

COURT PROVINCIAL COURT OF ALBERTA (CRIMINAL)

COURT LOCATION CALGARY  
Calgary Courts Centre, 601 5 Street SW  
Calgary, AB T2P 5P7

ACCUSED ARTUR PAWLOWSKI

DOCUMENT **NOTICE OF APPLICATION AND CONSTITUTIONAL ISSUE**

Clerk's Stamp
at _____ AM/PM
Clerk's initials

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**UPON** the Application of the Accused, Artur Pawlowski, ("**Mr. Pawlowski**") pursuant to *Constitutional Notice Regulation*, AR 102/99, s 1 and the *Judicature Act*, RSA 2000, c J-2, s 24, **TAKE NOTICE** that the Mr. Pawlowski will bring an application on 22<sup>nd</sup> day of February, 2022 at trial, for an order allowing the application and granting the remedy set forth in this Application, and **FURTHER TAKE NOTICE** that Mr. Pawlowski expressly reserves the right to raise additional constitutional arguments which may be disclosed by the evidence presented at trial.

**THE GROUNDS FOR THIS APPLICATION ARE:**

1. Mr. Pawlowski is a resident of Calgary and the pastor of Street Church, a charity and Christian worship organization. Mr. Pawlowski has been charged with an offence pursuant to section 73(1) of the *Public Health Act*, RSA 2000, c P-37, ("**PHA**").

2. Section 73(1) of the *PHA* states:

**Penalty**

**73(1)** A person who contravenes this Act, the regulations, an order under section 62 or an order of a medical officer of health or physician under Part 3 is guilty of an offence.

3. The facts set out within this Application are not admissions of fact but are provided as a summary of anticipated evidence or argument.

4. The Information for this docket lists one charge related to accusations of “multiple offences” under the *PHA* from December 13, 2020 and January 6, 2021. The offence is described as “operating the entity known as Street Church on public property...did unlawfully attend a **private social gathering at an outdoor public place** contrary to s. 12 of CMOH Order 42/2020” (emphasis added).
5. The anticipated theory of the Crown Prosecutor is an allegation that Mr. Pawlowski violated or failed to comply with an order of a medical officer of health, specifically, CMOH Order 42-2020 (“**Order 42**”). Any such allegation is not admitted and explicitly denied.
6. Order 42 was issued on December 11, 2020. It was amended on December 22, 2020 by CMOH Order 43-2020 (“**Order 43**”).
7. Order 42 defines a “private social gathering” in section 10 as any type of private social function or gathering at which a group of persons come together and move freely around to associate, mix or interact with each other for social purposes rather than remain seated or stationary for the duration of the function or gathering”.
8. Note that the Street Church activities are not a private social gathering. The purpose of Street Church is not “social”. Neither is the function “private”. These gatherings are outdoor public gatherings, related to worship and protest. We anticipate the evidence at trial to show that the gatherings have been conducted weekly for many years prior to the COVID-19 pandemic.
9. In section 12, Order 42 goes on to prohibit anyone from attending a “private social gathering” at an outdoor private place or public place.
10. Note that Order 42 does not prohibit outdoor, public worship gatherings, nor does it prohibit outdoor, public protests. The defined term “private social gatherings” and its plain meaning would not apply to public protests or public worship services.
11. The anticipated theory of the Crown Prosecutor is an allegation that Mr. Pawlowski attended a “private social gathering” when he attended the public events referred to in the Crown’s disclosure as Street Church. Whether the gathering(s) are “private social gatherings” is a matter for the trial on the merits.

