

October 25, 2022

Dear Marshall,

Please thank the Premier for taking the time to speak with me on Friday. It was nice to see her again in her new role and nice to meet you.

I'll send you another note in a couple of days about the Election Finances and Contributions Disclosure Act. Strangely, Alberta has the most restrictive law in the country that's out of step with every other jurisdiction — even with Trudeau's federal version of the law. I think that's pretty easy to fix.

On the lockdown and pandemic prosecutions, I was heartened to see how well informed the Premier is on these matters and that she clearly understands how important these issues are, both politically and morally. She really is on the right side of history — I see that, just today, the New York Supreme Court reinstated all employees fired for being unvaccinated and ordered backpay.

The Premier was interested in any information that I could provide her about the situation on the ground and the mechanisms available to her to provide leadership on these issues. The purpose of this note is to provide the Premier with that information.

Existing Cases

There are still an unknown number of tickets, charges, and contempt proceedings or related matters (the "Prosecutions") pending or proceeding that do not involve firearms or violence. I have good knowledge of many Prosecutions that are being supported by The Democracy Fund or Rebel News, but other lawyers have files as well and some people who are charged would be self-represented. I can not give you firm numbers, but I have asked counsel who I am working with to compile at least a partial list of the Prosecutions, which I hope to get to you this week.

Some trials have commenced and there are real issues about why they are proceeding. As the Premier says, they appear to have been politically motivated. Staying or withdrawing the charges would send a strong message in support of the rule of law.

I am only suggesting that the Prosecutions which have been politically motivated, targeting people who only sought to exercise their constitutional freedom of expression and religion, be stayed, or discontinued. From my knowledge of the Prosecutions, most people charged were either attending a protest or a religious gathering. Usually, the people charged were the low-hanging fruit - the most vocal or the ones sharing their message on social media. None of the Prosecutions that The Democracy Fund or Rebel News supports have any violence or firearms involved. The Premier's action on these Prosecutions will promote democratic principles and ensure an appropriate use of our Court's limited resources.

Jurisdiction

Almost all the Prosecutions that I am aware of are being conducted by provincial prosecutors employed by the Alberta Crown Prosecution Service (ACPS), so these matters are under the Premier's jurisdiction.

The Attorney General (AG) has the discretion on whether and how to prosecute. Here is a leading case on the matter:

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.[1]

Specifically, the AG can decide the nature and extent of the prosecution and the AG's participation in it. And Crown Prosecutors employed by ACPS have prosecutorial discretion to stay or withdraw proceedings under the Criminal Code or Provincial Offences Procedures Act. As such, I expect that with the proper guidance and direction from the Premier's office, the prosecutions related to the Coutts protest (the non-violent cases, without firearms), other anti-lockdown protests, or offences under the Public Health Act (which is prosecuted pursuant to the Provincial Offences Procedures Act) can all be withdrawn, stayed or otherwise discontinued by the ACPS. The Crown Prosecutors exercise this discretion regularly, and are well versed in how to administratively direct a stay of proceedings (usually a letter to the Provincial Court - Criminal Division) or withdraw the charges. This is usually done in open court, by bringing the matter forward and withdrawing the charge with the accused's consent.

To my knowledge, Alberta Health Services (AHS) is not prosecuting any of the Prosecutions before the Court (either in-house counsel or hired external counsel). The matters that were initiated and pursued by AHS have either concluded or been discontinued by AHS itself. For example, AHS did commence civil contempt proceedings against Christopher Scott and Pastors Artur and Dawid Pawlowski, but those concluded (in the Pawlowski's favour) at the Court of Appeal this summer. I am not presently aware of any active matters before the Court being prosecuted by AHS, but the Premier's office could confirm this easily through the office of the Minister of Health, who can make the appropriate inquiries to the AHS in-house legal department.

From what I have ascertained, all the matters currently before the Courts are being prosecuted by ACPS. There may be one matter prosecuted under the Quarantine Act which would likely be prosecuted by the Public Prosecution Service of Canada ("PPSC"), but my understanding is that largely the PPSC has not been involved in prosecutions in Alberta due to the legislative framework under the Quarantine Act and Alberta's refusal to adopt the federal Contraventions Act.

The Basis For Staying or Withdrawing the Charges

Withdrawing charges, staying proceedings, or declining to prosecute (or continue a prosecution) is justified if there is no reasonable likelihood of conviction (this standard varies by the facts of each case) or if the prosecution does not serve the public interest. The Prosecutions that I am aware of do not meet either element of the test, let alone both, so staying the charges is well justified.

