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COURT FILE NO.:	2101 05742
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ALBERTA HEALTH SERVICES
RESPONDENTS	ARTUR PAWLOWSKI and DAWID PAWLOWSKI
DOCUMENT	**BRIEF OF LAW BY THE APPLICANT, ALBERTA HEALTH SERVICES (Application for Civil Contempt of Court – Imposition of Sanction)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. In May 2021, as the province was in the midst of a third wave of the Covid-19 pandemic, Alberta experienced the highest rate of per-capita Covid-19 infection in all of Canada as well as the United States. To counteract the spread of Covid-19, Alberta's Chief Medical Officer of Health issued a series of orders (**"CMOH Orders"**) designed to limit further transmission of the virus, including orders which restricted public in-person gatherings.

2. During this historically unprecedented moment, all Albertans were called upon to follow the CMOH Orders in order to collectively protect one another from viral exposure and to limit the province's rate of infection, death, and hospitalization.

3. Certain individuals, however, including the Respondents, publicly flouted the CMOH Orders and persisted in organizing, promoting, and attending large public gatherings in spite of the public health risks engendered by their actions. Due to this recalcitrance, Alberta Health Services was obliged to seek the Court's assistance in enforcing the CMOH Orders, and ultimately received an injunction on May 6, 2021, which enjoined certain named respondents, as well as against John and Jane Doe(s), from organizing or attending public gatherings which breached CMOH Orders (the **"Injunction Order"**).

4. Despite the Injunction Order, the Respondents, knowing full well that their actions were in breach of an order of the court, persisted in organizing and attending a large in-person public gathering on May 8, 2021 (the **"May 8 Gathering"**). Prior to, and during the May 8 Gathering, the Respondents referred to, and openly repudiated, the Injunction Order.

5. On June 28, 2021, this Court found the Respondents in contempt of Court in connection with their breach of the Injunction Order (the **"Liability Decision"**).

6. To this day, the Respondents have failed to offer any admission of guilt, or apology, for their breach of the Injunction Order. On the contrary, in the case of Artur Pawlowski, he has continued to publicly attack the Injunction Order's legitimacy, and has openly called into question the appropriateness of this Court's finding of contempt against him.

7. In view of the foregoing, AHS requests that the following sanctions be rendered against the Respondents' contempt of court as follows:

   (a) In the case of Artur Pawlowski, a term of imprisonment of 21 days; and

   (b) In the case of Dawid Pawlowski, a term of imprisonment of 10 days, (collectively, the **"Requested Sanction"**).

8. As will be set forth below, the Requested Sanction is proportional with the scope and nature of the Respondents' contempt and is commensurate with the need for this court to appropriately deter and denounce the Respondents specifically, as well as the public at large, from engaging in similar actions in the future.

II. FACTS

9. Both Artur and Dawid Pawlowski are well known to law enforcement and AHS as both have been active in staging "anti-masking" and other public gatherings throughout the pandemic. In addition, throughout the pandemic, both Respondents acted as leaders within their Church community and participated in church services which breached the restrictions contained in CMOH Orders.

Affidavit of Chris Develter, sworn May 12, 2021 at para 12.

10. On the morning of the May 8 Gathering, Artur Pawlowski posted on his personal Facebook page, attaching a screenshot of a media release that had been issued by the Calgary Police in relation to the Injunction Order (the **"CPS Media Release"**). The CPS Media Release provided a summary of the Injunction Order, in particular, that the order provided enforcement powers, including the powers of arrest, for those organizing, promoting, or attending any public gatherings where public health orders were not being followed.

Affidavit of Kendra Laustsen, sworn May 12, 2021 ("Laustsen Affidavit) at para 15(d); Exhibit "E".

11. In his May 8 Facebook post, Artur Pawlowski commented upon the CPS Media Release, stating:

> ..we have officially moved into a dictatorship in Canada! The rule of law destroyed! Protesting our government corruption, now in Alberta, just become illegal! Democracy has fallen!

Laustsen Affidavit, Exhibit "E".

12. After Dawid Pawlowski was personally served with a copy of the Injunction Order, both Respondents proceeded unabated with the May 8 Gathering, in direct contravention of the Injunction Order's prohibition against public gatherings. Furthermore, Artur Pawlowski directly referred to the Injunction Order in his sermon before the congregation, and live-streamed on the internet, and cast aspersion on the Injunction Order as an illegitimate attempt to prevent individuals like him from preaching.

Laustsen Affidavit, Exhibit "Q".

13. On June 28, 2021, immediately following this Court's decision on the liability component of the contempt proceedings, Artur Pawlowski participated in an interview with Rebel News in which he openly attacked this Court's finding of contempt and launched a critique on the Court's administration of justice:

> I am greatly saddened by the judge's decision… I am saddened because the notion that the pastor can be found in contempt of court order for simply doing his job for opening the Church, for saving lives, for helping people that are in desperate need… it's egregious, it's absolutely sad what has become, what happened to our beloved Canada. So me and my brother Dawid, we have been found in contempt of court order, me for two counts, and my brother Dawid for one, and it breaks my heart because where is, what happened to the justice system these days…
>
> I need your prayers, please pray, so this evil, this great evil that we are witnessing in our country is going to be revoked, broken, and what else can I say? We will keep speaking the truth, we will keep fighting for the future of this country so Canada will stand strong and free.