**CONSTITUTIONAL ISSUES TO BE RAISED:**

12. If Order 42 prohibits protests or outdoor worship services, Order 42 unjustifiably and unreasonably infringes on Mr. Pawlowski’s fundamental freedoms. Specifically, Mr. Pawlowski’s rights and fundamental freedoms, as protected by the *Canadian Charter of Rights and Freedoms* (the “**Charter**”), have been infringed as follows:
  - (a) Mr. Pawlowski has *Charter*-protected fundamental freedoms for freedom of conscience and religion pursuant to section 2(a) of the *Charter*. Order 42 and the

related prosecution unjustifiably and unreasonably infringe on Mr. Pawlowski's religious freedoms and impair his religious practices. Order 42 unjustifiably and unreasonably interferes with Mr. Pawlowski's personal religious beliefs. At the time of the alleged offence, Mr. Pawlowski was practicing his religion with his community, outdoors, in a lawful, justified, and safe manner. There was no consideration in the *PHA* or any subordinate legislation (including Order 42) for his religious freedoms. In addition, if religious services or protests are a "private social gathering", the same treatment of religious or protest gatherings as social gatherings which have no constitutional protection cannot be justified.

- (b) Mr. Pawlowski also has *Charter*-protected fundamental freedoms for freedom of expression pursuant to section 2(b) of the *Charter*. This ticket, the charge, and the underlying circumstances unjustifiably and unreasonably impair Mr. Pawlowski's fundamental freedoms of expression by prohibiting his religious and protest gatherings. Such prosecution is an infringement on Mr. Pawlowski's freedoms of expression, and cannot be justified.
  - (c) Mr. Pawlowski also has *Charter*-protected fundamental freedoms for freedom of assembly pursuant to section 2(c) of the *Charter*. This ticket, the charge, and the underlying circumstances unjustifiably and unreasonably impair his rights to assembly and have the effect or incidental purpose of restricting expressive activity including participating in social decision-making, gathering, and engaging in public life and joining together for common goals. Such prosecution is an infringement on Mr. Pawlowski's freedoms of assembly.
13. There is no demonstrably justified reason for impairing Mr. Pawlowski's constitutional freedoms in this manner.
14. A trial date has been set for February 22-23, 2021, and Mr. Pawlowski expects that this Application will be heard at the Calgary Courts Centre after the trial proper on the merits, as discussed with the Crown Prosecution Service.

## CONSTITUTIONAL PRINCIPLES

### SECTION 2(A) - FREEDOM OF RELIGION

15. The freedom of religion includes both the absence of coercion and the right to manifest beliefs and practices, "by worship and practice or by teaching and dissemination."<sup>1</sup> As found by the Supreme Court of Canada,

Even if a law has a valid purpose, it is still open to a litigant to argue that it interferes by its effects with a right or freedom guaranteed by the Charter.<sup>2</sup>

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<sup>1</sup> *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at paras 94, 95.

16. The effect of Order 42 prohibits Mr. Pawlowski from practicing his religion in the form which conforms to his religious beliefs. The mandate of Street Church and Mr. Pawlowski's religious practice (which has been established by over 20 years of practice in Calgary) requires:
  - (a) in-person connection for those who may be unwelcome at physical churches due to their poverty or addictions,
  - (b) providing the word of God in-person by oration to those who may be illiterate, and
  - (c) engaging in charitable acts in a community which is generally inaccessible due to its dispersion unless an organization provides a regular, central, and public location for those to congregate.
17. These are the key elements of Mr. Pawlowski's church and religion. Order 42, and especially section 12 (if it is found to apply to religious services), infringes on Mr. Pawlowski's freedom of religion by failing to permit his worship and dissemination of his religious beliefs.
18. Any requirement which prohibited outdoor gatherings of 11 or more people for the purpose of protest or religion from December 13, 2020 to January 6, 2021 is an unreasonable restriction on the religious and political freedoms of Mr. Pawlowski. Mr. Pawlowski and Street Church provide religious services to the poor in a manner of natural and accessible congregation and gathering during certain times of the week in a central and consistent location. The fluidity, or come-and-go nature, of attending religious services with Street Church is a key aspect of Mr. Pawlowski's religious practices, and a gathering restriction which prohibits the attendance of 11 or more worshippers or protestors in an outdoor location during the time in which Order 42 was in place, is an unreasonable restriction and infringement of Mr. Pawlowski's section 2(a) *Charter* rights.
19. Following Order 42, there have been further Orders which explicitly acknowledge the rights of protestors. For example, on May 27, 2021, CMOH Order 29-2021 was issued to clarify previous orders and stated "a person may attend at an outdoor public place to exercise their right to peacefully demonstrate for a protest or political purpose without limit to the number of persons in attendance..." Such further Orders acknowledge the rights of Albertans to gather outdoors for the purpose of political protest and assembly.
20. Any requirement by Order 42 to direct how Mr. Pawlowki practices his religion or interacts with his congregation or members of the public, as alleged to be implied by section 12 of Order 42, is a further violation of Mr. Pawlowski's (and others') rights to freedom of religion.

