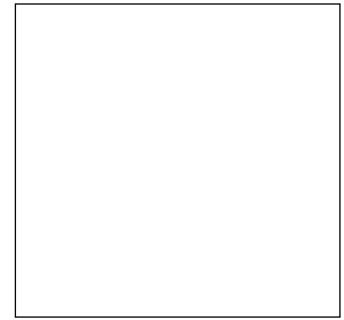


FORM CC3
(Subrule 12(1))



COURT FILE NUMBER 210161956-P-1


COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

CROWN HER MAJESTY THE QUEEN

ACCUSED JAMES COATES

DOCUMENT **APPLICATION FOR JUDICIAL INTERIM RELEASE OR
JUDICIAL REVIEW OF AN ORDER REGARDING JUDICIAL INTERIM RELEASE**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT James S. M. Kitchen
Justice Centre for Constitutional Freedoms
#253, 7620 Elbow Drive SW, Calgary, Alberta T2V 1K2


HEARING DATE: Wednesday, March 3, 2021

ACCUSED SURNAME: COATES

GIVEN NAME(S): JAMES DAVID

DATE OF BIRTH: 29/01/1980

CHARGE(S) *(Please attach copy of the Indictment(s).)*

Count 1. On or about the 14th date of February 2021, at or near Stoney Plan, Alberta, did exceed capacity of 15 percent, contrary to section 73(1) of the Public Health Act

Count 2. On or about the 14th date of February 2021, at or near Stoney Plan, Alberta, did not maintain 2 meters distance between persons, contrary to section 73(1) of the Public Health Act

Count 3. On or about the 14th date of February 2021, at or near Stoney Plan, Alberta, being at large on an undertaking, did fail, without lawful excuse, to comply with a condition of that undertaking, to wit: must abide

Next Court Appearance: Monday, May 3, 2021

- Election & Plea
- Preliminary Inquiry
- Trial

Has complete disclosure been obtained on these charges? Yes No

JUDICIAL INTERIM RELEASE PREVIOUSLY DENIED OR GRANTED:

Date: February 16, 2021

Court: Stoney Plain Provincial Court - Hearings Office

Grounds: N/A

Previous Court of Queen's Bench reviews scheduled:

Date: N/A

Reason for adjournment: N/A

Date: N/A

Result: N/A

NATURE OF THE APPLICATION

- Review of denial of release:
- Review of condition of no contact:
- Review of other condition(s) (*please specify*):

You will not attend or conduct services at Grace Life Church at 51529A, Range Road 262, Parkland Country, Alberta, unless you have complied with any existing orders of the Chief Medical Officer of Health, Alberta Health Services Executive Officers or orders of the Court of Queen's Bench.
(The "Impugned Condition")

- Reduce cash bail from \$ _____ to \$ _____
- Other (*please specify*):

GROUND FOR APPLICATION

- Error in Court below (*please specify*):
See Appendix "A"
- Change in circumstances (*please specify*):
- New evidence to be relied on:

Documents to be presented at hearing: (*Please attach with application and include a transcript of previous proceeding(s).*)

1. The herein Notice of Application;
2. The Affidavit of Erin Coates, sworn February 26, 2021;
3. The transcript of proceedings; and
4. Such further and other material as counsel may advise and as this Honourable Court may permit.

ESTIMATED TOTAL TIME FOR HEARING OF APPLICATION:

Crown: 15 *minutes* Defence: 15 *minutes*

I am currently in possession of all the information I require in order to make this application on the hearing date.

Signature of Applicant or Counsel: _____



Name in block letters: JAMES S. M. KITCHEN

Date: February 26, 2021

APPENDIX “A”