Affidavit of Mia Neudorf, sworn July 13, 2021, Exhibits "A" and "B".

III. ISSUES

14. The sole issue to be determined by this Court is what sanction appropriately addresses the Respondents' contempt of court for their breach of the Injunction Order.

IV. LAW AND ARGUMENT

A. The Requested Sanction Falls Within the Range of Punishment Established under Rule 10.53 of the Alberta Rules of Court and Accords with the Underlying Purposes of a Contempt Sanction.

15. Pursuant to Rule 10.53(1)(b) of the Rules of Court, a court can order a term of imprisonment of up to two years as a sanction against civil contempt:

> **Punishment for civil contempt of Court**
> **10.53(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) all or part of a commencement document, affidavit or pleading be struck out,
>
> (ii) an action or an application be stayed,
>
> (iii) a claim, action, defence, application or proceeding be dismissed, or judgment be entered or an order be made, or
>
> (iv) a record or evidence be prohibited from being used or entered in an application, proceeding or at trial.
>
> **(2)** The Court may also make a costs award against a person declared to be in civil contempt of Court [emphasis added].

16. As will be explored further in the analysis of the case law which follows, Alberta courts have regularly imposed custodial sanctions against civil contemnors. This punitive component is unsurprising given that the courts have consistently held that the purpose of

contempt proceedings is twofold and is intended to: (1) ensure compliance with court orders, and (2) punish the contemnor.

Builders Energy Services Ltd. v Paddock, 2009 ABCA 153, ("*Paddock*"), para 13 **[Tab 1].**

Law Society of Alberta v Beaver, 2021 ABCA 163, para 78 **[Tab 2]**.

17. In *Apotex Fermentation Inc. v. Novopharm Ltd*, [1997] M.J. No. 466 (MBQB), the Manitoba Court of Queen's Bench further explained how the ability of a court to punish a contemnor for contempt comprises an integral aspect of upholding the rule of law:

> Respect for the rule of law is essential if we are to have the benefit of living in an orderly, peaceful society. That is why it is so important that the terms imposed by an order of the court be obeyed. If citizens cannot be confident that they can rely upon the protection afforded by an order of the court, the court becomes irrelevant as the vehicle by which disputes between citizens, corporate or otherwise, are resolved in a peaceful manner.
>
> Where there is a willful breach of a court order, the party who is responsible for the breach and who is found to be in contempt of the court must bear the consequences of the contemptuous conduct and be subjected to the sanction of the court.

Apotex Fermentation Inc. v. Novopharm Ltd, [1997] M.J. No. 466 (MBQB), ("*Apotex*") paras 25-26, varied 1998 MJ No. 297 (MBCA) **[Tab 3]**.

18. Furthermore, in *Oommen v Capital Housing Corp*, 2016 ABQB 283, Justice Viet cited with approval decisions out of Ontario setting out the general tenets of sanctioning civil contempt; namely, that a sanction imposed upon a finding of contempt must be significant and of such consequence as to ensure the administration of justice is not brought into disrepute. Sanctions should be restorative to the victim of the contempt, and they should be punitive to the contemnor. To accomplish the former, the sanction must correlate to the conduct that produces the contempt. To accomplish the latter, the sanction must not reflect a marked departure from those imposed in similar cases.

Oommen v Capital Housing Corp, 2016 ABQB 283, para 37 **[Tab 16]**.

19. In view of the foregoing, it is AHS' position that the Requested Sanction falls within the bounds permitted by Rule 10.53 and likewise aligns with the underlying purposes which guide the sanctioning of contempt, in particular, the need to appropriately punish a contemnor.

B. A Custodial Sentence Can be Ordered Notwithstanding the Fact that the Respondents are First Time Offenders

20. AHS acknowledges that it is widely held and uncontroverted that, as a general rule, first time offenders should not receive custodial sentences unless no other sentence is commensurate with the gravity of their offence. As will be detailed below, however, this general rule is not without exception and AHS submits that the scope and nature of the Respondents' contempt is such that a term of imprisonment is warranted under the circumstances.

21. In its report entitled "Some Guidelines on the Use of Contempt Powers", the Canadian Judicial Council notes that, notwithstanding the general principle that first time offenders should be dealt with by way of fines, imprisonment is appropriate under certain circumstances, specifically when no remorse has been voiced and when the impugned behaviour displayed deliberate disobedience:

> In Canada, punishment for contempt has been quite moderate, reflecting the court's usual view that a conviction for contempt and a modest fine is usually sufficient to assert the courts' authority, to protect their dignity or to ensure compliance. Often these sentences are imposed after the contemnor has apologized and purged his or her contempt which substantially mitigates any punishment that might otherwise be imposed. The purpose of sentencing in contempt cases is to "repair the depreciation of the authority of the court"
>
> If the contempt has not been purged and the contempt is a serious one, or if there has been a deliberate disobedience of a court order accompanied by violence or other flagrant misconduct **then imprisonment or heavy fines becomes more likely**, but care must always be taken to ensure that the disposition of the proceedings does not appear to by bullying or vengeful.

