

Docket No.: [REDACTED]-1  
AJ17425142-1

Nelson Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Between

HER MAJESTY THE QUEEN

and

[REDACTED] AND NADINE PODMOROFF

(Accused/Applicants)

**NOTICE OF CONSTITUTIONAL QUESTION**

(Pursuant to section 8(2) of the *Constitutional Question Act*, RSBC 1996, c 68)

TO: **Attorney General of British Columbia**  
1001 Douglas Street  
Victoria BC, V8W 2C5  
Attention: Duty Counsel

AND TO: **Attorney General of Canada**  
900-840 Howe Street  
Vancouver BC, V6Z 2S9

TAKE NOTICE, pursuant to section 8(2) of the *Constitutional Question Act*, RSBC, c 68 that a date and time to be determined at the courthouse at 320 Ward Street in the City of Nelson, in the Province of British Columbia (the "Hearing"), the Accused/Applicants seek an order and/or declaration pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11* (the "*Charter*"), relying on the principle of constitutional supremacy as set out in section 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11* (the "*Constitution Act, 1982*"), that the order of the Provincial Health Officer titled "Gatherings and Events" issued on March 31, 2021 (the "Impugned Order") unjustifiably infringes the fundamental freedoms guaranteed by sections 2(b), 2(c), and 2(d) of the *Charter* and is therefore void and of no force or effect in these matters.

AND TAKE FURTHER NOTICE that the Accused/Applicants seek an order and/or declaration, pursuant to section 24(1) of the *Charter*, dismissing the charges and/or

quashing the proceedings, or in the alternative, to be acquitted of the charges made against it, pursuant to the above.

AND TAKE FURTHER NOTICE that the particulars necessary to show the points to be argued in the Hearing concerning the constitutional remedies sought are set out as follows:

**a. No person may be convicted pursuant to an unconstitutional law**

1. Pursuant to the supremacy of the Constitution as embodied in section 52(1) of the *Constitution Act, 1982*, no person may be convicted of an offence under a law which is itself “inconsistent with the provisions of the Constitution”, as such a law is, “to the extent of the inconsistency, of no force or effect”.

2. “[L]aw” in this context is broader than statutes or statutory provisions, and includes binding norms of a general and impersonal nature that determine a line of conduct and whose application is not limited to a specific case.

**b. The Impugned Order is a law within the meaning of section 52(1) of the *Constitution Act, 1982***

3. The Impugned Order is a law within the meaning of section 52(1) of the *Constitution Act, 1982*: it has imposed binding norms of general application, restricting the conduct of all persons in British Columbia on penalty of law. This has included the imposition of sweeping and previously unimaginable restrictions on personal interaction amongst British Columbians, including a general prohibition on the organizing, hosting or attending of a “demonstration”.

**c. The exemption provided by the Impugned Order for outdoor demonstrations is illusory**

4. Although the Provincial Health Officer (the “PHO”) stated in Clause L of the preamble to the Impugned Order that she was “not prohibiting outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy”, this exemption (the “Supposed Exemption”) to the general prohibition on demonstrations imposed by the Impugned Order is illusory.

5. The Supposed Exemption was explicitly stated by the PHO to be “subject to my expectation that persons organizing or attending such an assembly will take the steps and put in place the measures recommended in the guidelines posted on my website in order to limit the risk of transmission of COVID-19.”

6. No such guidelines specifically pertaining to outdoor assemblies were made available on the PHO’s website until May 17, 2021, when the BC Centre for Disease Control published its “Guidance for Outdoor Assemblies, Rallies and Protests During the COVID-19 Pandemic” (the “Guidance Document”).

7. The Guidance Document was therefore not made available to the public of British Columbia through the PHO's website at any point in which the Impugned Order was in force: the Impugned Order was repealed and replaced by the PHO on May 7, 2021.

**d. The Impugned Order unjustifiably infringes the *Charter* rights and freedoms of the Accused/Applicant and other British Columbians**

8. The Impugned Order unjustifiably infringes the fundamental freedoms of the Accused/Applicant and other British Columbians as protected by the *Charter*.

9. The Impugned Order unjustifiably infringes the fundamental freedoms of thought, belief, opinion, and expression (as protected by section 2(b) of the *Charter*); of peaceful assembly (as protected by section 2(c) of the *Charter*); and of association (as protected by section 2(d) of the *Charter*).

**i. Freedom of thought, belief, opinion and expression (section 2(b) of the *Charter*)**

10. The Impugned Order infringes the freedom of thought, belief, opinion and expression of the Accused/Applicants and other British Columbians, as protected by section 2(b) of the *Charter*.

11. Section 2(b) extends *prima facie* constitutional protection to all human activity intended to convey a meaning. Such activity may only be excluded from section 2(b) protection if its method (e.g. violence or threats of violence) or location clearly undermines the values that underlie the guarantee, namely democratic discourse, truth-finding and self-fulfillment.

12. Section 2(b) also protects the right to receive expression, thereby protecting speakers as well as listeners.

13. The holding of a demonstration is by its very nature an expressive activity which attracts *prima facie* constitutional protection under section 2(b) of the *Charter*. This extends to those speaking or engaging in other expressive activity at a demonstration, and those who choose to participate by listening or viewing such expression.