GROUNDS FOR MAKING APPLICATION

Error in Court Below

BACKGROUND

1. The Applicant, Pastor James Coates, is a Christian minister and lead pastor at Grace Life Church (“Grace Life”).
2. Pastor Coates has been charged twice under section 73 of the *Public Health Act* for allegedly conducting a worship service at a place of worship at which attendance exceeded 15% of the venue’s fire code capacity and for allegedly failing to maintain 2 meters distance from every other person, in contravention of the orders of the Chief Medical Officer of Health (“CMOH”). Pastor Coates has also been charged with allegedly breaching an undertaking contrary to section 145(4) of the *Criminal Code*.
3. Pastor Coates is currently detained at the Edmonton Remand Centre due to his inability to agree to the Impugned Condition. As the Condition prohibits him from conducting worship services in accordance with the sincerely-held religious beliefs of himself and his congregation at Grace Life, agreeing to and abiding by the condition would violate his conscience. Since it would also violate his conscience to breach a condition he agreed to, he is unable to agree to the Impugned Condition.
4. Pastor Coates brings this application under section 520(1) of the *Criminal Code* to request that this Honourable Court make an order under section 520(7)(e) of the *Criminal Code* that the Impugned Condition of his release order be vacated and that he be released pending his trial with no conditions that purport to restrict manifestations of his sincerely held religious beliefs. He will readily agree to any condition that he appear for his trial and face penalties if he does not.

LEGAL BASIS

5. Section 520(1) of the *Criminal Code* provides that an accused may apply to a judge for a review of their Release Order. According to section 520(7)(e) of the *Criminal Code*, the judge shall "...if the accused shows cause, allow the application, vacate the order previously made by the justice and make any order provided for in section 515 that he considers is warranted."
6. The Supreme Court of Canada has recently released four significant decisions dealing with a range of aspects of the Canadian bail system: *R v St Cloud*, 2015 SCC 27; *R v Antic*, 2017 SCC 27; *R v Myers*, 2019 SCC 18; and *R v Zora*, 2020 SCC 14. As Justice Boswell of the Ontario Superior Court of Justice has stated, the Supreme Court of Canada, in each of these cases, has "...stressed two common and related themes. First, that release is the norm and detention is the exception. Second, that the law favours the earliest possible release on the least onerous conditions possible."¹
7. For a review under section 520 of the *Criminal Code*, the governing principles are those identified by the Supreme Court of Canada in *R v St Cloud*. The Supreme Court of Canada has stated that a judge may appropriately exercise his or her powers under section 520 of the *Criminal Code* in three situations: "(1) where there is admissible new evidence; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate."² The Applicant Accused relies on the second and third situations.
8. The Impugned Condition is unreasonable, more onerous than necessary and not shown by the Crown to be justified. Justice of the Peace Morris therefore erred in law and made a clearly inappropriate decision in imposing the Impugned Condition. Imposing upon a pastor as a condition of release from incarceration pending his trial that he agree to stop ministering to his congregation in accordance with the beliefs of himself and his congregation is shocking to the conscience of the public.
9. Section 515(1) of the *Criminal Code* states:

when an accused who is charged with an offence ... is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, make a release order in respect of that offence, without conditions, unless the prosecutor, having been

¹ *R. v. JW*, 2020 ONSC 4186 at para 10.

² *R v St Cloud*, 2015 SCC 27 at para 6.

given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made. [Emphasis added]

10. Further, section 493.1 of the *Criminal Code* states that a justice shall:

...give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with...[Emphasis added]

11. In discussing bail conditions, the Supreme Court stated in *R v Antic*:

- Section 11(e) [of the Charter] guarantees both the right not to be denied bail without just cause and the right to bail on reasonable terms;
- Save for exceptions, an unconditional release on an undertaking is the default position when granting release;
- [R]elease is favoured at the earliest reasonable opportunity and, having regard to the [statutory criteria for detention], on the least onerous grounds[.] ... This principle must be adhered to strictly.
- If the Crown proposes an alternative form of release, it must show why this form is necessary. The more restrictive the form of release, the greater the burden on the accused. Thus, a justice of the peace or a judge cannot impose a more restrictive form of release unless the Crown has shown it to be necessary having regard to the statutory criteria for detention.
- Terms of release imposed under s. 515(4) may "only be imposed to the extent that they are necessary" to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person's behaviour or to punish an accused person.³

³ *R v Antic*, 2017 SCC 27 at para 67.

12. As the Supreme Court recently found in *R v Zora*, “the default form of bail is to release accused persons based on an undertaking to attend trial, without any conditions restricting their activities or actions (s. 515(1) of the Code).”⁴ Later on in the same case, the Court stated:

All those involved in the bail system are to be guided by the principles of restraint and review when imposing or enforcing bail conditions. The principle of restraint requires any conditions of bail to be clearly articulated, minimal in number, necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10).

...