> Imprisonment should be imposed only in cases of serious deliberate disobedience, violence, or willful interference with the course of justice [emphasis added].
>
> Canadian Judicial Council Report "Some Guidelines on the Use of Contempt Powers", May 2001, pgs. 39-40 **[Tab 4]**.

22. In the current instance, none of the mitigating factors highlighted above which could apply to lessen the sanction applied to a first-time offender are applicable in the current instance. More specifically:

    (a) Neither respondent has offered an apology for their conduct;

    (b) The nature of the Respondents' contempt is such that it cannot be purged retroactively; and

    (c) The Respondents' contempt is serious in nature and was characterized by both a deliberate disobedience of a court order as well as flagrant misconduct.

23. There is also ample appellate authority for the principle that penal sanctions may be appropriate for first time offenders, including several cases from the British Columbia Court of Appeal which have ordered imprisonment for first-time offenders in both civil and criminal contempt matters.

> *MacMillan Bloedel Ltd. v Brown*, [1994] BCJ No. 268 (BCCA), ("*MacMillan Bloedel*"), **[Tab 5]**.
>
> *Trans Mountain Pipeline ULC v Misair*, 2019 BCCA 156, ("*Trans Mountain*"), **[Tab 6].**
>
> *Majormaki Holdings LLP v Wong*, 2009 BCCA 349, ("*Mjormaki*") **[Tab 7]**.

24. In the decision of *MacMillan Bloedel Ltd v Brown* [1994] BCJ No. 268 ("*MacMillan Bloedel*"), a case which involved the sanctioning of protesters who had breached a court injunction prohibiting protests which obstructed logging activities, the British Columbia Court of Appeal confirmed that imprisonment could be ordered against first time offenders, stating:

> First, it would be naive to consider these sentences, even for first offenders, in isolation from the larger picture of events at these blockades. These Appellants were not guilty of youthful exuberance or rash judgment, which are the usual hallmarks of first offenders. With foolish, herd bravery, the Appellants chose to join in what they knew was an unlawful disobedience of the law. Every accused person is entitled to be considered separately from every other accused person, but a sentencing judge is not required to blind himself to the obvious fact that these were not ordinary first offenders and that they were acting in concert. They were persons who, after knowingly and deliberately committing an offence, were nevertheless asked by a peace officer to walk away. They chose instead to stay and be arrested and charged. Notwithstanding their personal beliefs, they do not qualify for the usual leniency that judges generally offer to first offenders

MacMillan Bloedel, para 45 **[Tab 5]**.

25. Based on the existing case law and judicial commentary, in conjunction with the egregious scope of the Respondents' contempt, AHS submits that there is ample authority to support the Requested Sanction, even when taking into account the fact that both Respondents are first-time offenders as relates to the Injunction Order.

C. The Requested Sanction Satisfies All Factors which are to be Taken into Consideration in Determining an Appropriate Sanction

26. In *Builders Energy Services Ltd. v Paddock*, 2009 ABCA 153 ("*Paddock*"), the Alberta Court of Appeal enumerated the criteria which are to be given consideration when devising a penalty for civil contempt as follows:

(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 (collectively, the "Paddock Factors")

Paddock, para 13 **[Tab 1]**.

27. The Paddock Factors continue to guide the assessment of appropriate contempt sanctions in Alberta, and received renewed endorsement by the Alberta Court of Appeal in its recent decision of *Law Society of Alberta v Beaver*, 2021 ABCA 163.

Beaver, para 78 **[Tab 2]**.

28. Each of the Paddock Factors will be individually assessed in the submissions which follow, and in each instance, a weighing of the relevant factors favours the granting of the Requested Sanction.

29. Before proceeding with an analysis of the Paddock Factors, AHS would first like to draw the Court's attention to a further list of criteria developed by the Newfoundland Supreme Court to guide the evaluation of contempt penalties. In *Health Care Corp of St. John's v Newfoundland and Labrador Assn. of Public and Private Employees*, [2001] NJ No. 17 (NFSC) ("*Health Care Corp of St. John's*"), the Newfoundland Supreme Court raised the following factors to take into consideration when devising a civil contempt penalty:

> 1. The inherent jurisdiction of the court, as a superior court, allows for the imposition of a wide range of penalties for civil and criminal contempt;
>
> 2. Deterrence, both general and specific, but especially general deterrence, as well as denunciation, **are the most important factors to be considered** in the imposition of penalties for civil, as well as criminal, contempt;
>
> 3. The impact that the contemptuous act has had on the general public**, particularly in relation to health and safety matters**, is a relevant consideration in determining the level of penalty;
>
> 4. It is the defiance of the court order, and not the illegality of any actions which led to the granting of the court order in the first place, which must be the focus of the contempt penalty;
>
> 5. Imprisonment is normally not an appropriate penalty for a civil contempt where there is no evidence of active public defiance (such as public declarations of contempt; obstructive picketing; and violence) and no repeated unrepentant acts of contempt;

6. Where a fine is to be imposed, the level of the fine may appropriately be graduated to reflect the degree of seriousness of the failure to comply with the court order;

