Docket Nos.: A77255194R

IN THE PROVINCIAL COURT OF ALBERTA
Sitting at Calgary

BETWEEN:

HER MAJESTY THE QUEEN

- and –

LAURA TODD

(Accused/Applicant)

NOTICE OF INTENTION TO RAISE CONSTITUTIONAL ARGUMENT
Pursuant to *Constitutional Notice Regulation*, Alta Reg 102/1999

RE:	*R v Todd;* *Public Health Act*, s.73(1); Next Appearance: June 7, 2021

WHEREAS THE ACCUSED STANDS CHARGED THAT:

COUNT 1: On the 26th day of December 2020, at Calgary, Alberta, did unlawfully contravene section 73(1) of the *Public Health Act* (the "*Act*").

(The "Charge")

TAKE NOTICE THAT counsel for the Accused will apply to the Court for the following orders:

1. A declaration pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), relying on the principle of constitutional supremacy as set out in section 52(1) of the *Constitution Act, 1982* (the "*Constitution*"), that section 12 of CMOH Order 44-2020, section 3.4 of CMOH Order 10-2021, and all subsequent similar provisions (collectively, the "Outdoor Gathering Restrictions") infringe sections 2(b), 2(c) and 2(d) of

the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and are not saved by section 1 of the *Charter*.

2. An Order pursuant to section 24(1) of the *Charter* dismissing the Charge or acquitting the Accused of the Charge.

3. In the alternative, an Order pursuant to section 24(1) of the *Charter* entering a stay of proceedings.

4. In the further alternative, a declaration pursuant to section 24(1) of the *Charter*, relying on the principle of constitutional supremacy as set out in section 52(1) of the *Constitution* "reading down" the Outdoor Gathering Restriction such that it does not apply to any type of peaceful outdoor gathering the primary purpose of which is political, democratic, or is a form of public expression regarding the public policy choices of government decision-makers, and not a "private social gathering" as defined by the CMOH Orders;

5. In the further alternative and in the event this Honourable Court declines to read down the Outdoor Gathering Restriction or make a finding the Outdoor Gathering Restriction unjustifiably infringes *Charter* rights, an order pursuant to section 24(1) of the *Charter* that the actions for which the Accused is Charged are justified by sections 2(b), 2(c) and 2(d) of the *Charter* and entering an absolute discharge.

AND FURTHER TAKE NOTICE THAT the grounds for the application are as follows:

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

7. On December 26, 2020, Ms. Todd participated in a "freedom walk" in Calgary to peacefully protest the restrictions imposed by the Chief Medical Officer of Health of Alberta (the "Freedom Walk"). The purpose of the Freedom Walk was political, not social. In other words, the primary function of gathering for the Freedom Walk was to publicly express, in a peaceful manner, disapproval of government "lockdown" polices. The primary intention of Ms. Todd in attending the Freedom Walk was to engage in the democratic process and peacefully oppose what she believes to be egregious government overreach and a resulting disturbing loss of civil liberties. It was not to socialize, and any socialization was incidental

to the constitutionally-protected purposes underlying the Freedom Walk and Ms. Todd's attendance.

8. On the day in question, Ms. Todd was walking towards the Calgary City Hall grounds. Before she even arrived at City Hall, several Calgary Police Officers approached her and issued her a ticket with the Charge.

SECTION 2(b) – FREEDOM OF EXPRESSION

9. The Supreme Court of Canada has established a three-part test for whether freedom of expression, protected under section 2(b) of the *Charter*, is engaged.[1] Adapted to the present context, the three-part test asks the following three questions:

   a) Is protected expressive content captured by the Outdoor Gathering Restriction?
   b) Did the method or location of the expression remove that protection?
   c) If the expression is protected by section 2(b), is the purpose or effect of the Outdoor Gathering Restriction to infringe that protection?

10. The expressive activity in question is of a highly political and democratic nature, and therefore goes to the core of what section 2(b) protects. It involved criticism of government decisions, objecting to perceived unjustified rights violations by government, challenging the truthfulness of government messaging regarding COVID-19, challenging the soundness of the basis for lockdown measures, and demanding that government change its policies.

11. There are three core values that underly freedom of expression: self-fulfillment, truth-seeking and democratic discourse.[2] Ms. Todd's expressive activity engaged all three values and undermined none of them.

