their instructions"; (iii) "any other person acting .... in concert with them"; and (iv) "any other person acting ...independently to like effect". All parties agree that the phrase "and with Notice of this Order" applies to each of the categories.

[55] The chambers judge made the following comments with respect to the meaning of the phrase "independently to like effect", at paras 34-35:

> [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.

[56] Essentially, the chambers judge interpreted the injunction as applying to the "named individual Respondents and any other person .... with Notice of the Order". This fails to give any meaning to the language in paragraph 1 that reads "acting under their instructions or in concert with them or independently to like effect". The chambers judge's interpretation that the phrase "to like effect" refers to anyone who plans and participates in public events incorporates a reference to the prohibited conduct as an aspect of identifying who is subject to the injunction. This interpretation contains an inherent circularity, capturing individuals who are acting independently of the named respondents and prohibiting them from engaging in the prohibited conduct because they are engaged in the prohibited conduct. While this might be viewed as merely awkward drafting, it creates an ambiguity and potential confusion when the language identifying who is subject to the order refers to the prohibited conduct without clearly stating that all persons are subject to the injunction.

[57] The wording in paragraph 1, on its face, directs the injunction at the respondents and individuals who are linked to them in some fashion, either because they are acting under their instructions, or acting in concert, or because they are acting "to like effect". In this context, what is meant, if anything, by the phrase "to like effect"? The Pawlowskis suggest that language refers to conduct of a similar nature to that engaged in by the named respondents, which they say is distinguishable from conducting a religious service. For example, CMOH Order 19- 2021 contained different restrictions for "Restaurants, cafes, bars and pubs" (Part 6.1) than for "Places of worship" (Part 7).

[58] In setting aside, as containing imprecise language, a permanent injunction that enjoined a golf club from permitting its members to hit golf balls onto a plaintiff's property, this Court said:

> Injunctions are serious matters. They are court orders, and accordingly a breach of an injunction is not merely a "breach of contract", but will generally amount to contempt of court. The importance of the precise wording of injunctions was discussed in *Nova Scotia v Doucet-Boudreau*, 2003 SCC 62 at para. 97, [2003] 3 SCR 3:

> . . . The exercise of the court power to grant injunctions may lead, from time to time, to situations of non-compliance where it may be necessary to call upon the drastic exercise of courts' powers to impose civil or criminal penalties, including imprisonment . . . Therefore, proper notice to the parties of the obligations imposed upon them and clarity in defining the standard of compliance expected of them must be essential requirements of a court's intervention. Vague or ambiguous language should be strictly avoided . . .
>
> Injunctions must be cautiously worded, and an injunction should not be granted unless it is capable of clear interpretation: *Carey v Laiken*, 2015 SCC 17 at para. 33, [2015] 2 SCR 79. The parties cannot be expected to comply with uncertain or imprecise obligations where a breach is punishable in a quasi-criminal procedure. A court cannot enforce the impossible even against a wrongdoer: *Broder Estate v Broder*, 2005 ABCA 442 at para. 22, 51 Alta LR (4th) 203, 376 AR 180.
>
> *Liu v Hamptons Golf Course Ltd.*, 2017 ABCA 303 at para 24.

[59] Where there is ambiguity in a phrase that purports to identify a group of individuals to whom an *ex parte* injunction applies, the injunction may not be sufficiently clear to found contempt proceedings against such individuals for breaching the terms of the order. As all elements of contempt must be established beyond a reasonable doubt, we conclude that the injunction here was not sufficiently clear and unambiguous, when it referred to other parties "acting independently to like effect", so as to apply to the Pawlowskis. The contempt finding against the Pawlowskis must therefore be set aside.

[60] Because of our conclusion on this ground of appeal, it is not necessary to address the other issues raised on the appeal of the contempt order. The setting aside of the finding of contempt means the sanction order must also fall.

Conclusion and costs on the Pawlowski appeals

[61] The Pawlowskis' appeals are allowed. The finding of contempt and the sanction order are set aside. The fines that have been paid by them are to be reimbursed.

[62] The chambers judge awarded costs to AHS payable by the Pawlowskis jointly in the amount of $15,733.50, calculated at 2.5 times column 1. That costs award is set aside and the Pawlowskis are awarded their costs payable by AHS in the proceedings below and in this Court calculated on the same basis.

No costs awarded with respect to the intervenor

[63] No costs were sought nor are any awarded to be paid by or to the intervenor CCLA with respect to any of the appeals.

Appeal heard on June 14, 2022

Memorandum filed at Calgary, Alberta
this 22nd day of July, 2022

Authorized to sign for: Veldhuis J.A.

Authorized to sign for: Crighton J.A.

Strekaf J.A.

Appearances:

A.S. Groenewegen (via teleconference)
J. D. Siddons
K.P. Fowler
for the Respondent

S.C. Miller
for the Appellants, Artur Pawlowski and Dawid Pawlowski
(2101-0234AC & 2101-0276AC)

K.C. Johnston (no appearance)
S.R. Nicol
C. Williamson
for the Appellant, C. Scott (2101-0275AC)

H.D. Ferg
S.E. Rankin
for the Intervenor, Canadian Civil Liberties Association