7. Where the defiance of the order is related to continuance of an unlawful strike resulting in failure to report for work when normally scheduled to do so, the number of times when the contemnor was presented with a clear and visible opportunity to demonstrate his or her intention to comply with the order and does not avail of that opportunity can be used as a rough measure of the degree of defiance;

8. Because the symbolism of continuance of collective defiance in the face of the court order is often significant in encouraging continuance of the contempt by others, and conversely, the symbolism of individuals acting, in the face of group pressure, to comply with the law is also often significant in encouraging others to do likewise, **those with a special visible position of leadership within the group, such as shop stewards or union officers who are also members of the unlawfully striking bargaining unit may be regarded as committing a more serious contempt if they refuse to comply with the order, and thereby may appropriately receive a greater penalty**;

9. In setting the overall level of penalty, the court may take account of the level of penalty imposed in similar cases in the past and may adjust the penalty upwards or downwards, depending on the court's assessment as to whether previous levels of penalty have had an effective general deterrent effect;

10. In ordering payment of a fine, the court may permit, by imposition of appropriate conditions, the contemnor to satisfy the fine in alternative ways, such as payment to a charity or the provision of free services to the persons harmed by the continuance of the contemptuous behaviour [emphasis added].

Health Care Corp of St. John's v Newfoundland and Labrador Assn. of Public and Private Employees, [2001] NJ No. 17 (NFSC), ("*Health Care Corp*") para 2 **[Tab 8]**.

30. While the factors outlined in *Health Care Corp of St. John's* have not been directly cited by an Alberta court, they have been cited approvingly in several other jurisdictions, including the Federal Court of Appeal and the British Columbia Court of Appeal.[1]

D. The Requested Sanction is Proportional to the Respondents' Wrongdoing

31. With respect to the first Paddock Factor, proportionality, AHS submits that the Requested Sanction is proportional to the Respondent's contempt, especially when the following factors are taken into consideration :

(a) The Respondents' contempt was of deleterious effect to the general public and directly imperiled the public health;

(b) The Respondents participated in active public defiance of the Injunction Order;

(c) The Respondents were in a leadership position with respect to their congregation, and can be interpreted as having incited others to breach the Injunction Order;

(d) With respect to Artur Pawlowski, Mr. Pawlowski has directly, and publicly, cast aspersion on this Court and called into question the legitimacy of its finding of contempt against him,

32. Indeed, this Court noted in its Liability Decision that the Respondents:

(a) openly flaunted AHS' efforts in trying to control the third wave of the pandemic, including AHS' obtaining of the Injunction Order;

(b) had full knowledge regarding the nature of the Injunction Order and its prohibitions; and

(c) continued to conduct and participate in the May 8 Gathering after having been served with the Injunction Order.

Alberta Health Services v Pawlowski, 2021 ABQB 493,

[1] See *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 156; *Merck & Co v Apotex Inc*, 2003 FCA 234.

("*Pawlowski*"), paras 4, 21-23 **[Tab 17]**.

33. Each of the considerations above favours the granting of an increased penalty and warrants a term of imprisonment.

34. Of particular concern is the public nature of the Respondents' contempt which, far from being confined to the interests of the parties (i.e. AHS and the Respondents), extended to concerns affecting the public at large. It is a widely held principle that when imposing a penalty for civil contempt in instances where the contempt in question "transcends the interests of the private litigants", a harsher penalty is warranted, particularly when the contempt in question threatens the proper administration of justice.

Marjormaki, paras 18-25 **[Tab 7]**.

Health Care Corp, para 2 **[Tab 8]**.

Law Society of Alberta v Beaver, 2021 ABQB 134, varied 2021 ABCA 163, paras 127-129 **[Tab 9]**.

35. To be clear, in suggesting that the public interest and the public nature of the Respondents' contempt ought to be taken into consideration by the Court in devising an appropriate contempt sanction, it is not AHS' intention to suggest that the Respondents are guilty of criminal contempt, nor is AHS suggesting that the Respondents warrant a sanction which would be otherwise reserved for an act of criminal contempt. To the contrary, it is AHS' position that the Requested Sanction falls within the scope of an allowable civil contempt remedy and that such a sanction is readily available to the Court as part of civil contempt proceedings.

36. In terms of taking the public interest into account when devising a civil contempt remedy, the Alberta Court of Appeal has acknowledged that certain elements associated with criminal contempt, such as public defiance, can nonetheless be taken into account when crafting a civil penalty with purposefully punitive effects. In *Beaver* a decision involving a civil contempt, the Court of Appeal explained this ability as follows:

> We refer to s 127 of the *Criminal Code* by analogy and do not suggest the section applies directly; this was not a public prosecution. Nonetheless, the characterization of the present case as having elements akin to criminal conduct is correct for more than one reason. First, this was a form of contempt which was found to have the characteristic of public defiance of authority: compare *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901. Second, the chambers judge disposed of the case in a punitive fashion, involving a "true penal consequence" which was "aimed at promoting public order and welfare within a public sphere of activity": compare ***Guindon v Canada***, 2015 SCC 41, paras 45-46, [2015] 3 SCR 3. See also ***Carey***, para 31. Accordingly, the sanction in this case fits within the general concept of a criminal sanction in the public interest, and differs from the generally coercive purpose of civil contempt: compare ***Envacon***, paras 62-66. [emphasis added]

Beaver, 2021 ABCA 163, para 49 **[Tab 2]**.