12. The location of an expressive activity can only remove it from the protection of section 2(b) of the *Charter* if permitting expressive activity in that location conflicts with or undermines the values protected by freedom of expression.[3] Permitting expression on public streets,

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[1] *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 [*Montreal*] at para 56; *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 37.
[2] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.
[3] *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2, 1 SCR 19 at para 37.

parks, green spaces, and on the grounds of symbolic public institutions such as courthouses furthers those values by allowing individuals to communicate openly and effectively with fellow citizens, elected officials, state decision-makers, and the media. These locations have long been recognized as attracting some of the highest degree of protection from section 2(b). Only if the expressive activity interferes substantially with the primary function of the location will the values underlying freedom of expression begin to be undermined.

13. The method of Ms. Todd's expressive activity does not remove it from *Charter* protection. Ms. Todd was peaceful, the Freedom Rallies were peaceful, and the content of the expression was peaceful, even if strongly and colourfully conveyed.

14. The effect of the Outdoor Gathering Restriction is to limit Ms. Todd's freedom of expression. By purporting to prohibit all outdoor gatherings, and not merely "social" gatherings, notwithstanding the wording contained in the CMOH Orders, the Outdoor Gathering Restriction prevents and penalizes the peaceful outdoor gathering of citizens for the purposes of engaging in a core democratic function, namely physically rallying to collectively protest unjust government actions and publicly communicating their disapproval of government policy. It is obvious that the voices of individuals are heard more clearly and are more difficult to ignore when they are amplified through collective, public, in-person expression.

SECTION 2(c) – FREEDOM OF PEACEFUL ASSEMBLY

15. Although this fundamental freedom is not fully developed in Canada's jurisprudence, an identified purpose of freedom of peaceful assembly is to protect the physical gathering together of people.[4] Further, the right of peaceful assembly is, by definition, a collectively held right: it cannot be exercised by an individual and requires a literal and physical coming together of people.[5]

16. The right to peacefully assemble is separate and distinct from the other section 2 *Charter* rights, and it requires the state to refrain from preventing, penalizing, or otherwise unduly interfering with such assembly. It may even require the state to facilitate such assembly.[6]

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[4] *Roach v Canada (Minister of State for Multiculturalism and Citizenship),* [1994] 2 FC 406, 1994 CanLII 3453 (FCA) at para 69
[5] *Mounted Police Assn. of Ontario v Canada (*Attorney *General),* 2015 SCC 1 at para 64 [*MPAO*]
[6] See e.g. *Garbeau c Montreal (Ville de),* 2015 QCCS 5246 at paras 120-156

Although freedom of assembly cases have often been determined on other *Charter* grounds, most notably freedom of expression,[7] freedom of peaceful assembly is an independent constitutionally-protected right that is directly engaged by the Outdoor Gathering Restriction.

17. Both the purpose and the effect of the Outdoor Gathering Restriction is to almost entirely prohibit the outdoor assembling together of Albertans. Although the scope of what collective activities section 2(c) of the *Charter* guarantees is not yet fully defined, there can be no doubt that physically assembling to publicly and peacefully protest government overreach goes to the core of what 2(c) protects.

SECTION 2(d) – FREEDOM OF ASSOCIATION

18. A purposive approach to freedom of association defines the content of this right by reference to its purpose: "to recognize the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation in the pursuit of his or her ends".[8] Freedom of association allows the achievement of individual potential through interpersonal relationships and collective action.[9]

19. The purpose of the right to freedom of association includes protecting collective activity in support of other constitutional rights, and collective activity that enables "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict".[10]

20. Both the purpose and effect of the Outdoor Gathering Restriction is to severely limit the rights of individuals to collectively exercise their freedoms of expression and peaceful assembly and to join together so as to meet on more equal terms the power and strength of the government that is harming their interests.

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[7] Basil S. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8: I, UWO J Leg Stud 4 online: https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5715/4809

[8] MPAO at para 54, citing from Reference re Public Service Employee Relations Act (Alta.), [1987) 1 SCR 313, 1987 CanLII 88 (SCC) at 365 [*Re Public Service*] [Emphasis added].

[9] *Dunmore v Ontario (Attorney General), 2001 SCC 94* at para 17

[10] MPAO, at para 54, citing from *Re Public Service,* at 366.