14. The effect of the Impugned Order is to generally prohibit expressive activity as engaged in in the context of a demonstration. The Supposed Exemption did not have the effect of permitting outdoor assemblies, as the PHO made this exemption subject to adherence to guidelines to be posted on the PHO's website which were not made available to the public of British Columbia until after the Impugned Order was repealed and replaced.

15. In light of its effect on such expressive activity, the Impugned Order therefore infringes the expressive freedom of the Accused/Applicants and other British Columbians as protected by section 2(b) of the *Charter*.

### **ii. Freedom of peaceful assembly (section 2(c) of the *Charter*)**

16. The Impugned Order infringes the freedom of peaceful assembly of the Accused/Applicants and other British Columbians as protected by section 2(c) of the *Charter*.

17. Peaceful assembly as protected by section 2(c) of the *Charter* is geared toward the physical gathering together of people and is by definition a collective right protecting activities which are incapable of individual performance.

18. This right has been described as speech in action, and is concerned with the public expression of opinion by spoken work and by demonstration.

19. The effect of the Impugned Order is to generally prohibit activities that epitomize such collective speech in action. The Impugned Order therefore strikes at the very heart of the protection for peaceful assembly, and therefore clearly infringes the freedom of peaceful assembly of the Accused/Applicants and other British Columbians as protected by section 2(c) of the *Charter*.

### **iii. Freedom of association (section 2(d) of the *Charter*)**

20. The Impugned Order infringes the freedom of association of the Accused/Applicants and other British Columbians as protected by section 2(d) of the *Charter*.

21. Section 2(d) of the *Charter* protects against laws and other government action which substantially interferes with the freedom of association.

22. 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. Freedom of association allows the achievement of individual potential through interpersonal relationships and collective action.

23. The freedom of association encompasses the protection of (1) individuals joining with others to form associations, (2) collective activity in support of other constitutional rights, and (3) 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.

24. The effect of the Impugned Order is to substantially interfere with the freedom of the Accused/Applicants and other British Columbians to associate by gathering together

for the collective exercise of other constitutional rights. The Impugned Orders therefore infringe the freedom of association of the Accused/Applicants and others as protected by section 2(d) of the *Charter*.

**iv. The Impugned Order's infringements of the *Charter* as they apply to the outdoor assemblies specified in the Supposed Exemption are not justifiable under section 1 of the *Charter***

25. The Impugned Order's infringements of the fundamental freedoms of the Accused/Applicants and other British Columbians as protected by the *Charter* are unjustifiable under section 1 as they apply to the outdoor assemblies specified in the Supposed Exemption.

26. In accordance with section 1, *Charter* rights are "subject only to such reasonable limits prescribed by law as can be justified in a free and democratic society." Infringements on such rights are deemed to be prescribed by law only if they are sufficiently accessible and precise to whom they apply, thereby precluding arbitrary state action and providing individuals and government entities with sufficient information on how they should conduct themselves.

27. In contrast, the Impugned Order as it applied to the outdoor assemblies referred to in the Supposed Exemption—given the failure of the PHO to provide applicable guidelines upon which benefit of the Supposed Exemption was made conditional by the PHO—failed to provide such accessible and precise information either to those subject to the Impugned Order or those tasked with enforcing its terms.

28. The requirement within the Supposed Exemption for communication of a "position on a matter of public controversy" likewise imposed fatally imprecise boundaries for permissible conduct, while the required adherence to non-existent applicable health guidelines rendered the right to public protest in accordance with the Supposed Exemption impossible to exercise.

29. This is consequently fatal to the constitutional validity of the Impugned Order in relation to its infringements of the *Charter* as they apply to activities covered by the Supposed Exemptions. These infringements are therefore irrevocably unconstitutional, rendering the Impugned Order's prohibition of outdoor assemblies of no force or effect.

**v. The Impugned Order's infringements of the *Charter* resulting from its general prohibition on demonstrations are not justified under section 1**

30. The infringements of the *Charter* imposed by the Impugned Order's general prohibition on general prohibition on demonstrations are not justified under section 1.

31. To the extent that Violation Ticket # [REDACTED]-1 and Violation Ticket #AJ17425142-1 (the "Tickets") have resulted from these infringements, these Tickets must fall with the Impugned Order underlying them.

32. Due to the lack of scientific evidence in support of any significant effectiveness of the general prohibition on demonstrations in protecting public health, this prohibition is unjustified. This prohibition is not rationally connected to any identifiable pressing and substantial objective and has imposed a sweeping prohibition of activities fundamental to a free society in a manner that is not minimally impairing of the fundamental freedoms engaged. Further, the severely deleterious effect of these orders on these freedoms is not outweighed by any proven salutary effect.

**e. Further proceedings**

33. This application does not include a remedy for any unconstitutional actions resulting from enforcement of the Impugned Order, and will, if necessary, be raised in a subsequent notice.

Dated: November 5, 2021



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