37. In the current instance, the Respondents' breaches of the Injunction Order directly imperiled efforts designed to protect public health and posed a risk to the well-being of not only the attendees present at the May 8 Gathering, but the broader population in general, while simultaneously offending the integrity of the legal system. This conduct requires the imposition of a custodial sentence as a lesser penalty would not be commensurate with the scope of the Respondents' conduct and the risk such conduct posed to the public.

E. The Aggravating Factors at Issue Outweigh any Mitigating Factors and Favours Granting the Requested Sanction

38. With respect to the second Paddock Factor, the presence of either aggravating or mitigating factors, AHS submits that the Respondents' contempt is marked by several aggravating that favours granting a term of imprisonment.

39. In terms of potential mitigating factors, the following factors have been taken into consideration by the courts:

(a) If the contemnor has entered a guilty plea;

(b) The contemnor has shown good conduct following release;

(c) If it was a first time offence; and

(d) There is no risk of further breaches.

40. With the exception of the third factor, a first time offence, the Respondents have not satisfied any of the other mitigating factors which would tend to lessen a potential sanction. To the contrary, several aggravating factors exist which favours granting the Requested Sanction, including:

(a) Neither Respondent entered a guilty plea;

(b) With respect to Artur Pawlowski, Mr. Pawlowski has publicly expressed his scorn towards this Court and the finding of contempt made against him;

(c) The Respondents' breach of the Injunction Order occurred with their full knowledge and understanding, as opposed to having occurred through mistake or misunderstanding;

(d) The violation of the Injunction Order had potential health risks associated with it;

(e) Neither Respondent has stated that they will unconditionally abide by any future court order enjoining them to comply with CMOH Orders;

(f) By virtue of their leadership role with their congregation, the Respondents encouraged others to follow in their contemptuous conduct by organizing and attending the May 8 Gathering and inviting others to attend;

(g) Both Respondents, by way of their statements and actions, publicly declared their intention not to follow the Injunction Order; and

(h) Given their recalcitrance and prior behaviour, including the persistent breach of CMOH Orders, it is highly likely that the Respondents would engage in further breaches in the event a new court order was secured enjoining the Respondents from breaching CMOH Orders.

41. Moreover, as noted by this Court in its Liability Decision, both Respondents made a virtue of their civil disobedience in relation to the public health restrictions imposed upon them, and participated in a willful, and deliberate breach of the Injunction Order.

Pawlowski, para 30 **[Tab 17]**.

42. These factors, collectively, justify a custodial sentence.

43. To the extent either Respondent attempts to issue an apology, AHS submits that such an apology should not be considered as genuine and should be accorded little weight. In *Majormaki*, the Court rejected a contemnor's apology as not being genuine and having been tendered solely for the purpose of seeking a more lenient contempt penalty. Similarly, the lower court decision of *Beaver*, the court rejected the contemnor's apology noting that while the early acknowledgement of guilt and intention to reform are significant mitigating factors, the contemnor's apology and promises were not genuine. In the current instance, AHS maintains that should either Respondent proffer any apology at this late stage of proceedings, a similar conclusion should be arrived at – and that any apology be given no weight.

Majormaki, para 62 **[Tab 7]**.

Beaver, 2021 ABQB 134, paras 114-118 **[Tab 9]**.

F. The Requested Sanction Will Serve as An Appropriate Deterrent Against Future Contempt and Will Likewise Serve as an Appropriate Denunciation of the Respondents' Conduct

44. With respect to the third Paddock Factor, deterrence, the scope of the Respondents' contempt is such that a custodial sentence is required in order to sufficiently deter the Respondents, as well as other members of the public, from engaging in similar conduct in the future.

45. It is axiomatic that deterrence and denunciation are to be treated as the most important sentencing objectives in civil contempt cases.

Boily v Carleton Community Corp, 2014 ONCA 574, ("*Boily*") para 105 **[Tab 10]**.

Majormaki, paras 27-30 **[Tab 7]**.

Apotex, paras 27-28 **[Tab 3]**.

46. In *Apotex*, the Manitoba Court of Appeal underscored the importance of devising a contempt penalty which sufficiently deterred the contemptuous behaviour at issue as follows:

> In the circumstances here, the objectives of the sanction to be imposed that must be given prominence are punishment and deterrence.
>
> The inflicting of punishment on a party found to be in contempt of breaching an order of the court is important because it demonstrates that the court will not tolerate the offensive conduct committed by the guilty party and that the court will act to protect its integrity and the inviolability of orders it imposes.

Apotex, paras 27-28 **[Tab 3]**.

47. The case law has delineated between two different components of deterrence which are to be effected by a contempt penalty: (a) specific deterrence (i.e. as against the specific contemnors before the court); and (b) general deterrence (i.e. as against the public at large). The difference between specific deterrence and general deterrence was described by the Manitoba Court of Appeal in *Apotex* as follows:

> The principle of deterrence has a goal that is two-fold in nature. First, the principle is applied to discourage the contemnors before the court from ever again breaching an order of the court. This is often referred to as specific deterrence. The second aspect is to discourage others of a like minded nature from breaching an order of the court. This is called general deterrence.