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<sup>2</sup> *R v Videoflicks Ltd*, [1986] 2 SCR 713 at para 83.

21. Order 42 is an unconstitutional violation of Mr. Pawlowski's religious freedoms and should be found to be of no force and effect on that basis.

## **SECTION 2(B) FREEDOM OF EXPRESSION**

22. To fall within the scope of section 2(b) protection, there must be content of an expressive nature which is infringed upon by legislation. The effect of the legislation, rather than the purpose, is relevant to finding whether the legislation limits freedom of expression.<sup>3</sup>
23. Legislation violates the right to freedom of expression "where the legislation has the incidental purpose of restricting expressive activity in furtherance of some broader overall objective."<sup>4</sup>
24. Order 42 has the incidental purpose of impairing Mr. Pawlowski's expression. He is a pastor for Street Church and takes to the street every week to express his religious views, practice his religion through charity and community as directed by his religious texts, and preach to his congregation and other attendees.
25. Expressive content includes activities where persons are seeking or attaining truths, participating in social and political decision-making, and pursuing self-fulfillment and human flourishing.<sup>5</sup> Factors which inform whether the expression is protected includes the importance of the expression, potential chilling effect caused to future expression (for either Mr. Pawlowski or others), and the history of activism or advocacy in the public interest.<sup>6</sup>
26. From December 13, 2020 to January 6, 2021, Mr. Pawlowski was participating in religious services and political protest which help him seek and attain his truths and pursue self-fulfillment and flourishing for himself and his community. The importance of religion is unquestionable, as itself is a separate freedom protected by the *Charter*. Mr. Pawlowski also has an established history and practice of engaging in expression at that location in that manner on a regular and consistent basis. Order 42 has a chilling effect on Mr. Pawlowski expression of his religion, as well as others.
27. Any requirement by Order 42 which directs Mr. Pawlowski on how to practice his religion or interact with his congregation and members of the public is a violation of Mr. Pawlowski's rights to freedom of expression. It has a chilling effect in that it expects Mr. Pawlowski to orate and share sermons to 15 or less people, manage and monitor

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<sup>3</sup> *Attorney General of Ontario v 2192 Dufferin Street*, 2019 ONSC 615 at para 64 [*Dufferin Street*].

<sup>4</sup> *Dufferin Street*, *ibid* at para 61, citing *R v Banks*, 2007 ONCA 19 at para 126.

<sup>5</sup> *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 77 [*PPA*], citing *R v Sharpe*, 2001 SCC 2 at para 181 [*Sharpe*]; *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 75; *Dufferin Street*, *supra* note 3 at para 62, citing *Montreal (Ville) v 2952-1366 Quebec Inc*, 2005 SCC 62 at para 83.

<sup>6</sup> *PPA*, *ibid* at para 80.

members of the public on a public street. The gathering size restriction reduces the effectiveness and scope of Mr. Pawlowski's expression.