SECTION 1: JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY

21. The limitations of sections 2(b), 2(c) and 2(d) of the *Charter* as a result of the Outdoor Gathering Restriction and Charge are not justified in a free and democratic society. Due to the lack of scientific evidence in support of the need for or effectiveness of the Outdoor Gathering Restriction, it is not rationally connected to any identifiable pressing and substantial objective. It is also not minimally impairing to effectively outlaw all outdoor peaceful protests in light of the lack of scientific evidence that such a measure is warranted, produces any measurable impact, or inflicts less harm upon the community than the measure itself or the ostensible harm the measure purportedly prevents. Further, given how total the abrogation of constitutional rights is, the overall negative impacts of the Outdoor Gathering Restriction far outweigh any purported benefits achieved.

REMEDY ANALYSIS

22. Ms. Todd contends that the Outdoor Gathering Restriction is unconstitutional and is therefore incapable of enforcement against her. Ms. Todd further contends that even if the Outdoor Gathering Restriction is found to be constitutional, her conduct in participating in the Freedom Rallies was lawful, protected, and justified because she was exercising her constitutional rights as guaranteed by sections 2(b), 2(c) and 2(d) of the *Charter*.

23. Ms. Todd seeks a declaration pursuant to section 24(1), relying on the underlying principles of section 52(1) of the *Constitution*, that the Outdoor Gathering Restriction infringes sections 2(b), 2(c) and 2(d) of the *Charter* and is not saved by section 1.

24. Further, in the alternative, a declaration pursuant to section 24(1), again relying on the principles of 52(1) of the *Constitution* "reading down" the Outdoor Gathering Restriction such that it does not apply to any type of peaceful outdoor gathering the primary purpose of which is political, democratic, or is otherwise public in nature, and not a "private social gathering" as defined by the CMOH Orders.

25. The appropriate relief, should this Court find that the Outdoor Gathering Restriction is not saved by section 1, is to issue a section 24(1) remedy that effectively remedies the limitations of the Accused's *Charter* rights, which necessarily involves disposing of the Charge.

26. In the alternative, if this Court determines that, in fact, on a proper reading of the Outdoor Gathering Restriction peaceful political demonstrations such as that attended by Ms. Todd are not proscribed by the Outdoor Gathering Restriction, this Court should provide relief to Ms. Todd and direction to the authorities in the form of a declaration that the Outdoor Gathering Restriction does not prohibit peaceful outdoor gatherings for political or democratic purposes.

27. In the event this Honourable Court finds that the Outdoor Gathering Restriction does, in fact, capture all outdoor gatherings and is saved by section 1 of the *Charter*, Ms. Todd seeks an order pursuant to section 24(1) of the *Charter* that the actions for which she is charged are justified by sections 2(b), 2(c) and 2(d) of the *Charter* and entering an absolute discharge.

28. Both the purpose and the effect of the Charge is to penalize Ms. Todd for exercising her *Charter* rights to engage in the constitutionally-protected activity of peaceful political protesting, thereby breaching her freedom of expression as protected by section 2(b), her freedom of peaceful assembly as protected by section 2(c) and her freedom of association as protected by section 2(d).

29. Where a *Charter* violation occurs as a result of government action, section 24(1) of the *Charter* permits this Court to provide an appropriate and just remedy.[11] The Supreme Court of Canada has stated:

> Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. … A superior court may craft any remedy that it considers appropriate and just in the circumstances.[12]

30. This Court has stated, "by application of s. 24(1), a court of competent jurisdiction may issue a judicial stay (or other *Charter* remedies) in respect of the criminal proceedings."[13] More specifically, this Court has unequivocally stated:

> The Provincial Court of Alberta is a court of competent jurisdiction to grant a judicial stay where a breach of s. 9 of the *Charter* or where a breach of other *Charter* rights

[11] *R v 974649 Ontario Inc*, 2001 SCC 81 at para 14.
[12] *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at para 87.
[13] *R v Pringle*, 2003 ABPC 7 at para 95.

has been established and the presiding judge determines that a judicial stay is the appropriate and just remedy under s. 24(1) of the *Charter*."[14]