Apotex, para 29 **[Tab 3]**.

48. AHS submits that a term of imprisonment is required to sufficiently deter the Respondents specifically, as well as the public in general, from similar breaches in the future. With respect to specific deterrence, a custodial sentence is required to curtail any future breaches

by the Respondents should additional health restrictions be imposed in the future, as well as to condemn the brazen manner by which the Respondents (a) openly attacked the integrity of the Court; and (b) jeopardized the well-being of others during a pandemic.

49. With respect to general deterrence, the Respondents breach of the Injunction Order at the May 8 Gathering attracted a large number of individuals who, like the Respondents, had a blatant disregard for the public health measures and the rule of law. Neither the Respondents, nor the likeminded individuals who attended the May 8 Gathering, were deterred by the Injunction Order, and this reality should, in and of itself, be concerning to the Court. A custodial sentence would serve as notice to the public that all member of society are subject to the rule of law, including public health orders, and that individuals are not unilaterally entitled to circumvent, or otherwise repudiate, restrictions which they personally do not adhere to. Absent such deterrence, the administration of justice would fall into disrepute.

G. The Requested Sanction is Reasonable and Is Commensurate With Penalties Imposed in Other Judicial Decisions

50. When assessing the fourth Paddock Factor, the reasonableness of any fine or term of imprisonment, such reasonableness can be assessed by comparing penalties rendered in comparable cases. As will be outlined in the review of relevant case law below, the Requested Sanction falls within the range of sentences which has been issued in similar cases and is reasonable under the circumstances.

Boily, para 90 **[Tab 10]**.

51. Of particular utility for comparison purposes are a line of cases which have emerged from British Columbia involving breaches by environmental and labour protesters of court orders enjoining public protests. These cases have involved both instances of civil and criminal contempt:

(a) In *R v Kelly*, [2000] B.C.J. No. 1092 (BCSC), a civil contempt proceeding, four protestors were found to have breached a court order enjoining public protests and

were sentenced to terms of imprisonment ranging from 14 days, 28 days, 42 days, and 56 days **[Tab 11]**.

(b) In *Telus Re: 11 Individuals found to be in Contempt*, 2006 BCSC 397, varied on other grounds 2008 BCCA 144, one contemnor was sentenced to one month imprisonment in a civil contempt proceeding for breaching a court order that set restrictions on a labour strike and picketing **[Tab 12]**.

(c) In *Peter Kiewit Sons Co. et al. v. Perry et al.*, 2007 BCSC 305, a civil contempt proceeding, a contemnor who breached a court order enjoining public protests was sentenced to 14 days imprisonment **[Tab 13]**.

(d) In *MacMillan Bloedel*, a criminal contempt proceeding, protesters who breached court orders enjoining public protests were sentenced to terms of imprisonment of up to 45 days **[Tab 5]**.

(e) In *Trans Mountain*, a criminal contempt proceeding, protesters who breached court orders enjoining public protests were sentenced to terms of imprisonment of up to 45 days **[Tab 6]**.

52. The above cases are particularly germane to the instant proceedings since the contempt at issue, the participation in protests that had been prohibited by court order, is directly analogous to the Respondents' participation in an "illegal public gathering" prohibited under the Injunction Order.

53. In *Beaver*, the Court of Appeal was faced with determining the reasonableness of a one-year term of imprisonment for a repeat contemnor who had previously never faced a term of imprisonment. The ultimate finding of imprisonment was upheld, however, the Court of Appeal reduced the term of imprisonment to a period of 90 days. In reducing the sanction, the Court cited a line of authority which referenced blatant refusals to abide by court orders where lengthy periods of imprisonment were ordered, as follows:

> Mr Beaver points to cases which he says reflect more blatant refusal to abide by an order but for which shorter periods of incarceration have been ordered, including Echostar Communications

> Corporation v Rodgers, 2010 ONSC 2164, para 71, 97 CPC (6th) 177 (four months); Mella v 336239 Alberta Ltd, unrep (ABQB), referred to in 2016 ABCA 226, para 13 (three months); Law Society of Upper Canada v Boldt, 2007 CanLII 41426 (ON SC), para 32 (conditional sentence, four months); and Law Society of British Columbia v Hanson, 2004 BCSC 825, paras 124-125 (one month, 100 hours community service, and costs).
>
> The Law Society indicates that in Echostar, paras 64-67, the court reviewed several cases in which deliberate breaches of court orders were punished by imprisonment for terms ranging from three to 15 months, and in Norfolk v 1313567 Ontario Inc, 2011 ONSC 4156, paras 33, 35-37, the court reviewed cases in which deliberate breaches of court orders resulted in custodial sentences of six months, 12 months, and 15 months

Beaver, 2021 ABCA 163, paras 75-76 **[Tab 2]**.