### **SECTION 2(C) - FREEDOM OF PEACEFUL ASSEMBLY**

28. The freedom of peaceful assembly is a "guarantee of access to and use of public spaces, including public parks, squares, sidewalks, roadways, bridges, and buildings around which public life unfolds."<sup>7</sup> Section 2(c) of the *Charter* is also designed to protect the physical and literal gathering of people.<sup>8</sup>
29. The government must refrain from interfering with activities that individuals are naturally capable of engaging in on their own, without government assistance.<sup>9</sup> In other words, this means that the government should not enact laws which prevent its citizens from gathering and engaging in public life.
30. From December 13, 2020 to January 6, 2021, Mr. Pawlowski was assembled with others for peaceful purposes, on a public street, for a physical gathering of his community.
31. Order 42 severely constrains Mr. Pawlowski's ability to assemble peacefully in a public street and prevents use of the public space in any feasible way. Its purpose is explicitly to prevent the gathering together of people. Therefore, Order 42 violates Mr. Pawlowski's right to freedom of peaceful assembly.

### **SECTION 1 - ORDER 42 IS NOT REASONABLE**

32. The burden is on the Government of Alberta to establish that Order 42 is a reasonable limit which can be demonstrably justified in a free and democratic society.
33. Mr. Pawlowski was located outdoors, interacting with only those who were interested in interacting with him and his community. There was no public risk to any other person besides those who chose to attend at Street Church or otherwise gather with Mr. Pawlowski.
34. Order 42 does not minimally impair Mr. Pawlowski's rights. The effects of Order 42 on Mr. Pawlowski's fundamental freedoms, and particularly its application as against outdoor religious services or outdoor political protests, is not proportionate to the risk posed by outdoor transmission of COVID-19. The severity of the interference cannot be justified.
35. Mr. Pawlowski may bring expert evidence to respond to anticipated arguments of the Government of Alberta with respect to section 1.

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<sup>7</sup> *Hussain v Toronto (City)*, 2016 ONSC 3504 at para 38 [*Hussain*].

<sup>8</sup> *Roach v Canada (Minister of State for Multiculturalism & Culture)*, [1994] 2 FC 406 (Fed CA) at 436; *Mounted Police Assn of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 64.

<sup>9</sup> *Rodriguez v Canada*, 2018 FC 1125 at para 27.

**STATUTORY PROVISIONS OR RULES TO BE RELIED UPON**

36. This Application is brought pursuant to *Constitutional Notice Regulation*, AR 102/99, s 1 and the *Judicature Act*, RSA 2000, c J-2, s 24. The Applicant relies on these statutes, the *PHA*, its subordinate legislation in effect on the date of the offence, and any such other statutory provisions which counsel may advise, and this Honourable Court may allow.

**THE RELIEF SOUGHT IS:**

37. Mr. Pawlowski seeks a declaration pursuant to section 52(1) of the *Constitution Act, 1982* that Order 42 is contrary to section 2 of the *Charter*, is not saved by section 1 of the *Charter*, and should be of no force or effect. As a result of this declaration, his ticket should be withdrawn.

38. In the alternative, Mr. Pawlowski seeks a declaration pursuant to section 52(1) of the *Constitution Act, 1982* that section 12 of Order 42 is contrary to section 2 of the *Charter* insofar that section 12 should not apply to religious services or protests, that section 12 is not saved by section 1, and that section 12 be read down so as not to apply to religious services and be of no force and effect as against religious services. As a result of this declaration, it is anticipated that the Crown's theory would fail and his ticket should be withdrawn.

39. In the further alternative, Mr. Pawlowski seeks a remedy or remedies pursuant to section 24(1) of the *Charter* to have the charge stayed as Order 42 and the ticket itself have an improper purpose which violates Mr. Pawlowski's rights and freedoms. Further, or in the alternative, such remedy, or remedies, pursuant to section 24(1) of the *Charter* that this Honourable Court considers appropriate and just in the circumstances, including legal costs for Mr. Pawlowski's defence. In the further alternative, Mr. Pawlowski seeks to have all evidence of the police excluded pursuant to section 24(2) of the *Charter*.

**IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON** the cases and legislation cited herein, the *PHA*, Order 42 and any further evidence or caselaw that may be provided and this Honourable Court may allow.

**DATED** at the City of Calgary in the Province of Alberta this 2nd day of November, 2021.

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