As the default position in the Code is bail without conditions, the first issue is whether a need for any condition has been demonstrated. Restraint and the ladder principle require anyone proposing to add bail conditions to consider if any of the risks in s. 515(10) are at issue and understand which specific risks might arise if the accused is released without conditions: is this person a flight risk, will their release pose a risk to public protection and safety, or is their release likely to result in a public loss of confidence in the administration of justice?⁵ [Emphasis added]

13. The Impugned Condition requires Pastor Coates to violate his conscience and to act contrary to his sincerely-held religious beliefs.⁶ As such, the Impugned Condition does not merely limit his liberty, it is a severe infringement of his section 2(a) *Charter* rights. The Impugned Condition amounts to an attempt to change his behaviour and the effect is to punish him. Such a condition is not reasonable or in any way the “least onerous”.
14. Pastor Coates submits that, pursuant to the ladder principle, he should be released without any conditions pending his trial that restrict his ability to manifest his sincerely-held religious beliefs, as any such conditions would be too onerous and unreasonable. The Impugned Condition is only capable of being defensible if it is demonstrably necessary. However, the Crown has failed to show that releasing Pastor Coates without conditions that restrict religious activities is necessary on the secondary grounds of protecting public safety or the tertiary grounds of preserving public confidence in the administration of justice.

⁴ *R v Zora*, 2020 SCC 14 at para 1.

⁵ *R v Zora* at paras 6 and 83.

⁶ Affidavit of Erin Coates, paras 9-20; Exhibit “D” (Affidavit of James Cotes, sworn January 20, 2021)

Secondary Grounds: Public Safety

15. The “overly excitable”⁷ may fear that regular worship services at Grace Life represent a public health threat, yet the Crown has put forth no evidence that the behaviour of Pastor Coates in conducting worship services in excess of 15% venue capacity week after week has resulted in any negative public health outcomes such as a COVID outbreak in the community or increased cases or hospitalizations. On the contrary, it has resulted in positive public health outcomes by contributing to the positive mental health of attendees.⁸
16. Vague, unsupported assertions that continued regular worship services at Grace Life are insufficient to support the Impugned Condition on grounds of public safety. More is required than the presumption of constitutionality of a public health order or the theory of the efficacy of lockdowns to give effect to unevicenced claims by the Crown that the release of Pastor Coates without the Impugned Condition carries a substantial likelihood of endangering the public.
17. Pastor Coates and Grace Life have demonstrated that they act in a reasonable and responsible manner in response to the presence of COVID-19. Under Pastor Coates direction, Grace Life has ceased passing the offering plate, modified the distribution of the Lord’s Supper, encouraged the congregation to stay home when experiencing any cold/flu symptoms, made hand sanitizer available and made masks available.⁹
18. In July 2020, Pastor Coates became aware that a few Grace Life congregants tested positive for COVID-19. Under the direction of Pastor Coates, and with a view to protecting congregants and mitigation any spread, Grace Life suspended all in-person gatherings at the Church building and exclusively conducted virtual worship services for a period of 2 weeks. Grace Life also performed its own, in-house contact tracing and completed it prior to AHS notifying Grace Life of the possible exposure to COVID-19. Only when it was evident that no further spread had taken place did Grace Life resume in-person services and gatherings.¹⁰

⁷ *R. v. MacDougal*, 1999 BCCA 509 at para 24.

⁸ Affidavit of Erin Coates, para 13.

⁹ See para 16 of the Affidavit of James Coates - Exhibit “D” to the Affidavit of Erin Coates.

¹⁰ See paras 17-18 of the Affidavit of James Coates - Exhibit “D” to the Affidavit of Erin Coates.

19. It is Pastor Coates' observation that no COVID-19 transmission or infection has occurred as a result of any gathering at Grace Life, at least since July 2020. The Crown has presented no evidence to contradict those observations.¹¹ The Crown has asserted that conducting worship services with more than 15% venue capacity in attendance is theoretically a public health threat, but has presented no evidence that it is a real or substantial threat despite Grace Life meeting well over 15% capacity every Sunday for months on end. The evidence indicates that worship services in excess of 15% of venue capacity is not objectively a substantial public safety threat.
20. Further, the assertion that there is such a serious public health threat flowing from non-compliance with the CMOH orders that it rises to the level of a substantial public safety threat justifying onerous conditions of release is at odds with the fact that imprisonment is not a possible penalty for such non-compliance.¹²