54. Given the above line of authorities, a term of imprisonment of 21 days with respect to Artur Pawlowski, and 10 days with respect to Dawid Pawlowski, are both reasonable and appropriate. These sentences are aligned with comparable cases and is similarly in keeping with sanctions vetted against first-time offenders whose breaches of an injunction transcended merely private interests.

H. A Lesser Penalty Other Than Imprisonment Would Not Be Appropriate Under the Circumstances

55. It is AHS' position that a lesser penalty, other than imprisonment, would not be appropriate under the circumstances.

56. With respect to a potential fine, it is not certain whether the Respondents would have the financial means to pay an elevated fine commensurate with the scope of their contempt.

57. With respect to a conditional or a suspended sentence, AHS submits that a conditional or suspended sentence would not provide sufficient denunciation of the Respondents' conduct, and would not serve as a sufficient deterrent to the Respondents, or the public at large, in a manner which would discourage future deliberate breaches of court orders intended to enforce public health restrictions.

58. In view of the foregoing, lesser measures are not appropriate and would not satisfy the principle aims of a contempt sanction which, as explained above, must be designed so as to ensure compliance with court orders and to punish a contemnor.

I. The Respondents Have Not Suffered Any Breach of their *Charter* Rights Which Would Entitle them to a Lesser Sanction

59. The Respondents have alleged that that they suffered the following during their detainment by Calgary Police subsequent to their arrest for breaching the Injunction Order:

(a) They were not given timely access to legal counsel;

(b) They were denied basic necessities; and

(c) They were treated poorly by members of the CPS.

Affidavit of Dawid Pawlowski, sworn May 17, 2021, paras 23-25.

Affidavit of Artur Pawlowski, sworn May 18, 2021, paras 40-60.

60. The allegations of mistreatment raised by the Respondents have been contested, however, by those police officers who were involved with the Respondents' detainment who have affirmed that:

(a) The Respondents were given prompt access to a telephone to contact legal counsel, and were given contact information for legal assistance;

(b) Efforts were made to bring the Respondents before a justice of the Court of Queen's Bench, as required under the Injunction Order, as soon as possible;

(c) Efforts were made to have the Respondents transferred to the Remand Centre when it became clear that the Respondents needed to be housed overnight;

(d) When it became clear that the Respondents could not be transferred to the Remand Centre during their first night of detention, the Respondents were provided with a mattress and offered warmer clothing;

(e) Both Respondents requested, and were seen by a medic on the premises; and

(f) The Respondents were offered meals on multiple occasions, which they declined.

Affidavit of Staff Sergeant Scott Campbell, sworn July 10, 2021.

Affidavit of Cst. Brad Milne, sworn July 8, 2021.

Affidavit of A/Sgt Chris Develter, sworn July 13, 2021.

61. In view of the foregoing evidence, the Respondents' allegations of mistreatment are rendered highly suspect, and do not serve as a sufficient basis upon which to argue that: (a) the Respondents' *Charter* rights have been infringed; or (b) the Respondents are entitled to a lesser sanction due to their supposed treatment over the course of their prior detention.

J. Submission on Costs

62. Rule 10.53(2) of the Rules of Court notes, that in addition to any sanctions rendered pursuant to section 10.53(1), that the court may also make a costs award against a person declared to be in civil contempt of Court.

Rules of Court, Rule 10.53.

63. The general rule on costs provides that a party successful in its contempt application is presumptively due costs, however, the power to award costs shall remain at the Court's discretion. Nevertheless, courts have historically awarded solicitor-client costs upon successful contempt applications. The award of solicitor client costs in contempt proceedings is reflective of the sentiment that applicants should not be penalized for assisting in upholding the administration of justice and for compelling obedience of a court order.

Rules of Court, Rules 10.29 and 10.31

Peel Financial Holdings Ltd. v. Western Delta Lands Partnership, 2003 BCCA 551 at para 51**[Tab 14]**

64. In keeping with that principle, the Alberta Court of Queen's Bench in *Alberta Dental Assn v Unrau*, 2001 ABQB 315 awarded costs to the applicant's on a solicitor/client scale. Similarly, in *Beaver*, and notwithstanding the contemnors success on appeal to reduce the term of imprisonment, the Court of Appeal awarded the Law Society of Alberta solicitor client costs to the date of the Court of Appeal decision for all court proceedings in that action, as well as for additional services the Law Society undertook of a restorative fashion in response to the contemnor's actions.

Alberta Dental Assn. v Unrau, 2001 ABQB 315, at para 20 **[Tab 15]**.

Beaver, 2021 ABCA 163, para 90 **[Tab 2]**.

65. As noted in *Oommen v Capital Housing Corp*, 2016 ABQB 283, sanctions, including awards of costs, should be restorative to the victim of the contempt. In this case the Applicant was required to expend significant public resources, both internally and externally, including mobilizing the assistance of Law Enforcement. Further, the Applicant has been required to prosecute the Respondents contempt without any contrition or acknowledgment of wrongdoing on the part of the Respondent. Therefore, a cost award that seeks to be restorative to the Applicant would serve as a further deterrent to future contempt, both specific to this contemnor and to the public at large.

Oommen v Capital Housing Corp, 2016 ABQB 283, para 37 **[Tab 16]**.