31. In *R v Elliot*[15], this Court found that a just and appropriate remedy under section 24(1) of the *Charter* was to grant the accused an absolute discharge, due to a violation of the accused's right not to be arbitrarily detained, despite the fact that the accused was found guilty of the charge.[16] In addition, the Ontario Court of Appeal restored a trial judge's decision to dismiss charges against the accused because of an unlawful strip search which violated the accused's *Charter* section 8 rights, even though it had no bearing on the driving offence for which the accused was charged.[17]

32. In *R v Pringle*[18], this Court held that an appropriate remedy for a *Charter* section 9 violation includes a stay even if there is no nexus or temporal connection between the breach and the evidence that ultimately would lead to conviction.[19] In *R v Herter*[20], this Court stayed the proceedings of an accused based on his *Charter* section 9 rights having been breached.[21] Likewise, the Supreme Court of Canada has stayed proceedings against an accused due to a breach of their *Charter* section 7 and 11 rights.[22]

33. A stay of proceedings would be appropriate when two criteria are fulfilled:

a) The prejudice caused by the abuse in question will be manifest, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

b) No other remedy is reasonably capable of removing that prejudice.

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[14] *R v Pringle*, 2003 ABPC 7 at para 94.
[15] [1984] AJ No 940, 57 AR 49
[16] *R v Elliott*, [1984] AJ No 940, 57 AR 49 at paras 13-14.
[17] *R v Flintoff*, [1998] OJ No 2337, 111 OAC 305
[18] 2003 ABPC 7
[19] *R v Pringle*, 2003 ABPC 7 at para 95.
[20] 2006 ABPC 221, AJ No 1058
[21] *R v Herter*, 2006 ABPC 221, AJ No 1058 at para 45.
[22] *See R v Demers*, 2004 SCC 46, 2 SCR 489 and *R v Carosella*, [1997] 1 SCR 80.

34. These guidelines apply equally to prejudice to the accused or to the integrity of the judicial system.[23] The presence of either one of the criteria justifies the exercise of discretion in favour of a stay.[24]

35. The Supreme Court of Canada has stated that a stay of proceedings can be entered "where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued."[25] It would bring the administration of justice into disrepute to permit the prosecution of a woman for simply exercising her most fundamental right to peaceful protest in the face of draconian government overreach and without any evidence that her actions in any way caused harm to another person or to the health care system, or that the prosecution's unsupportable theory that prohibiting outdoor gatherings contributes to a net benefit in public health.

AND FURTHER TAKE NOTICE THAT in support of this application the Accused may rely on the following cases and such other authority as counsel may advise:

- *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2, 1 SCR 19;
- *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62;
- *Dunmore v Ontario (Attorney General),* 2001 SCC 94*;*
- *Garbeau c Montreal (Ville de)*, 2015 QCCS 5246;
- *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31;
- *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62;
- *Mounted Police Assn. of Ontario v Canada (Attorney General*), 2015 SCC 1;
- *R v 974649 Ontario Inc*, 2001 SCC 81;
- *R v Carosella*, [1997] 1 SCR 80;
- *R v Demers*, 2004 SCC 46, 2 SCR 489;
- *R v Elliott*, [1984] AJ No 940, 57 AR 49;
- *R v Flintoff*, [1998] OJ No 2337, 111 OAC 305;
- *R v Herter*, 2006 ABPC 221;
- *R v O'Connor*, [1995] 4 SCR 411, 4 RCS 411;

[23] *R v O'Connor*, [1995] 4 SCR 411, 4 RCS 411 at para 75.
[24] *R v Carosella*, [1997] 1 SCR 80 at para 56.
[25] *R v O'Connor*, [1995] 4 SCR 411, [1995] 4 RCS 411 at para 82.

- *R v Pringle*, 2003 ABPC 7;
- *Reference re Public Service Employee Relations Act (Alta.),* [1987) 1 SCR 313, 1987 CanLII 88 (SCC);
- *Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 1994 CanLII 3453 (FCA); and
- *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41

Secondary Sources

- Basil S. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8: I, UWO J Leg Stud 4 online: https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5715/4809

AND FURTHER TAKE NOTICE THAT the Accused expressly reserves the right to raise additional constitutional arguments that are disclosed by the evidence and that are not the subject of this notice.

AND FURTHER TAKE NOTICE THAT any statements of fact contained in this notice should not be interpreted as admissions of fact, but rather, merely as anticipated evidence based on disclosure provided by the Crown.

DATED at the City of Calgary in the Province of Alberta this 2nd day of June 2021.

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