Tertiary Grounds: Public Confidence in the Administration of Justice

21. Pastor Coates is only facing one charge that could possibly result in jail time as a potential penalty—that he breached an undertaking contrary to section 145(4)(a) of the *Criminal Code*. The strength of the Crown's case that Pastor Coates breached an undertaking is non-existent. The undertaking the Crown alleges Pastor Coates breached is not binding, as Pastor Coates did not agree to it. Further, and as a result, the Crown is also unable to show Pastor Coates had the requisite *mens rea*.¹³
22. Further still, there is an insufficient nexus between the alleged offences under section 73 of the *Public Health Act* and section 145(4) of the *Criminal Code* for criminal consequences to attach to those offences or to flow from a purported undertaking not to commit those offences.¹⁴ The Crown has not demonstrated how an undertaking regarding compliance with provisions of the *Public Health Act*, with criminal consequences attached to it, can be lawfully

¹¹ See para 19 of the Affidavit of James Coates - Exhibit "D" to the Affidavit of Erin Coates.

¹² See section 73 of the *Public Health Act*.

¹³ See *R. v. Custance*, 2005 MBCA 23 at para 10.

¹⁴ *R v Gladue*, 2015 ABPC 187 at paras. 48-50; *R v Jerret*, 2017 NLCA 65 at paras 16-21.

imposed on an individual, even if agreed to by that individual. Section 5 of the *Provincial Offences Procedure Act* does not permit such an undertaking, nor does the *Public Health Act*.

23. Pastor Coates has committed no crime. The only charges for which Pastor Coates faces any likelihood of conviction, even assuming the constitutionality of the underlying CMOH Orders, are provincial offences for which jail time is not a possible or contemplated penalty. Section 73 of the *Public Health Act* only lists fines as possible penalties for an offence. The lawful method to enforce the CMOH orders as prescribed by the Legislature of Alberta through section 73 of the *Public Health Act* is to impose fines and seek convictions if those fines are contested. It is not arrests, detentions, or onerous conditions of release that violate freedom of conscience and religion as protected by section 2(a) of the *Charter*. Conditions such as the Impugned Condition can only be lawfully imposed following a conviction under section 73 of the *Public Health Act*.¹⁵
24. The unacceptable result of the Impugned Condition, if it is not removed, is that Pastor Coates will remain incarcerated for another eight weeks until his trial. Even if at his trial, Pastor Coates is convicted of the *Public Health Act* offences for which he has been charged, he will not be jailed. While innocent, he will be punished in a more severe manner than after he is found guilty. By the time of Pastor Coates trial on May 3-5, he will have served 11 weeks of jail time if the Impugned Condition is not vacated. Such a repugnant state of affairs is what will damage public confidence in the administration of justice, not Pastor Coates' release without the Impugned Condition pending his trial.
25. Any theoretical threat Pastor Coates may pose to the public must be weighed against the harm to the public confidence in the administration of justice as a result of his continued incarceration for offences that are not punishable by jail time. As the Supreme Court noted in *R v Hall*:

Where justice is not seen to be done by the public, confidence in the bail system and, more generally, the entire justice system may falter. When the public's confidence has reasonably been called into question, dangers such as public unrest... may emerge. Public confidence

¹⁵ See section 73(4) of the *Public Health Act*.

is essential to the proper functioning of the bail system and the justice system as a whole.... Indeed, public confidence and the integrity of the rule of law are inextricably intertwined.¹⁶

26. Similarly, the BC Court of Appeal has stated:

To sustain the rule of law, a core value of our society, it is necessary to maintain public respect for the law and the courts. A law that is not broadly acceptable to most members of society will usually fall into desuetude: witness the unhappy prohibition experiment in the United States. Courts must be careful not to pander to public opinion or to take account of only the overly excitable.¹⁷

27. The rule of law is not somehow suspended because a public health crisis has been declared by the government or the media. Courts must not pander to overly excitable members of the public that complain about the conduct of others that they do not approve of, or to the opinion held by part of the public that civil liberties should be abandoned in a self-immolating attempt to stop the spread of COVID-19.

28. Pastor Coates requests that this Honourable Court intervene to vacate the Impugned Condition in order to maintain the public's respect for and confidence in the justice system and the courts. The Impugned Condition is "clearly inappropriate" and not in the interests of justice.

¹⁶ *R. v. Hall*, 2002 SCC 64 at para 26.

¹⁷ *R. v. MacDougal*, 1999 BCCA 509 at para 24.