66. Considering the Applicant's representation by in-house counsel in the present matter, the general restorative principle of awarding solicitor client costs may be impractical. Nevertheless, despite any difficulty of assessing costs that would be restorative to the Applicant, it is submitted that a significant costs award is warranted. Given the foregoing, the Applicant submits that costs should be awarded against the Respondent on an elevated column under Schedule C of the Rules of Court and adjusted pursuant to a multiplier deemed appropriate by this Court. Alternatively, the Applicant submits that costs can be awarded for a lump sum pursuant to the general discretion of the Court to determine a costs award.

V. CONCLUSION

67. The Applicant acknowledges that the requested sanction is exceptional in that it is seeking a custodial sentence for first-time offenders. However, given the factual context of the Respondents' contemptuous behaviour, most notably the risk which the Respondent created to the well-being of the public at large, the Applicant asserts that the Requested Sanction is commensurate with the scale and nature of the Respondents' contempt.

68. In breaching the Injunction Order, both Respondents have made a virtue of their civil disobedience and this disobedience has been publically disseminated to an audience of followers. Furthermore, as is specifically the case with Artur Pawlowski, he has attempted to defend his conduct by referring to his position as a Pastor as a basis for justifying his actions. Irrespective of one's position in society, under a system of rule of law, each individual is to be held to account on an equal basis.

69. Consequently, it is respectfully submitted that there is only one remedy which is appropriate in the circumstances to respond to the factors for consideration of an appropriate sentence for the Respondents' contempt, and that is an Order:

    (a) Providing that the Respondent, Artur Pawlowski, serve a term of imprisonment equal to 21 days;

    (b) Providing that the Respondent, Dawid Pawlowski, serve a term of imprisonment equal to 10 days;

    (c) Awarding costs against the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF JULY, 2021.

ALBERTA HEALTH SERVICES

Per: _____

Kyle Fowler/John Siddons

IV. LIST OF AUTHORITIES

TABLE OF AUTHORITIES	
Tab	Description
1.	*Builders Energy Services Ltd. v Paddock,* 2009 ABCA 153 2009 ABCA 153 (CanLII) | Builders Energy Services Ltd. v. Paddock | CanLII
2.	*Law Society of Alberta v Beaver*, 2021 ABCA 163 2021 ABCA 163 (CanLII) | Law Society of Alberta v Beaver | CanLII
3.	*Apotex Fermentation Inc. v. Novopharm Ltd*, [1997] M.J. No. 466 (MBQB) 1997 CanLII 22810 (MB QB) | Apotex Fermentation Inc. v. Novopharm Ltd. | CanLII
4.	*Canadian Judicial Council "Some Guidelines on the Use of Contempt Powers"(2001, pg. 39-40)* Contempt_Powers_2001_with_Header.pdf (cjc-ccm.ca)
5.	*MacMillan Bloedel Ltd. v Brown,* [1994] BCJ No. 268 (BCCA) 1994 CanLII 3254 (BC CA) | MacMillan Bloedel Ltd. v. Brown | CanLII
6.	*Trans Mountain Pipeline ULC v Misair,* 2019 BCCA 156 2019 BCCA 156 (CanLII) | Trans Mountain Pipeline ULC v. Mivasair | CanLII
7.	*Majormaki Holdings LLP v Wong,* 2009 BCCA 349 2009 BCCA 349 (CanLII) | Majormaki Holdings LLP v. Wong | CanLII
8.	*Health Care Corp of St. John's Newfoundland and Labrador Assn. of Public and Private Employees,* [2001] NJ No. 17 (NFSC)
9.	*Law Society of Alberta v Beaver*, 2021 ABQB 134 2021 ABQB 134 (CanLII) | Law Society of Alberta v Beaver | CanLII
10.	*Boily v Carleton Community Corp,* 2014 ONCA 574 2014 ONCA 574 (CanLII) | Boily v. Carleton Condominium Corporation 145 | CanLII

11.	*R v Kelly,* [2000] B.C.J. No. 1092 (BCSC)
12.	*Telus Communications Inc. v. Telecommunications Workers Union* [2006] B.C.J. No. 559 2006 BCSC 397 (CanLII) | Telus Re: 11 Individuals found to be in Contempt | CanLII
13.	*Peter Kiewit Sons Co. et al. v. Perry et al.,* 2007 BCSC 305 *2007 BCSC 305 (CanLII) | Peter Kiewit Sons Co. et al. v. Perry et al. | CanLII*
14.	*Peel Financial Holdings Ltd. v. Western Delta Lands Partnership,* 2003 BCCA 551 2003 BCCA 551 (CanLII) | Peel Financial Holdings Ltd. v. Western Delta Lands Partnership | CanLII
15.	*Alberta Dental Assn. v Unrau*, 2001 ABQB 315 2001 ABQB 315 (CanLII) | Alberta Dental Assn. v. Unrau | CanLII
16.	*Oommen v Capital Housing Corp,* 2016 ABQB 283 2016 ABQB 283 (CanLII) | Oommen v Capital Regional Housing Corporation | CanLII
17.	*Alberta Health Services v Pawlowski,* 2021 ABQB 493 2021 ABQB 493 (CanLII) | Alberta Health Services v Pawlowski | CanLII