There are clear legal issues with many of the Prosecutions that I am familiar with. Prosecutions under the Public Health Act are likely to fail because, as the Premier likely recalls, the CMOH Orders were

vague, confusing, inconsistent, and did not specifically prohibit certain activities. The Faculty of Law at the University of Calgary has addressed this in three blog posts in their award-winning legal blog, Ablawg. As aptly noted by Dr. Fluker in comment on the CMOH Orders:

Words and phrases whose meaning is essential to the actus reus (i.e., required elements) of an offence have too often been left undefined or given a vague and indeterminate description in these Orders. There are countless examples to draw upon for illustrations.[2]

As Dr. Fluker goes on to note with his co-author Lorian Hardcastle in a subsequent article, there are serious shortcomings with CMOH Orders, and Order 42-2020 is no exception, such as:

[P]oor drafting, inconsistencies between podium announcements and public health orders, hastily granted non-transparent exemptions, and failing to publish legal rules with adequate notice.[3]

And Fluker and Hardcastle go on to question: “How is a protest on a matter of the public interest a “private social gathering”?”[4]

In addition, what the Premier will see from the summary that I am having put together is that there is no public interest in continuing the Prosecutions. ACPS and Court resources should be redirected to far more pressing criminal matters.

If the pattern to date is any indication, the non-violent criminal proceedings which are presently being undertaken by the ACPS are also unlikely to succeed. For example, Pastor Pawlowski was charged under the Criminal Code with:

- (i) criminal contempt of a Court order (stayed),
- (ii) cause a disturbance (found not guilty); and
- (iii) four counts of breach of probation (stayed).

These criminal charges were undertaken by the ACPS. Due to the work with The Democracy Fund, Pastor Pawlowski was able to plead not guilty and launch fulsome defence to each case. As can be seen, those defences were successful in one way or another.

As indicated above, I am currently collecting the details related to non-violent criminal charges arising from the Coutts protest. I will provide specifics as to why the ACPS lacks reasonable likelihoods of conviction. In at least one case, a charge under the Critical Infrastructure Defence Act (“CIDA”) was laid in conjunction with criminal charges. Constitutional notice will be filed on that case if it proceeds, and I would expect that the Province has a vested interest in avoiding a constitutional determination on that Act. AUPE has previously filed a constitutional challenge against CIDA which did not proceed because AUPE did not have appropriate “standing”. [5] I understand that there is a real likelihood that AUPE will seek to intervene on any constitutional application made against CIDA in the future.

The Premier can, should she choose to, direct the AG to review and withdraw or discontinue any cases arising from the CMOH Orders under the Public Health Act, criminal charges being prosecuted by ACPS, charges under the Critical Infrastructure Defence Act, or any pending charges or applications stemming from alleged breaches of the Court’s Orders to refrain from public gatherings or otherwise.

The Premier could request that the review be undertaken with respect to each Prosecution held with ACPS and cases where there is no reasonable chance of conviction or where prosecution does not serve the public interest be discontinued immediately. Obviously, the AG would take into account the Premier's view that, without more (i.e., violence), proceeding with these prosecutions is not in the public interest.

I would also encourage the Premier to note that beyond the lack of merit and political nature of these charges, the province has a shortage of prosecutors, court staff and Superior Court Judges. That makes these prosecutions all the more egregious and harmful to the community at large, for the effect it is having delaying other matters of merit. That further justifies the Premier's public position and it might be helpful for the AG to take that into account as well.

In consultation with my lawyers, it appears the most direct and efficient way to direct a stay of proceedings is to make a written memorandum or specific request by phone call of the Minister of Justice and Solicitor General to have the Crown Prosecutors direct stays of proceedings on all outstanding matters where possible, noting that the Premier is of the opinion that there is no public interest in proceeding when:

- (i) the alleged offence does not involve acts of violence or firearms, but arises from the Criminal Code in response to protests or exercises of section 2 Charter rights to freedom of expression or religion (i.e., criminal contempt, mischief, or disturbance charges);
- (ii) any alleged offences arising from the Public Health Act and its subordinate legislation (i.e., CMOH Orders); or
- (iii) any alleged non-violent offences arising from the Critical Infrastructure Defence Act.

The people in the Province of Alberta will benefit from this call to action. ACPS and Court resources will be redirected, and political matters will stay in politics and outside of the Courts. A wholesale review will encourage Crown Prosecutors who are otherwise overworked and distracted by more pressing matters to clear our court system of these matters. It will send a message to all Albertans that the province is returning to a state of normalcy and respect for our fellow citizens regardless of political beliefs. The review will strengthen protection of our constitutional freedoms, and the rest of the country will follow Alberta's leadership in progressing these matters to conclusion.

I will provide the summary of Prosecutions shortly, and would be happy to answer any questions or make my lawyers available for further comment.

Yours truly,



Ezra Levant

Footnotes:

[1] Krieger v. Law Society of Alberta, 2002 SCC 65 (CanLII), [2002] 3 SCR 372, at para. 47

[2] Shaun Fluker, "COVID-19 and Enforcement of Public Health Orders" (27 May 2021), online (blog): ABlawg <https://ablawg.ca/2021/05/27/covid-19-and-enforcement-of-public-health-orders/>

[3] Shaun Fluker and Lorian Hardcastle, "Alberta's Vaccine Passport System: The Good, the Bad and the Ugly" (20 September 2021), ABlawg (blog) online: <https://ablawg.ca/2021/09/20/albertas-vaccine-passport-system-the-good-the-bad-and-the-ugly/>

[4] Fluker and Hardcastle, *ibid.*

[5] Alberta Union of Public Employees v Her Majesty the Queen (Alberta), 2021 ABCA 416. Note that AUPE has sought leave to appeal this decision to the Supreme Court of Canada.